

In Reply Refer To:
PP-CA-ClearCreek-05-05
1617.2 (210)P

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Mr. Gene Cunningham
3 Quail Run Circle #200
Salinas, California 93907

Dear Mr. Cunningham:

The Bureau of Land Management (BLM) has carefully reviewed and considered your letter of October 29, 2005, regarding the Clear Creek Management Area (CCMA) Proposed Resource Management Plan Amendment and Final Environmental Impact Statement (EIS). As the Assistant Director for Renewable Resources and Planning, I am responsible to the BLM Director for reviewing and resolving all protests of BLM's land use plans. The purpose of this letter is to inform you of the results of my review.

As stated in the Dear Reader letter for the proposed plan, the planning regulations at 43 CFR 1610.5-2 outline the requirements for filing a valid protest. I find that you meet these requirements, in part; therefore, portions of your protest letter are considered a valid protest. I have determined that your letter also contained 19 comments which are not considered valid protest issues, either because they represent an opinion not substantiated with a concise statement of why the State Director's proposed decision is believed to be wrong, or because they address matters outside the scope of the Plan Amendment itself, or because they represent an attempt to raise for the first time an issue that the protestor did not raise before, and are therefore not protestable here. The issues and comments are addressed below.

Issue 1: "I protest the continued OHV [off-highway vehicle] use in the CCMA as it is destructive to, and endangering the rare plant *camissonia benetensis*. Damage is ongoing and continues to threaten this rare plant with the thresholds of damage to the plant and its habitat, in excess of those established by the BLM and U.S. Fish and Wildlife Service."

Response 1: The Proposed Action includes numerous measures to protect *Camissonia benetensis* (see Final EIS, pages 2-2 to 2-4, 2-9 to 2-10, 2-13 to 2-14, and Appendices A, B, and C). The FWS agreed with these protective measures and concluded the plan would not jeopardize the species.

The Proposed Plan Amendment would provide major benefits to the San Benito evening-primrose and its habitat as described on page 4-15 of the Final EIS:

Nearly all remaining suitable San Benito evening-primrose habitat (both terrace sites and temporary streamside habitat) along Clear Creek would be maintained or enhanced due to enforced limited use vehicle restrictions, fence protection, habitat manipulation, and public education. Management actions related to the introduction of the San Benito evening primrose at 33 medium- and high-priority terrace sites could increase the number of populations. Additional protected riparian habitat within the expanded SBMRNA [San Benito Mountain Research Natural Area] would also benefit this species.

Greater protection of the San Benito evening-primrose potential and occupied habitat would occur under the proposed action because of significantly reduced route, trail, and barren designations within this vegetation community. Roads and areas that impact this species would be rerouted or closed. The Larious watershed would be closed to motorized vehicles, providing enhanced long-term protection for this important species population there and contribute to recovery efforts. Upper Clear Creek Canyon would be included in the expanded RNA [Research Natural Area] and coupled with further vehicle restrictions in the RNA, would facilitate and enhance management to protect this species there. Large proportions of Clear Creek Road, Sawmill Creek Road, San Benito River Road, and San Carlos Creek Road would be managed for introducing the primrose into suitable habitat.

Portions of Clear Creek terraces used for camping and as off-road vehicle staging areas and portions of 28 terraces used for main roads would remain unsuitable as San Benito evening-primrose habitat. OHV use in lower Clear Creek Canyon would remain relatively unchanged compared to existing conditions and would therefore see the smallest change in riparian impacts as a result of the route designation process. Most of the serpentine riparian habitat in lower Clear Creek is fenced; however additional fencing and protection measures may be required.

The substantial reduction in stream crossings and 52 percent reduction in miles of routes in this riparian vegetation community, would have significant beneficial impacts by reducing sediment delivery to habitat for the San Benito evening-primrose and the following riparian plant species; rayless layia, Guirado's goldenrod, Heerman's buckwheat, Hernandez bluecurls, and Brewer's salix; particularly outside lower Clear Creek Canyon.

