



Air Pollution Control District
San Luis Obispo County

SLOAPCD RESPONSE TO OHMVR “CONFIDENTIAL SETTLEMENT COMMUNICATION”

August 31, 2017

This is the Air Pollution Control District’s (APCD) preliminary response to the State Parks Off Highway Motor Vehicle Recreation Division’s (OHMVR) initial statement to the Special Master (SM) on the June 12, 2017 Notice of Violation (NOV) issued by APCD. OHMVR begins their comments by citing case law relating to common law nuisance and stating they cannot present arguments in their defense on this issue until they see the APCD evidence supporting the violation. They further claim the Consent Decree Agreement (CD) empowers the Special Master to mediate virtually any topic of dispute between the agencies that pertains to the ODSVRA, including the Nuisance issue.

The Special Master selection process involved interviewing a number of candidates chosen for their specific knowledge and expertise in particulate aerosols measurement and evaluation; the origin and control of dust emissions from anthropogenic and natural sources; knowledge of sand dune structure and geomorphology; knowledge of the mechanisms of sand transport, saltation and surface erosion; and a host of other highly specialized *scientific* expertise and knowledge relative to the ODSVRA dust issue. Dr. Nickling was selected as the SM through a consensus decision process based on his well-regarded expertise in these scientific subject areas. We are aware of no specific expertise Dr. Nickling possesses relative to legal interpretation of California air pollution control law or the adopted Rules and Regulations of the San Luis Obispo County APCD, and/or what might constitute a violation of those laws and regulations. Thus, it is not appropriate to ask Dr. Nickling to opine on the legal aspects of this issue as he is not a recognized subject matter expert in this area. Furthermore, implicit in the CD Agreement is the clear understanding that the APCD cannot abdicate his authority to enforce the requirements of the California H&SC.

The role of the SM is defined by Sections 5 & 6 of the first amendment to the CD Agreement dated March 26, 2014. As related to the dispute resolution process for this NOV, APCD Rule 402 and H&SC Section 41700 address Nuisance issues in the context of air pollution control law in California, which prescribes an APCD Hearing Board process to address the abatement of nuisance issues caused by air pollution. This process is completely outside the purview of the Special Master’s dispute mediation role, and OHMVR’s citations of case law regarding common law nuisance are not applicable to these laws or this process. Nonetheless, should mutually agreeable settlement of all aspects of the NOV be reached through the SM dispute resolution process, then the Hearing Board process may not be needed.

Before responding to OHMVR’s technical arguments related to the NOV, it’s important to provide some context behind the issuance of the NOV. OHMVR has operated the ODSVRA in violation of Rule 1001 since 2012, including failure to meet almost every compliance schedule specified in the Rule, and failure to meet the performance standard on many more days than those cited in the NOV. This has resulted in causing an ongoing nuisance and endangering public health through failure to adequately control the

particulate emissions from their facility. Even so, this is the first NOV issued to OHMVR since implementation of the initial Consent Decree Agreement executed in 2013. The Air Pollution Control Officer has used his enforcement discretion under the H&SC to not enforce these Rule violations in an effort to follow a more collaborative process envisioned by the CD in working with ARB and OHMVR to jointly resolve this issue.

Unfortunately, OHMVR has not followed the same collaborative process. They have used our withholding of enforcement actions as a means to delay implementation of meaningful dust mitigation and to fight any attempt to place permanent dust controls, such as vegetation, within the most emissive riding and camping areas. They stand on the collaborative CD Agreement process in disputing the NOV to the SM, yet have operated completely outside that process in many notable instances:

