

CONFIDENTIAL SETTLEMENT COMMUNICATION

The California Department of Parks and Recreation (Parks) submits this initial statement with respect to the San Luis Obispo County Air Pollution Control District's (District or APCD) Notice of Violation dated June 12, 2017 (NOV). This is an initial statement only, and Parks reserves the right to supplement this statement with further facts and evidence once the District submits its statement. Parks requested that the District set forth facts and evidence supporting the NOV; but the District declined, insisting that Parks first defend the NOV before it be obligated to offer any evidence to support it. Nonetheless, in order to move the process forward and in a demonstration of good faith, Parks agrees to the District's procedure.

Parks cannot adequately respond to the District's contention that that Oceano Dunes State Vehicular Recreation Area (ODSVRA) is a "public nuisance in violation of District Rule 402." The existence of a public nuisance is a fact-specific inquiry which requires balancing an activity's harm against its utility, and therefore requires consideration of factors such as: the location of the activity and the nature of the surroundings, the manner in which the activity is conducted, the extent and frequency of the harm caused by the activity, and the harm that would be caused by discontinuing the activity. (See *Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224.) Asking Parks to defend itself by proving that it is not a public nuisance before the District offers any supporting evidence puts Parks at an unreasonable disadvantage.

Parks disagrees with the District's attempt to limit the scope of the Special Master's authority, as set forth in its July 6, 2017 letter. In that letter, the District contends that "the Special Master has no authority to provide a recommendation on whether or not a violation of Rule 1001 occurred or on the amount of any fine proposed by the District" and also that "[t]he authority of the [Air Pollution Control Officer (APCO)] to pursue the Rule 402 Nuisance Violation is independent from the Consent Decree process." The Consent Decree between Parks and the Districts empowers the Special Master to mediate any "dispute between the Parties involving the implementation of this Consent Decree, Rule 1001, or any other issue related to under the APCD's authority." (Emphasis added.) The language of the Consent Decree broadly empowers the Special Master to attempt to resolve *all* disputes concerning ODSVRA, not to allow the APCO to selectively regulate ODSVRA in order to evade the Special Master's purview.

Parks is also confused by the District's demand that it obtain "approval for a Particulate Matter Reduction Plan (PMRP) by November 1, 2017." The District approved Parks' PMRP in July 2013, recognizing that "the PMRP is State Parks' Plan for complying with Rule 1001, not APCD's." Since that time, Parks has circulated its final environmental impact report (EIR) for its 5-year dust control program (state clearinghouse # 2012121008), and has applied to the California Coastal Commission (Commission) for a coastal development permit (CDP) to implement its dust control program, which is scheduled for hearing in September. Accordingly, Parks is of the view that it has complied with this requirement of Rule 1001.

Subject to the above concerns and caveats, Parks responds to the NOV as follows:

Special Master Case
California Department of Parks and Recreation
OHMVR Division
August 25, 2017

Issue #1 Failure to Implement a Control Site Monitor

Monitoring Site Selection Plan

As written, Rule 1001 allows California State Parks (State Parks) to choose locations to place air monitors downwind of the off-highway vehicle (OHV) riding area of the dunes and downwind of a comparable non-riding area of the dunes. This was to be accomplished via the preparation of a Rule 1001-required Monitoring Site Selection Plan (MSSP).

State Parks prepared an MSSP dated 5/4/2012 that was approved per Rule 1001 requirements by the Air Pollution Control Officer (APCO) of the San Luis Obispo County Air Pollution Control District (SLOAPCD) on May 22, 2012.

The MSSP outlined objective scientific criteria used to determine the air monitor locations. These criteria include upwind dune setting (e.g., open sand/dune vegetation acreage comparisons), dune wind conditions during high winds, dune source dispersion, monitoring site characteristics (e.g., comparable elevations and distances inland between riding area and non-ride monitors), and dune source strength (See Table 3 of the MSSP).

However, the MSSP criteria were never used to evaluate the location of what has become the riding area monitor, which is the SLOAPCD's air monitoring station at 2391 Willow Road, a California Department of Forestry (CDF) fire station in Arroyo Grande. The CDF monitoring site location is well away from Oceano Dunes, does not accurately record the strength or direction of regional prevailing winds due to near-station influences, and is influenced by other dust sources that lie between it and Oceano Dunes. The MSSP criteria were also not used to consider the location of the Oso Flaco site, the upwind area of which is not even proportionally comparable to the riding area upwind of the CDF site (See Figure 1, attached).

The State Parks MSSP and the SLOAPCD approval letter of the MSSP are attached for reference.