Issue 2: "I protest the continued OHV use in the CCMA in that there is no *balanced management*. BLM management is overly favorable to the OHV community and OHV users. This favoritism precludes the achievement of a public land use goal, espoused by the BLM, that being *multiple resource use*. Multiple resource use is precluded due to the massive OHV use and the out of control demeanor, noise, litter, and general destruction of the environment wrought by these vehicles and users. Rock hounding, hiking, hunting and enjoyment of the quiet solitude is precluded. Equestrian use is nearly impossible."

Response 2: In accordance with the Federal Land Policy and Management Act (FLPMA), the 1984 Hollister Resource Management Plan (RMP) designated the CCMA a multiple use area. As described in 43 CFR 1601.0-5(f), the definition of multiple use is “. . . the management of public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of these lands for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions.”

Since 1984, the BLM has approved multiple amendments to the Hollister RMP to address changing needs and conditions in the CCMA. The Proposed CCMA Plan Amendment is also an effort to address many of the issues and concerns raised by the protestor, including balanced management of recreation resources in the CCMA. As identified in Chapter 1, page 1-4, the Purpose and Need for the Proposed Plan Amendment is to implement the Limited Use Area designation for the CCMA, approved in the 1999 Record of Decision (ROD), which requires that vehicles be restricted to a designated route system. The criteria developed by BLM to provide for multiple use and sustained yield are included on page 1-4. These criteria include “proximity to sensitive resources, private land, and motorized and non-motorized recreation opportunities.”

The impacts of the Proposed Plan Amendment on non-motorized recreation are described on page 4-23 of the Final EIS:

The proposed action provides 197 trails comprising 242 miles of routes ranging from paved roads to single track trails. This route network would provide access throughout the CCMA for a wide variety of non-motorized recreation activities. Two routes would be closed in the Condon Peak area; however several miles of route would remain open to 4-wheeled vehicles, providing access to a substantial portion of traditional hunting areas. The Condon Peak hiking trail would be closed to motor vehicles and provide an improved hiking experience. Passive recreation opportunities (hiking/backpacking, wildlife watching, nature study) would be enhanced under the proposed action with areas free of motorized disturbance and user conflicts. Non-motorized recreation activities and opportunities for ecological study would be significantly improved in the SBMRNA.

Therefore, the CCMA Proposed Plan Amendment and Final EIS is consistent with the definition of *multiple use* pursuant to FLPMA, and the issues identified by the protestor have been analyzed and discussed through the National Environmental Policy Act (NEPA) process.

Issue 3: “I protest the continued OHV use in the CCMA in that such a use is contributing to massive soil loss and erosion.”

Response 3: Refer to responses to Issue 6 and Comment 5.

Issue 4: “I protest the continued OHV use in the CCMA in that the rate of erosion and soil loss from OHV use is in excess of regeneration rates.”

Response 4: The Final EIS discloses that OHV use and the Proposed Action would increase soil erosion above natural levels by 15,030.4 tons/year (see Final EIS, pages 4-5 to 4-7). Compared to existing conditions, “the proposed action would result in a reduction in erosion and sediment yield” by approximately 19,600 tons per year (Final EIS, page 4-6).

Issue 5: “I protest the continued OHV use in the CCMA as the Planning Process and Public Collaboration is a farce. The T.R.T. [Technical Resources Team] committee is essentially an OHV lobby. I am a member of the T.R.T. committee and continually I am precluded from participation by failure to receive notice, or receiving notice after the meeting has taken place. All members of the T.R.T. are not noticed equally. I received my copy of the Final EIS and RMP on October 20, last, and would not have received it at all had I not called the BLM office in Hollister. Yet the OHV community had a copy prior to the publication in the Federal Register. They received a copy on September 28, last. Additionally, the Technical Review Team (T.R.T.) has no technicians as members. There are no independent technicians involved, there are no *independent* geologists, foresters, biologists, toxicologists, hydrologists, or botanists involved in the Planning Process and there is no Public Collaboration. See Exhibit ‘A-P’ [Tobin’s Blog] to this protest letter.”