- The CD Agreement describes a joint decision-making process between APCD and OHMVR facilitated by policy and scientific assistance and resources provided by ARB. Nonetheless, OHMVR proceeded to remove the Oso control site monitor required under Rule 1001 with no notice to APCD or ARB until after the site had been completely dismantled. Contrary to OHMVR statements, which are addressed separately below, that site location was established through an extensive consensus decision-making process. The unauthorized removal of the site occurred through a unilateral decision by OHMVR that was only reported to APCD and ARB after the fact. Nonetheless, the APCO offered Mat Fuzie, as the newly appointed OHMVR Deputy Director, the opportunity to correct the problem without issuance of an NOV if they replaced the monitor by within 30 days; the APCO subsequently agreed to a one-month extension of the replacement deadline. Neither replacement deadline was met by OHMVR.
- The CD Agreement describes an iterative process of mitigation actions, evaluation and revision to reduce emissions and ultimately comply with Rule 1001. This has not happened.
 - In 2014, OHMVR proposed the installation of 30 acres of sand fencing in the northern Le Grande tract area; they wound up installing only 15 acres of fencing for a period of about 3 months during the spring, which achieved no demonstrable reduction in downwind PM10.
 - In 2015, OHMVR proposed and installed 40 acres of temporary sand fencing at the far eastern edge of the Le Grande tract, and 30 acres of hay bales in the very low emissivity non-riding areas in front of the CDF monitor; again no demonstrable reductions in downwind PM10 levels were measured.
 - In 2016, OHMVR proposed and installed, over APCD objection, the same 40 acre temporary fencing project, with an additional 2 adjacent acres of surface roughness components; again, no demonstrable downwind PM10 reductions were measured.
 - In 2016, OHMVR also developed and published a draft 5-year dust mitigation plan and associated EIR (discussed below), that proposed installing the same 40 acres of seasonal wind fencing in the exact same location for each of the next 5 years. In addition, they proposed planting up to 20 acres of new vegetation, with the majority of the planting to occur in low-emission nonriding areas. No scientific or technical analysis of the potential dust reduction effectiveness of this mitigation plan was prepared to demonstrate its potential to meet the requirements of Rule 1001.

- In 2017, OHMVR proposed the identical, ineffective wind fencing project they implemented in 2016. APCD refused to agree and insisted on a greater level of mitigation and moving the fencing location within the more emissive zones closer to shore. OHMVR then agreed to increase the mitigation acreage to 50 acres, with 30 acres of fencing located closer to shore and the other 20 acres in the same location as the previous 2 years. They began installing the 20 acres in the previous location, then refused to implement the remaining 30-acre fencing project due to a dispute with CCC over the language of their approval letter. I informed OHMVR that APCD would have to issue an NOV if they refused to complete the mitigation installation. OHMVR stated they understood this but had to do what they felt they needed to do.
- In preparing their 5-Year Dust Mitigation Plan and associated EIR, OHMVR sought no input from APCD nor the standing ARB/APCD/OHMVR Technical Committee that has reviewed every other mitigation, monitoring and special study proposal proposed during this period. The OHMVR plan included arbitrarily excluding any potential mitigation in the most emissive camping and riding areas in the north and all riding and camping areas within 1500 feet of shoreline, and that most of the new vegetation proposed for dust controls be planted in the low-emission zones outside the riding areas. When APCD strongly objected to OHMVR intentionally skirting the CD review process, they agreed to allow us to prepare our own mitigation alternative for analysis in the EIR. As a result, APCD recommended the re-establishment of vegetated foredunes in the Le Grande tract and the use of supplemental wind fencing on sequentially increasing acreage until compliance with Rule 1001 was met. The EIR, which was also solely prepared by OHMVR, determined the APCD recommendation would result in too many “*significant impacts*”, primarily because it would reduce the amount of OHV recreation area available to riders, and “*the emphasis on planting vegetation in near-shore areas would likely modify, to some degree, USFWS-designated critical habitat for the western snowy plover.*” The area being referred to as critical snowy plover habitat is the most intensive camping and riding area in the ODSVRA and has no current restrictions on its use related to snowy plover protection. There was no discussion or even mention of how the intensive OHV activity in this area impacts the snowy plover “critical habitat”, or how those potential impacts might compare to the “significant impacts” determined by OHMVR for planting vegetation and re-establishing the foredunes in this area.
- OHMVR continues to utilize every imaginable delaying tactic to avoid implementing effective dust controls, including the threat of lawsuits against them; provision of only partial information on key technical issues until pressed for additional information; taking unilateral actions that disrupt and hinder the collaborative process; and conducting ongoing ex-parte communications with APCD Board members, which continue to this day, that have sown dissension within the APCD Board and significantly affected the ability of the APCO to effectively carry out his responsibilities related to this issue. All of these efforts by OHMVR over the past five years to obfuscate, delay and avoid effectively addressing this significant pollution problem have further endangered public health by preventing the implementation of adequate controls that should have been in place long before now to reduce the particulate emissions from their facility.

