

**CALIFORNIA COASTAL COMMISSION**

CENTRAL COAST DISTRICT OFFICE  
725 FRONT STREET, SUITE 200  
SANTA CRUZ, CA 95060  
PHONE: (831) 427-4843



March 29, 2017

Ronnie Glick  
California Department of Parks and Recreation  
Oceano Dunes State Vehicular Recreation Area  
340 James Way, Suite 270  
Pismo Beach, CA 93449

**Re: 2017 Dust Mitigation Proposal to Comply with APCD Rule 1001**

Dear Mr. Glick:

This letter is provided to the California Department of Parks and Recreation (DPR) in response to DPR's request for guidance as to the regulatory compliance required of DPR under the Coastal Act in order to implement a proposed temporary wind fencing and monitoring program for the 2017 windy season from approximately late March through August 2017 and wholly contained within the riding area of the Oceano Dunes State Vehicular Recreation Area (ODSVRA), which was submitted to the Central Coast District Office of the California Coastal Commission. This proposed program (the "2017 Dust Mitigation Proposal" or "Proposal") is intended to comply with DPR's legal responsibilities and obligations under the San Luis Obispo Air Pollution Control District's (APCD) Rule 1001.

For the reasons discussed below and on the specific facts here, the Executive Director of the Commission concludes that the 2017 Dust Mitigation Proposal does not require a coastal development permit (CDP) because the Proposal is the minimum necessary to abate a public nuisance.

**Dust Emissions Emanating From ODSVRA During The Windy Season Constitute A Public Hazard/Nuisance**

California Civil Code Section 3479 defines the scope of a "nuisance" as follows:

*Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance. (emphasis added)*

In turn, California Civil Code Section 3480 defines a "public nuisance" as follows:

*A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. (emphasis added)*

To qualify as a public nuisance, the nuisance "must be both substantial and unreasonable. It is substantial if it causes significant harm and unreasonable if its social utility is outweighed by the gravity of the harm inflicted."<sup>1</sup>

With respect to the dust emissions emanating from the ODSVRA riding area, the San Luis Obispo County Superior Court has stated that "County residents are continually exposed to levels of unhealthy air in violation of state health standards approximately 65 days each year."<sup>2</sup> Likewise, the APCD has stated that "public exposure to unacceptably high levels of PM [particulate matter], much of which occurs in the form of highly toxic crystalline silica, have continued to impact downwind residents, representing a significant public health threat that must be abated."<sup>3</sup> For the 2017 windy season, the APCD further stated: "We've already seen high winds at the dunes and corresponding high PM levels in downwind residential areas. Thus, getting the fencing installed immediately is vital to the protection of public health."

Considering the above, dust emissions emanating from ODSVRA during the windy season constitute a critical public health hazard amounting to a public nuisance. As described by the Superior Court and the APCD, the dust emissions are injurious to human health, offensive to the senses, and interfere with the comfortable enjoyment of life within the meaning of "nuisance" under Civil Code Section 3479 because the dust emissions result in unhealthy air quality in violation of health standards 65 days out of the year and because the dust emissions are largely comprised of crystalline silica, which is known to be highly toxic.

Furthermore, the dust emissions constitute a "public nuisance" as that term is defined in Civil Code Section 3480 because the dust emissions affect County residents in residential areas downwind of the ODSVRA riding areas. The dust emissions are significant, considering that the Superior Court and the APCD have characterized them as "unacceptably high," "highly toxic," and "a significant public health threat." Additionally, the emissions are unreasonable because DPR can allow off-highway vehicle use (OHV) use to continue within the ODSVRA riding area while still implementing reasonable, temporary mitigation measures (see also discussion below) to abate the serious harm caused by the dust emissions.<sup>4</sup>

---

<sup>1</sup> See *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 305.

<sup>2</sup> See Case No. CV12-0013 (2015).

<sup>3</sup> See letter from Larry Allen (Air Pollution Control Officer for the APCD) to Dan Carl (District Director for Central Coast District of the Commission), dated March 27, 2017, subject "2017 Dust Mitigation Proposal for the Oceano Dunes SVRA."

<sup>4</sup> The Executive Director of the Commission does not in this letter take the position that OHV use in and of itself within the ODSVRA riding area constitutes a public nuisance. The Commission is aware that DPR is statutorily authorized to operate ODSVRA in part for the purpose of OHV use. However, this statutory authorization does not mean that DPR may operate the Park without consideration of public hazards/nuisance conditions that may be created as a result of the statutorily-authorized use or without consideration of reasonable measures that can abate the public hazard/nuisance (see also discussion below). Furthermore, the plainest reading of the statute authorizing DPR's operation of ODSVRA does not suggest that DPR is empowered to create unhealthy air quality conditions, free of any abatement obligations, as a necessary implication of the powers expressly conferred by the Legislature.