Response 5: As noted by the protestant, the BLM and the Environmental Protection Agency (EPA) posted a Notice of Availability (NOA) for the CCMA Proposed Plan Amendment and Final EIS in the Federal Register on September 30, 2005. Pursuant to the BLM planning regulations, the posting of EPA’s NOA in the Federal Register initiates a public protest period of 30 days for all proposed planning decisions (43 CFR 1610.5-2(a)(1)). The document was available by request at the Hollister Field Office in paper and CD-ROM version and on-line at the BLM website (http://www.blm.gov/nhp/spotlight/state_info/planning.htm). The BLM mailed over 200 copies of the document to interested parties.

The CCMA TRT that assisted the BLM in developing criteria for route and barren designation methodology to enhance public involvement in the planning process is no longer operational. Members of the TRT included BLM managers and resource specialists, OHV recreationists, environmental organizations, and local landowners. In fact, the protestor was a part of the original TRT, which was established to generate public involvement in management of CCMA. The TRT had no decisionmaking authority, but served as a forum to identify resource issues and conflicts on public lands. The BLM proposed to create a new TRT for CCMA in the 2004 Draft RMP Amendment and Draft EIS pursuant to the Federal Advisory Committee Act (FACA). As noted in Appendix K on page 37:

The Federal Advisory Committee Act (FACA) established in 1972 as one of the ‘openness in government’ laws was designed to counter the undue influence of special interests by balancing the membership of Federal advisory committees and ensuring that committee meetings and minutes are open to the public. The central tenets of FACA require that Federal advisory committees: (1) Establish a written charter that explains the mission of the committee; (2) Give timely notice of committee meetings in the Federal Register; (3) Have fair and balanced membership on the committee; (4) Open committee meetings to the public,

whenever possible; (5) Have the sponsoring agency prepare minutes of committee meetings; (6) Provide public access to the information used by the committee; (7) Grant to the Federal Government the authority to convene and adjourn meetings; and (8) Terminate within two years unless the committee charter is renewed or otherwise provided for by statute. To be chartered under FACA, committees must be ‘established’ under the authority of Federal laws, by an executive agency, or by the president.

Therefore, the issues raised by the protestor with regard to the TRT have been addressed in the Proposed Plan and Final EIS, and any proposal to develop a new TRT will include opportunities for public involvement pursuant to the FACA and the NEPA.

Issue 6: “I protest the continued OHV use in the CCMA as the BLM does not reveal the true facts and misrepresents the facts. As an example, the BLM states that accelerated erosion is caused by ‘*human activity*’. The true fact is that the accelerated erosion is caused by OHV activity.”

Response 6: As noted in BLM responses to comments on the Draft EIS (Final EIS, Appendix J), “‘Human activities’ include, but are not limited to OHV use.” Therefore, the BLM has considered the issue raised by the protestor through the NEPA process, and the Proposed Plan Amendment would reduce “accelerated erosion” caused by “human activity,” including OHV use.

Issue 7: “I protest the continued OHV use in the CCMA as it is a violation of executive order 11989.”

Response 7: As stated on page 1-6 of the Final EIS, “Executive Order 11989 (Off-Road Vehicles on Public Lands) . . . strengthened protection of the lands by authorizing agency heads to (1) close areas or trails to OHV’s causing considerable adverse effects and (2) designate lands as closed to OHV’s unless the lands or trails are specifically designated as open to them.”

Pursuant to Executive Order 11989, the BLM has the discretionary authority to designate routes and play areas on public lands.

Issue 8: “I protest the continued OHV use in the CCMA as the BLM has not and can not protect or conserve threatened species. There are 50-70,000 acres with only one ranger. Threatened species are not protected, i.e. *camissonia benetensis*, and the California Condor habitat.”