This is the context under which a long-overdue NOV was finally issued to OHMVR. The APCD's responses to the specific technical issues raised by OHMVR relative to the NOV are provided below.

Technical/Scientific Issues Raised by OHMVR

The technical arguments made in OHMVR's initial statement to the Special Master contain many incorrect statements, present facts and data taken out of context, and omit discussion of important data, documents and events that provide the complete story to the arguments they present. This results in the needless expenditure of large amounts of APCD time and resources in trying to correct the record and re-litigate issues already settled long ago.

The APCD Notice of Violation under dispute by OHMVR cites 2 violations of Rule 1001 and a separate violation of Rule 402 and H&SC 41700:

1. Unauthorized removal of the Oso Control Site Monitor required under Rule 1001 Section C.2.a
2. Failure to meet the PM₁₀ performance standard required under Rule 1001 Section C.3
3. Public nuisance, as defined in H&SC Section 41700 and reiterated in District Rule 402, caused by particulate emissions emanating from the ODSVRA

OHMVR presents selective bits of information mixed in with a lot of misinformation in an attempt to support four primary points they raise in disputing the basis of the NOV:

1. They claim to be operating under an APCD-approved Particulate Matter Reduction Plan (PMRP).
2. They claim the Monitoring Site Selection Plan (MSSP) was not followed and no other technical or scientific evaluation of appropriate monitoring site locations occurred before the installation of the Oso Control Site monitor.
3. They claim the Oso Control site monitor does not represent a comparable control site location based on an internal analysis performed by OHMVR and their consultants after the site was illegally dismantled.
4. They claim selection of the riding area monitoring site and the non-riding area control site monitor locations is completely up to OHMVR which, by inference, would imply an entitlement to remove the control site without approval from the APCO. Rule 1001 requires APCO approval of the monitoring plan, which includes site selection; we will not comment further on this.

Each of these claims are either false or disingenuous and are unsupported by a full presentation of the facts, as discussed below.

The Particulate Matter Reduction Plan

The PMRP conditionally approved by APCD was a very general "plan" that provided a broad outline of potential strategies that could possibly be implemented to help reduce dust emissions from the ODSVRA. There were no specific control strategies proposed for implementation, no specific areas within the ODSVRA identified for potential dust controls, no specific timelines proposed for implementation, and no substantive analysis of the potential effectiveness of the plans ability to meet

the requirements of Rule 1001 if implemented. In essence, it was a document describing the process OHMVR would undergo in determining how best to mitigate the dust emissions from the ODSVRA.

Nonetheless, in the spirit of cooperation and collaboration, APCD approved this *conceptual plan* with the understanding that, as stated in the March 29, 2013 OHMVR submittal letter, a more specific plan would be forthcoming based on scientific and technical analyses as they moved through the review and permit processes of other agencies. The July 10, 2013 APCD approval letter clearly stated that OHMVR was ultimately responsible for including control measures capable of achieving the emission reductions needed to comply with Rule 1001 by the timelines in the Rule.

Four years later, substantial technical and scientific analyses, field studies and modeling relative to this issue have been performed by all 3 agencies; yet the 5-year plan submitted to CCC by OHMVR relied on none of those analyses. Regardless, the APCD conditional approval of the PMRP was based on OHMVR meeting 3 conditions:

1. Comply with the conditionally approved Monitoring Site Selection Plan.
2. Obtain Air Pollution Control Officer (APCO) approval of the PM10 monitoring network required by Rule 1001 .C.2.a
3. Install and begin operation of the PM10 monitoring network by July 31, 2014.

Of these, only condition # 2 was met by OHMVR, thus voiding the APCD approval of the conceptual PMRP; no replacement plan has been submitted to APCD for review and approval as required by Rule 1001.

Process to Select the Control Site Monitor Location

Contrary to OHMVR statements, technical evaluation and substantial discussion of appropriate locations for both the riding area and the control site monitors were conducted during numerous meetings by the ARB/APCD/OHMVR Policy team and at least two meetings of the ARB/APCD/OHMVR Technical team prior to the designation of the CDF station as the riding area site and the selection of the Oso location for control site. The criteria in the conditionally approved MSSP was discussed in evaluating all potential sites, with one notable exception that OHMVR fails to mention: in APCDs approval of the MSSP, the issue of dune source strength and having a comparable amount of upwind exposed sand area for each site was specifically excluded by APCD as an inappropriate criterion (see point #2 in our conditional approval letter). This is discussed in further detail in the section below addressing representativeness of the Oso site.