Ronnie Glick, DPR  
ODSVRA 2017 Dust Mitigation Proposal  
March 29, 2017  
Page 3 of 4

**DPR's 2017 Dust Mitigation Proposal Constitutes Nuisance Abatement**

California Civil Code Section 3491 states: "The remedies against a public nuisance are: (1) Indictment or information; (2) A civil action; or, (3) Abatement."

ACPD Rule 402.A states:

*A person shall not discharge from any source whatsoever such quantities of air contaminants or other material which cause injury, detriment, nuisance or annoyance to any considerable number of persons or to the public, or which endanger the comfort, repose, health or safety of any such persons or the public, or which cause or have a natural tendency to cause, injury or damage to business or property. (emphasis added)*

APCD Rule 1001 was developed "to ensure efforts to reduce emissions from the dunes meet air quality requirements and protect public health."<sup>5</sup> In adopting Rule 1001, the APCD Board found that "clean air is a valuable and essential natural resource. Proposing new Rule 1001 will serve to aid in the restoration of this natural resource by reducing the amount of air pollutants introduced into the ambient air. The proposed rule will also serve to enhance and protect the environment by controlling and decreasing sources of air pollutants."

Likewise, the Superior Court has noted both the "critical need" for "comprehensive air pollution monitoring" that Rule 1001 provides, as well as the "genuine health concerns" underlying the Rule. The Court further described Rule 1001 as "an important public health regulation intended to improve the quality of the air breathed by local residents at issue."

Considering the discussion above that dust emissions emanating from OSDVRA during the windy season constitute a public health hazard/nuisance, APCD Rules 402.A and 1001 should be construed, consistent with Civil Code Section 3491 and on the specific facts of the situation here, as regulatory mandates to abate public health hazards/nuisances. Therefore, DPR's 2017 Dust Mitigation Proposal, which the APCD has indicated "was prepared at the direction of [APCD] as a requirement of compliance with APCD Rule 1001 and the Consent Decree Agreement" and which would also ensure compliance with APCD Rule 402.A, should be properly construed as public health hazard/nuisance abatement measures to abate the dust emissions emanating from the OSDVRA riding area during the windy season.

As described by the APCD, "[t]he control strategy [DPR's 2017 Dust Mitigation Proposal], approved by our joint technical team ... is expected to show significantly greater reductions in downwind PM levels than was observed in the prior 3 years' control efforts." Moreover, APCD has stated that "getting the fencing installed immediately is vital to the protection of public health." Relying on the ACPD's expert opinion on the projected efficacy of DPR's 2017 Dust Mitigation Proposal, the Executive Director determines that DPR's proposal is the minimum development necessary to abate the dust emissions public health hazard/nuisance.

---

<sup>5</sup> See APCD Staff Report to APCD Board Recommending Adoption of Rule 1001, dated November 16, 2011.

Ronnie Glick, DPR  
ODSVRA 2017 Dust Mitigation Proposal  
March 29, 2017  
Page 4 of 4

**DPR's 2017 Dust Control Mitigation Proposal Does Not Require A CDP At This Time**

Considering the totality of the circumstances discussed above, the Executive Director determines under the specific facts presented in this case that DPR's 2017 Dust Mitigation Proposal does not require a CDP for the following reasons: (1) the temporary proposal (which otherwise constitutes regulable development) is mandated by the APCD in order to comply with Rules 402.A and 1001 for the purpose of abating a public health hazard/nuisance; (2) the development is narrowly targeted at abating the nuisance; and (3) the development is the minimum necessary to abate the nuisance.

If at any point during the upcoming windy season DPR's actions in any way exceed the scope of the 2017 Dust Mitigation Proposal as approved and required by the APCD and which is minimally necessary to comply with Rule 1001 in the riding area of ODSVRA, the Commission reserves its future right to assert permitting authority over those excessive actions.

We hope that this year's dust control efforts will prove fruitful to helping better protect public health downwind of the ODSVRA, and we further look forward to helping DPR perfect its currently pending CDP application designed to provide particulate matter reduction at the ODSVRA consistent with APCD Rule 1001 moving forward beyond the current windy season. We would very much encourage DPR to commit the necessary resources towards completing that CDP application so that we can bring this matter to the Commission for action well before next year's windy season. Timely completion of the pending CDP application is even more essential in light of the APCD's expectation that DPR "need[s] to be planning now for much more significant dust control implementation next year." As we have for many years, we continue to be available to work collaboratively with DPR, APCD, the California Air Resources Board, as well as other parties keenly interested in ongoing issues at ODSVRA, to do all that we can to help resolve these issues moving forward.

Please do not hesitate to contact me if you have any questions or concerns regarding this letter.