Response 8: Refer to responses to Issues 1 and 24 and Comment 2.

Issue 9: “I protest the continued OHV use at the CCMA as the BLM has no public outreach. There is no registration of users, asbestos education, or soil loss erosion control education.”

Response 9: As noted in Chapter 2 of the Proposed Plan Amendment, “A variety of techniques will be used . . . to ensure compliance with the designation, including . . . education, etc.” A

detailed description of management actions related to the issues raised by the protestor is located in Appendix C of the Final EIS. Specifically, Immediate Actions (Target 0-2 Years), include:

- Monitor soil erosion and sediment yield to streams through Clear Creek gauging station. Implement soil erosion control measures, silt fences, and sediment trapping features.
- Create and implement new Sign Plan. Place large portal signs at entry points informing visitors of vehicle use restrictions, asbestos public health hazards, and compliance with protective measures for sensitive species habitat.
- Continue existing, and explore new outreach approaches to contact visitors with brochures, maps, and information. Continue to emphasize the ‘Leave No Trace’ and the ‘Tread Lightly’ programs.
- Conduct Fee Collection Study to determine effectiveness in implementing new fee collection in project area to help fund project activities. In the interim institute a program to register all vehicles and OHV’s entering the area.

Therefore, the BLM has considered the issues raised by the protestor, and the Proposed Plan Amendment would benefit BLM public outreach and education programs, as well as user compliance with CCMA rules and regulations.

Issue 10: “I protest the continued OHV use at the CCMA in that the Biological Opinion has been violated since it was rendered in about 1997. There exists OHV trails the BLM is not aware of. The trail mileage has always been in excess of that allowed in the Biological Opinion. The Biological Opinion addresses dust suppression. There is no evidence that the BLM has ever engaged in meaningful or effective dust suppression. There is no expectation that the Biological Opinion will be conformed to in the future.”

Response 10: In accordance with 40 CFR 1500, Section 1.9 of the Final EIS provides an explanation of the route inventory that was used for CCMA route designation:

The designations proposed in this project are based upon the best science and data reasonably available at this time. Between January 2001 and August 2003, field crews inventoried nearly 440 miles of motorized access routes within the CCMA . . . These inventoried routes are shown on [Draft EIS] Map 1-3 and are the database used in this route designation process.

BLM has commissioned aerial over flights during 2004 to compare the inventoried routes to those visible from the air using the latest digital imagery. These data are not yet available. The number of existing routes to be shown in this aerial imagery and not surveyed by field crews is roughly estimated at 15 percent of the total miles or routes.

Furthermore, as described in Appendix C, Immediate Actions for Implementation of the Proposed Action would include a “Complete inventory of all routes not in the current database. Evaluate routes through the established screening criteria. Providing routes meet the criteria and contribute to the route network they may be added to the route system within the thresholds identified in this plan amendment.”

In response to the human health risks associated with asbestos, see response to Comment 3.

The BLM has implemented dust suppression techniques in the CCMA on various maintenance and construction projects in the past and will continue to implement this strategy, as appropriate.

Issue 11: “I protest the BLM having ‘administrative access to private land’. Private land owners are much better stewards of the land than BLM. The land owners can see what the BLM has done to lands that they manage, and look with disdain upon the destruction wrought upon the CCMA by the BLM. I protest vociferously to administrative access to or through my land in Byles Canyon.”

Response 11: The Proposed Action does not make any decisions on lands not managed by the BLM. The Proposed Action states, on page 2.7, “Portions of routes crossing non-BLM lands will not be designated. Landowners/managers will be responsible for preventing public access to or across their lands Routes crossing non-BLM lands may be depicted on route maps as a part of the existing situation, but BLM has no jurisdiction for decisions related to the status of those routes.”

Issue 12: “I protest the continued OHV use at the CCMA as California Protected species are not addressed. The mountain lion is a protected species in California. We land owners occasionally see them and frequently find their kills. Obviously the CCMA is mountain lion habitat and OHV use is incompatible with mountain lion habitat.”