After considerable deliberation, the Osos site was chosen based upon available locations and best fit. Central to these deliberations was an ongoing discussion of how all the data collected up to that point in time informed the selection process. For instance, one proposal by OHMVR was to locate the riding area monitor on the sand in the Le Grande tract and to locate the control site monitor on the sand equidistant from shore in the Oso area, similar to the EBAM locations used in Transects 2 & 4 in the DRI field study described in the *Wind and PM10 Characteristics at the ODSVRA from the 2013 Assessment Monitoring Network* report dated September 22, 2014. However, the data collected during that study

showed the PM10 levels at the Transect 2 site in the LeGrande Tract would likely exceed the Federal PM10 standard on a regular basis, and the Oso control site might also show occasional exceedances of the federal standard. Thus, while these sites appear to be the most comparable matches of all the sites evaluated, the likely outcome of placing the monitors in those locations was deemed untenable by both OHMVR and ARB and was removed from further consideration.

Discussion then turned to use of the CDF site as the designated riding area monitor based on data from the 2013 *APCD South County Community Monitoring Project* report; that study demonstrated the CDF site already measured the highest downwind PM10 levels compared to data from all other sites in the study. The group reached consensus that the CDF site was acceptable for this purpose and began focusing on an appropriate location for the control monitor. Only two potential locations appeared available for that purpose: either downwind of the Nature Preserve to the north or downwind of the Oso nonriding area to the south. The Nature Preserve site was ultimately rejected by OHMVR technical and policy team members as not meeting their criteria. As a result, the only other potentially suitable location was the one ultimately chosen through this process: the Oso site monitor.

OHMVRs statements implying the Oso site was intended to be a temporary monitor just to test its suitability as a control site location and was never intended for regulatory compliance purposes is disingenuous and incorrect. After all the site selection discussion and review described above, the Policy Team formally decided the Oso site would be used to serve as the CDVAA control site required in the Rule 1001 to determine compliance with the performance standard. The primary concern then turned to whether or not PM10 levels at that site had the potential to exceed the federal standard; if that were to occur, it could result in EPA designating it as a permanent monitoring site if it remained in operation for more than two years. Thus, the group decided to track the data and agreed that if exceedances of the federal standard were measured at Oso within 18 months of installing the site, the Technical and Policy teams would begin discussing whether or not an alternate location was needed prior to it potentially being designated a permanent site. In addition, it was designated a special purpose monitor by APCD to ensure the data would not be used by EPA to determine compliance with the federal standard. No PM10 concentrations even remotely close to exceeding the federal standard have ever been measured at the Oso site; thus, there was no need to re-evaluate the location of the site because the primary concern for prompting that evaluation never came to pass.

To be clear, the APCD has never prescribed the use of our CDF site or the Osos site as mandatory locations; we have openly stated alternative locations for both can be considered at any time, and that more than one control site monitor can be put in place, subject to APCD site approval. However, a riding area and control site monitor must be in place at all times to meet compliance with the Rule. Thus, any APCD-approved replacement site must be installed and fully functional prior to removal of an existing site as the designated monitor required by Rule 1001. At this point, the current approved monitors at CDF and Oso are the basis of Rule compliance and are valid until replaced by APCD-approved alternative sites.

Representativeness of the Oso Control Site Monitor

OHMVR asserts the Oso Control Site Monitor is not suitable for use as the Control Site monitor required in Rule 1001 because the amount of unvegetated exposed sand acreage upwind of CDF is greater than that upwind of the Oso control site. This is a specious argument for several reasons. First and foremost, this criterion is not consistent with the APCD approved MSSP. As shown in Table 3 of that document, the relative criteria are as follows:

Scientific Criterion

Preliminary Characteristic

Open Sand/Vegetation, % Coverage: *Coverage upwind of CDVAA and Control monitor sites is representative of CDVAA and Control Source areas, respectively*

Fore-dune Presence, Absence, and Structure: *Representative of CDVAA and Control Source areas, respectively*