Sincerely,



Dan Carl  
District Director  
Central Coast District  
California Coastal Commission

cc: Larry Allen (APCD)  
Kurt Karperos (CARB)  
James Bergman (SLO County)

## **Exhibit B**

**CALIFORNIA COASTAL COMMISSION**

CENTRAL COAST DISTRICT OFFICE  
725 FRONT STREET, SUITE 300  
SANTA CRUZ, CA 95060  
PHONE: (831) 427-4863  
FAX: (831) 427-4877  
WEB: WWW.COASTAL.CA.GOV



April 17, 2017

Ronnie Glick  
California Department of Parks and Recreation  
Oceano Dunes State Vehicular Recreation Area  
340 James Way, Suite 270  
Pismo Beach, CA 93449

**Subject: Follow-Up to Letter Dated March 29, 2017**

Dear Mr. Glick:

This letter is provided to the California Department of Parks and Recreation (DPR) as a follow-up to my letter entitled "2017 Dust Mitigation Proposal to Comply with APCD Rule 1001," dated March 29, 2017. The purpose of that letter was simply to explain the rationale underlying the determination by the Coastal Commission's Executive Director that DPR's proposed limited, temporary wind fencing and monitoring program for the 2017 windy season within the riding area of the Oceano Dunes State Vehicular Recreation Area (ODSVRA) does not require a coastal development permit (CDP).

As explained more fully in that letter, the Executive Director's determination is based on the view that DPR's 2017 wind fencing and monitoring program constitutes narrowly tailored nuisance abatement. For that reason, the Executive Director has concluded that DPR's implementation of the 2017 wind fencing and monitoring program does not require a CDP. Through this follow-up, the Executive Director seeks to further clarify the scope and statements of that letter.

**The Coastal Commission Did Not and Does Not Declare a Nuisance at ODSVRA**

First, neither the Coastal Commission nor the Executive Director declares nuisances, and I did not intend to suggest in my March 29, 2017 letter that either of them has the power to do so or did in fact declare a nuisance at ODSVRA. To the extent that the letter describes dust emissions emanating from ODSVRA as a public health hazard amounting to a "nuisance condition," the purpose of that discussion was simply to provide context for the Executive Director's determination that DPR's 2017 wind fencing and monitoring program constitutes narrowly tailored abatement for which a CDP is not required.

Furthermore, in describing dust emissions emanating from ODSVRA as a public health hazard, the Executive Director did not declare, nor did I intend to suggest, in that letter that DPR's operation of ODSVRA – whether by allowing off-highway vehicle (OHV) recreation or otherwise – constitutes a nuisance. In fact, the letter expressly acknowledges DPR's statutory authorization to operate ODSVRA in part for the purpose of OHV use. To the extent that the letter suggests that the dust emissions condition results directly or indirectly from DPR's operation of ODSVRA, I want to now clarify that determining the cause(s) of the condition is unnecessary to our ultimate conclusion that DPR's 2017 wind fencing and monitoring program constitutes narrowly tailored abatement.

Ronnie Glick, DPR ODSVRA

April 17, 2017

Page 2

Additionally, the Executive Director expressly acknowledges here that DPR's 2017 wind fencing and monitoring program constitutes beneficial mitigation measures designed with San Luis Obispo County Air Pollution Control District (APCD) and California Air Resources Board input through a joint technical team with DPR to effectively address the dust conditions that are affecting public health. Furthermore, the Executive Director also recognizes that DPR is implementing its 2017 wind fencing and monitoring program pursuant to APCD's directive, including as it relates to compliance with Rule 1001.

**The Purpose of the March 29, 2017 Letter is Limited to Determining DPR's Coastal Permitting Responsibilities for the 2017 Wind Fencing and Monitoring Program**

In construing DPR's 2017 wind fencing and monitoring program as narrowly tailored abatement, the purpose of the March 29, 2017 letter was strictly limited to explaining the Executive Director's view regarding whether a CDP is required for DPR to implement its 2017 wind fencing and monitoring program in order to comply with its legal responsibilities and obligations as directed by APCD under Rule 1001.

To that end, in the March 29, 2017 letter the Executive Director's conclusion that DPR's compliance with APCD's current directive under Rule 1001 (i.e., the 2017 wind fencing and monitoring program) constitutes narrowly tailored abatement can be drawn from three facts: (1) Rule 1001 was adopted in recognition of significant health impacts caused by dune dust emissions; (2) in operating ODSVRA, DPR must comply with Rule 1001; and (3) DPR's implementation of its 2017 wind fencing and monitoring program is intended to ensure compliance with APCD's current directive under Rule 1001. However, it is important to keep in mind that the Executive Director's conclusion is only relevant and made to the extent that it informs his ultimate determination as to DPR's permitting obligations under the Coastal Act in order to implement its 2017 wind fencing and monitoring program.

To be absolutely clear regarding the scope and significance of the March 29, 2017 letter, the sole intent of that letter was to convey the Executive Director's determination that DPR does not require a CDP from the Coastal Commission in order to implement its 2017 wind fencing and monitoring program in compliance with APCD's current directive under APCD Rule 1001.

Sincerely,



Dan Carl  
District Director  
Central Coast District  
California Coastal Commission

cc: Larry Allen (APCD)  
Kurt Karperos (CARB)  
James Bergman (SLO County)