Response 12: The BLM responded to this issue, as submitted as a comment on the Draft EIS, in the Final EIS, Appendix J, page 91. The BLM determined that “. . . the survival of this species will not be adversely impacted by the proposed action.” Protection of special status species is BLM’s primary responsibility, as outlined in the response to Issue 3 and elsewhere. The BLM special status species include state-listed species under the California Endangered Species Act (CESA) and federally-listed species under the Endangered Species Act (ESA). The mountain lion is not a state-listed species under the CESA, nor a federally-listed species under the ESA. However, BLM management actions to protect special status species are likely to improve conditions for the California mountain lion.

The California mountain lion is also protected by Proposition 117, the California Wildlife Protection Act, which prohibits trophy hunting of the California Mountain Lion and made the lion a specially protected mammal. Proposition 117 requires that California spend no less than \$30 million a year on wildlife habitat protection and related purposes. It is now illegal to take, injure, possess, transport, import, or sell any lion or any part or product of a lion.

Issue 13: “I protest the continued OHV use at the CCMA in that the massive sedimentation for the facility is loading Hernandez Reservoir with asbestos and heavy metals. Hernandez Reservoir is not in the Area of Critical Environmental Concern, yet it does not meet the Federal Drinking Water Standards. The pollution with asbestos and heavy metals of Hernandez Reservoir is directly related to OHV activity, and the asbestos laden sediment generated at the CCMA.”

Response 13: Clear Creek and Hernandez Reservoir were identified as impaired by mercury on the 1998 Clean Water Act Section 303(d) list of impaired water bodies. The California Regional Water Quality Control Board, Central Coast Region (Regional Board) adopted a "Total Maximum Daily Load" (TMDL) for Mercury in Clear Creek and Hernandez Reservoir at the March 19, 2004 Regional Board meeting. This TMDL was approved June 21, 2004 by EPA, which became the effective date. The TMDL identifies attainable numeric targets to protect water quality and has determined that the implementation measures to achieve these targets have already been established by BLM.

USGS and Central Coast Regional Board data collected from 1995 through 2002 indicate that Hernandez Reservoir is meeting water column objectives for mercury (1998 data.) Six samples were collected in Hernandez Reservoir in 2002 by the Regional Board and all samples were below water quality and sediment objectives for mercury.

In preparation of the Regional Board’s Technical Report (March 2004) related to analysis for mercury impairment, two major activities that have been conducted in the Clear Creek area were evaluated for their possible contribution to mercury loads in the creek. The activities evaluated were: Off-Highway Vehicle use (OHV) and abandoned mine lands. Regional Board staff considered both of these activities in designing the water quality sampling program conducted in 2002.

Page 3-9 of the CCMA Proposed Plan Amendment states, “Background levels of mercury in soils and sediment in the Clear Creek area was estimated to be 0.2 mg/kg. Sediment data from paired sample sites were essentially all at or below this value except for one sample collected at the furthest downstream location, the USGS gage. “This indicates that sediment loading into the creek is roughly at background levels throughout most of the watershed, which suggests that the OHV activities are not causing any significant mercury loading.”

Chapter 4 of the CCMA Proposed Plan Amendment describes mitigation measures that would benefit water quality in Clear Creek and Hernandez Reservoir on page 4-5. Page 4-5 also states, “BLM has committed to the Regional Board a five year program of quarterly sampling and monitoring. The Regional Board has not requested any additional implementation efforts as the remedial actions of BLM appear to be causing a decrease in sediment concentrations of mercury in Clear Creek. Achieving the load allocations in Clear Creek is reasonably expected to achieve the load allocations in Hernandez Reservoir and restore beneficial uses of the reservoir.” Therefore, the BLM has considered the issues identified by the protestor and has already begun to take steps to address impacts to water quality from OHV use in CCMA.