The primary rationale for these characteristics is that the control site monitor is intended to represent “natural background” air quality conditions in the absence of any OHV activity; this was included in the Rule to protect OHMVR from being held liable for all air quality standard violations measured at our monitoring sites, rather than just those attributable to OHV activity. It is clear and proven that OHV activity significantly modifies the natural landscape of the dunes. The CGS vegetation studies performed at the ODSVRA document substantial destruction of vegetated foredunes and inland vegetated areas due to uncontrolled OHV activity. Undisturbed dune areas, by contrast, often develop some vegetated cover over portions of the dunes in the absence of anthropogenic disturbance. This is readily apparent in the CGS 1930’s aerial photograph that shows vegetated foredunes throughout the ODSVRA prior to the substantial intensification of OHV activity now occurring in those areas; the camping is currently concentrated in the former foredunes area of the Le Grande tract. Thus, insisting that a comparable control site must have a comparable amount of exposed sand is inappropriate because that is not a good indicator of natural conditions.

That said, there are some significant errors and omissions in CGS’s comparability analysis that we should point out:

- CGS utilized an incorrect and substantially skewed 15-degree wind direction arc (285 to 300 degrees) at the Osos site that is not supported by the data and grossly underestimates the percentage of open sand upwind from the monitor during high wind days. For Oso Flaco, the 15 degree WD arc that corresponds to the most frequent wind directions during high wind/PM events is 299-314 degrees. The figure below shows the correct arc and the corresponding sand areas directly upwind of the monitor. It would appear that CGS used the wind direction data from the S1 site rather than the Oso site in their analysis.
- The CGS analysis did not account for CDF’s much greater distance from open sand sources that allows for more particulate drop-out prior to reaching the CDF monitor compared to Oso.
- CGS mentions the higher wind speeds measured at the Osos site compared to the CDF site as an example poor comparability. What they omit from that discussion is that the substantially

higher wind speeds substantially more ability to cause saltation in the open sand sheets upwind from the Oso site, which is a significant benefit to OHMVR from a Rule compliance standpoint.

OHMVR also appears to attach some importance to their data analysis showing that, for all the days when a compliance determination for the Rule 1001 performance could have been made, PM10 levels measured at the CDF site were more than 20% higher than the Oso site on nearly 100% of those days, and overall CDF levels were more than 20% higher than Oso on over 80% of all days reviewed, regardless of concentration. We do not understand the point of this analysis, particularly its placement in this section of the report. It should come as no surprise that CDF PM10 levels are nearly always more than 20% above those measured at Oso. This is very consistent with all the emissivity and ambient air quality data collected by both APCD and DRI during the field studies referenced above, which show that emissivity and downwind PM10 levels are substantially higher in the riding areas than the nonriding areas. It also is a clear reflection of the fact that OHMVR has made no effort to install dust controls designed to date meet the performance standard in Rule 1001, which is the origin of that 20% comparison value. This only serves to demonstrate that significantly more dust mitigation is needed to resolve this problem.

Acknowledging that is the first step toward resolving this issue.

Monitoring Site Selection and Removal Authority

OHMVR appears to be claiming that selection of the riding area monitoring site and the non-riding area control site monitor locations is completely up to their discretion which, by inference, would imply an entitlement to remove the Oso control site without approval from the APCO. Rule 1001 specifically requires APCO approval of the monitoring plan, which includes site selection; this was further emphasized to OHMVR in our May 12, 2012 letter conditionally approving the MSSP. Unauthorized removal of the Oso Control Site was a clear violation of Rule 1001, plain and simple.

Conclusion

APCD has spent considerable time evaluating and responding to the arguments presented by OHMVR. We find no validity to their arguments regarding the site selection process, the comparability of the monitors or the difference in concentrations currently being recorded at CDF and Oso. Both of those sites are the official monitors of record for determining compliance with Rule 1001. To suggest otherwise is an attempt to revise history to defend against what APCD views as egregious and violations of Rule 1001.

It should be pointed out in passing that, if OHMVR is intending to promote their view that one or both of the CDF or Oso monitors cannot be used as the designated monitors required by Rule 1001, such an outcome would result in OHMVR being in violation of Rule 1001 for every day such monitors have not been in place since the July 31, 2013 monitoring implementation deadline in Section F.1.f. of the Rule.

They can't have it both ways.



The 285-300 degree arcs used by CGS are shown in red. The 299-314 arc for Oso is shown in green, as is the 295-310 degree arc representing the most frequent wind directions recorded at CDF during high wind/PM events.