Temporary Baseline Monitoring Plan

Rule 1001 includes the requirement that State Parks develop a Temporary Baseline Monitoring Program (TBMP) to determine baseline PM10 concentrations measured at the riding area and non-ride area monitoring locations prior to implementation of the emissions reductions and a permanent monitoring program. When the SLOAPCD implemented Rule 1001, they understood that finding two or more comparable monitoring sites was a technically challenging, if not impossible, task. To help refine locations of sites that could be used for analysis of compliance with the Rule 1001 performance standard, the SLOAPCD included a temporary monitoring program to assess the suitability and comparability of the possible monitoring sites.

Technical concerns related to the two monitoring locations as detailed above, as well as legal and statutory issues, prevented the initiation of a temporary baseline monitoring program prior to the installation of the Oso Flaco monitoring site.

Agreements Made when Oso Flaco Monitor Was Installed

As stated above, no technical deliberation occurred to determine the suitability of pairing the CDF site with the Oso Flaco site for Rule 1001 purposes. The Oso Flaco monitoring location and the CDF monitoring location were informally chosen at a policy-group level as part of a consent-decree process between State Parks, SLOAPCD, and the California Air Resources Board (CARB). State Parks and the APCD agreed to use the CDF monitoring site as a CDVAA monitor and the Oso Flaco monitoring site as a control site on a temporary basis on or about May of 2014. Originally, the proposal was to operate an eBAM at the Oso Flaco site to compare measurements to the CDF site. Some time prior to December 2014, the technical group recommended that State Parks install a BAM instrument at the Oso Flaco site. When this policy-level decision was made, State Parks worked diligently to design and assemble the BAM air monitoring instrument and associated solar power charging and storage needed to operate the instrument at the Oso Flaco site by July 2015.

Both the APCD and State Parks understood and agreed that the Oso Flaco monitoring site would be a temporary test to determine if the site would be suitable as a monitor for Rule 1001 compliance purposes. There was agreement to examine the data from this site and determine if the site should continue to be operated and used as a control monitor.

There was no explicit agreement that the Oso Flaco monitoring site would be a permanent site. There was an agreement to operate the site for a set time and to examine the data from this site. These were verbal agreements made at the policy level discussions between State Parks, SLO APCD and CARB.

2 Years of Continuous Operation of a Special Purpose Monitor

Air quality data for the Oso Flaco station are available on CARB's ambient air monitoring network web page (https://www.arb.ca.gov/qaweb/site.php?s_arb_code=40854). Though the Oso Flaco monitoring station was operational in July 2015, CARB has catalogued the Oso Flaco site as operational since February 7, 2015, an unexplained discrepancy. Per federal ambient air quality surveillance regulations (40 CFR Part 58), data from a BAM monitor which has operated for more than 24 months, even sporadically, are eligible for comparison to national ambient air quality standards. This means the Oso Flaco monitor would become a permanent air monitor in the CARB and US Environmental Protection Agency's (EPA) air monitoring networks if allowed to operate for two years.

State Parks was only made aware of this on June 15, 2016, when SLOAPCD's APCO, Larry Allen, emailed State Parks Superintendent Brent Marshall stating:

The [Oso Flaco Monitoring] site is designated as a special purpose monitor in AQS rather than as a regular monitor in our official network, which means the data cannot be used for federal attainment/nonattainment designations. *Special purpose monitors are allowed to retain that status for up to 2 years, after which they are designated as a regular monitoring site in our network and the data can be used by EPA along with the data from all our other monitoring sites for determining attainment/nonattainment* [emphasis added].

By December 2016, the Oso Flaco monitoring site had been continuously in operation for 18 months. The site had been designated as a “special purpose monitor” because it was considered a test monitoring site and was not intended to be used for regulatory compliance purposes. State Parks was concerned the Oso Flaco monitoring site would become permanent as early as February 2017, despite the fact that this site was installed as a temporary test to determine if it would be suitable for rule compliance purposes. State Parks opted to shut down the site and remove some of the instruments and infrastructure to prevent this temporary site from becoming a permanent monitoring site that could be used by State and Federal agencies for determining attainment/nonattainment with air quality standards.

For your reference, we have attached a screen shot of the Oso Flaco site dated December 16, 2016. This shows the erroneous record that the site was installed on February 7, 2015. We have also included an e-mail chain starting with the June 15, 2016 e-mail exchange concerning the Oso Flaco monitoring site.

Issue #2 Failure to Meet the PM 10 performance standard of Rule 1001

As outlined in the sections above, the Oso Flaco monitoring site was intended to be a temporary site to test its suitability as a control site monitor for Rule 1001 compliance purposes. The Oso Flaco and CDF monitoring sites were not evaluated under the objective scientific criteria outlined in the MSSP.