Issue 14: “I protest the continued OHV use at the CCMA in that the BLM management is deficient, as evidenced by the fact management admits it does not have knowledge of all the trails and roads in the CCMA. The CCMA has been under BLM management for more than 60 years (transferred from Forest Service to BLM in 1941) and in 60 years of management can not identify all roads and trails in the CCMA.”

Response 14: See response to Issue 10.

Issue 15: “I protest the continued OHV use at the CCMA in that the BLM is not placing a priority on environmental protection. It is a charge of the BLM to protect the land and the environment. OHV use and environmental protection are incompatible.”

Response 15: Pursuant to FLPMA, natural resource benefits include outdoor recreation. Well managed OHV use can be compatible with environmental stewardship. As described in Chapter 4 of the Final EIS, the Proposed Action offers a system of designated routes that would benefit management of recreation resources and enhance environmental protection in the CCMA.

Issue 16: “I protest the continued OHV use at the CCMA in that the BLM refers to actions to be taken in the future, with no date certain for installation or completion. In that the BLM is a lead agency under NEPA there is no oversight. Future actions always remain in the future, i.e. the installation of a wash rack.”

Response 16: Appendix C of the Final EIS includes a timeline for implementation of Immediate Actions (Target 0-2 Years), Midterm Actions (Target 3-4 Years), and Long-term Actions (Target 5+ Years). Also, see response to Comment 7.

Issue 17: “I protest the continued OHV use at the CCMA in that land owners are never notified by the BLM of new plans, changes to plans, modifications of plans, or meetings. I am a land owner and a member of the T.R.T., the BLM is well aware of my contact points yet I do not receive notice in timely fashion. In fact I am always placed in the position of a time squeeze. The BLM is selective in their notice policy.”

Response 17: See response to Issue 5.

Issue 18: “I protest the continued OHV use at the CCMA as there are adverse impacts on Federal and State protected species, i.e. the California Condor, Camissonia Benitensis, and the Mountain Lion.”

Response 18: See responses to Issues 1, 12, and 24.

Issue 19: “I protest the continued OHV use at the CCMA in that the BLM has not listed Federal or State agencies it must consult or coordinate with in conjunction with any future actions at the CCMA.... Air Quality Control needs to be consulted as to the generation of PM10 emissions at the CCMA. PM10 emissions likely exceed State and Federal regulations.”

Response 19: Demonstration of Consultation with Federal and State Agencies: As noted on page 3-1 of the Final EIS, “The CCMA is within two air quality management areas as regulated by the State of California. These air basins are: the North Central Coast and the San Joaquin Valley. There are two regional air quality boards that oversee these air basins: the Monterey Bay Unified Air Pollution Control District (MBUAPCD) and the San Joaquin Valley Unified Air Pollution Control District.” Page 3-2 of the Final EIS states:

The MBUAPCD meets federal standards for particulate matter and therefore does not have federal plans addressing those standards. San Benito County is designated as attainment/unclassified with respect to federal ambient air quality standards for ozone, carbon monoxide, and PM₁₀. The San Joaquin Valley Air Basin includes Fresno County, which currently exceeds both federal and California ambient air quality standards for ozone and PM₁₀. At a meeting in January 1997, the MBUAPCD indicated that BLM was in conformance with the State Implementation Plan (SIP) for ozone for the NCCAB [North Central Coast Air Basin]. In the 1999 ROD, it was identified that BLM received a memo from the MBUAPCD which stated that for the NCCAB, ‘Direct and indirect emissions of VOC and NO_x are below the threshold level of 100 tons/year applicable to the North Central Coast Air Basin; thus a general conformity finding is not necessary.’ Additionally in the memo, the MBUAPCD stated that; ‘Since the NCCAB is unclassified for the federal PM₁₀ standard, a general conformity finding is not needed for PM₁₀ emissions.’

Therefore, the Final EIS does contain a description of the agencies that were consulted on air quality. These are also the same agencies that would be consulted in the future for BLM management decisions that would impact air quality in the region.