Suitability of the Oso Flaco Site as a Comparison Monitor

State Parks-contracted specialists examined the suitability of the Oso Flaco and CDF monitoring sites.

In January 2017, the California Geological Survey (CGS) issued an analysis of site characteristics at the CDF and Oso Flaco monitoring sites. They compared overall acreages upwind of each monitoring location as well as open-sand and dune vegetation acreages. Additionally, CGS compared upwind areas as they existed in the 1930's, a time that predates OHV recreation in the dunes. CGS concludes:

Saltation-generated dust emission potentials as related to open sand acreage of the dune landscapes upwind of the Rule 1001 “control” and “riding area” monitors are demonstrably different with respect to total acreage, open sand acreage, and percent vegetation cover. The dune landscape acreage analyses...presented in Figures 1 and 2, attached, quantify this difference. It appears that using these monitors for the implementation of Rule 1001 will result in significant underestimation of “background” dust emissions when compared to the Oceano Dunes riding area monitor. Therefore, the two monitors do not provide comparable physical conditions for the purposes of Rule 1001.

Figures 1 and 2 from the CGS January memorandum are attached.

In January 2017, MIG (consultants under contract to State Parks) reviewed wind conditions and PM 10 levels from the Oso Flaco and CDF monitoring stations to determine if these sites would be suitable for determining compliance with the performance standards in Rule 1001. This evaluation also examined the Oso Flaco and CDF monitoring sites based on some of the important characteristics identified in State Parks MSSP. Some key findings of this evaluation include:

From July 1, 2015 – December 14, 2016, the CARB data indicates:

For the 87 days when a compliance determination could have been made, the CDF Riding Area Monitor was more than 20% higher than the Oso Flaco Control Monitor on 84 days, which is equal to a 97% non-compliance rate.

For the 87 days when a compliance determination could have been made, the average prevailing wind speed for the hours of 12 PM – 6 PM was approximately 9.5 miles per hour (mph) faster at the Oso Flaco Control Monitor (19.8 mph on average) than at the CDF Riding Area Monitor (9.3 mph on average)

The MIG evaluation concludes the CDF and Oso Flaco sites do not meet the siting characteristics identified for upwind dune setting, dune wind conditions, dune source dispersion, and monitoring site criteria as outlined in the State Parks' MSSP and, therefore, the data collected by these two monitors may not be comparable for Rule 1001 purposes.

State Parks requested that MIG compare the most recent 24-hour PM10 data available for the CDF and Oso Flaco monitoring sites through the ARB's Air Quality and Meteorological Information System¹. From March 25, 2017 to June 15, 2017 (the 83 calendar days identified in the APCD's Notice of Violation), MIG's review of the ARB data indicates:

- For the 33 days when a compliance determination could have been made, the CDF Riding Area Monitor was more than 20% higher than the Oso Flaco Control Monitor on all 33 days, which is equal to a 100% non-compliance rate.
- Regardless of the overall PM10 levels measured, the 24-hour average PM10 level at the CDF Riding Area Monitor was more than 20% above the 24-hour PM10 level at the Oso Flaco Control Monitor on 62 out of the 75 calendar days (83%) when both monitors were operating.

From March 25, 2017 to August 23, 2017 (152 calendar days), MIG's review of the ARB data:

- For the 36 days when a compliance determination could have been made, the CDF Riding Area Monitor was more than 20% higher than the Oso Flaco Control Monitor on all 36 days, which is equal to a 100% non-compliance rate.
- Regardless of the overall PM10 levels measured, the 24-hour average PM10 level at the CDF Riding Area Monitor was more than 20% above the 24-hour PM10 level at the Oso Flaco Control Monitor on 124 out of the 142 calendar days (87%) when both monitors were operating.

Conclusion

In summary, based on the analysis of site conditions and a comparison of the data measured from the Oso Flaco and CDF monitoring stations, these two sites are not comparable and should not be used for determining compliance with the Rule 1001 performance standard. The two monitoring sites do not meet the objective siting criteria presented in State Parks' MSSP, and more importantly, were never formally evaluated by the criteria as is required by the Rule. Analysis of approximately 23 months of wind and PM data from these stations indicates these sites do not exhibit wind conditions or dust levels that are comparable.

¹ The data available through the ARB's Air Quality and Meteorological Information System (<https://www.arb.ca.gov/aqmis2/aqmis2.php>) is considered preliminary data only and is subject to change.