PM₁₀ Emissions Generation: The Final EIS, page 3-3, states that “PM₁₀ in the atmosphere can be caused by both environmental factors and human activities. Human activities that contribute to PM₁₀ emissions include combustion sources, fugitive dust sources, agricultural activities, and off-highway vehicle travel on un-paved roads and OHV use areas. The 2002 Estimated Annual Average Emissions (CARB) for San Benito County, indicate a total of 6.31 tons per day of PM₁₀ emissions from unpaved road sources, however it is likely that these estimates do not account for emissions from the CCMA.” “Since the San Joaquin Valley Air Pollution Control Board adopted a PM₁₀ reduction plan effective December 1993, all land-use decisions for the CCMA will need to conform to this plan.”

Impacts to air quality as a result of the Proposed Action are discussed in the Final EIS, pages 4-1 to 4-3: “The principal pollutants of concern are PM₁₀ and airborne asbestos Compared to existing conditions, the air quality would likely remain unchanged and in particular as related to emissions of particulate matter and PM₁₀ concentrations.”

Issue 20: “I protest the continued OHV use at the CCMA in that the BLM has admitted to soil loss in excess of replenishment. This is a violation of Executive Order 11989.”

Response 20: See responses to Issue 7 and Comment 5.

Issue 21: “I protest the continued OHV use at the CCMA in that the BLM has admitted to metals, toxic to people, flow out of the CCMA by air and water. This is a violation of Executive Order 11989.”

Response 21: See responses to Issues 7, 13 and 23.

Impacts to air quality as a result of the Proposed Action are discussed in the Final EIS, pages 4-1 to 4-3: “The principal pollutants of concern are PM₁₀ and airborne asbestos Compared to existing conditions, the air quality would likely remain unchanged and in particular as related to emissions of particulate matter and PM₁₀ concentrations.”

Issue 22: “I protest the continued OHV use at the CCMA in that out dated studies are used to substantiate the BLM position of maintaining an OHV facility, i.e. Pacific Watershed Associates (1995), MBUAPCD study of the 1990’s.”

Response 22: The Pacific Watershed Associates study (1995) and the air quality data from the MBUAPCD represent the best available science at the time the Final EIS was prepared. The protestor fails to identify any data or information that might be considered inadequate. In addition, multiple agencies (including EPA and MBUAPCD) have reviewed the contents of the Final EIS through interagency involvement during the NEPA process, and they accept the validity of the studies identified in the protest. Therefore, the BLM considers all the information and studies referenced in the Final EIS to be valid for the purpose of analyzing the Proposed Action.

Issue 23: “I protest the continued OHV use at the CCMA in that high concentrations of mercury are present. Mercury is a toxic metal that accumulates in the human body and is not excreted. The effects are cumulative and toxic.”

Response 23: Page 3-14 of the Final EIS states:

Soil analytical results (Dynamac, 1998) revealed that the concentration of metals detected within the CCMA, are inherent to a highly mineralized area. . . .To evaluate the potential threat to human health, the surface water analytical results were compared to Federal drinking water regulations. Six downgradient surface water samples contained concentrations of antimony, cadmium, chromium, mercury, and nickel that exceeded the Maximum Contaminant Levels (MCL’s). On Clear Creek and the San Benito River, where multiple sampling points were established, cumulative, increasing concentrations did not appear to occur downstream. In general, the metal concentrations detected in the Clear Creek watershed were very low, with the exception of chromium which had two occurrences where MCLs were exceeded. Downstream sediment sampling suggests that the transport of metals may be limited to areas just downstream of a confluence of the mine drainage and the receiving stream.

Therefore, the BLM has considered the issues raised by the protestor through the NEPA process, and the Proposed Action would benefit human health and safety by providing OHV use outside of areas with high concentrations of heavy metals.

Furthermore, “The results of [CCMA soils] analysis revealed that the media samples collected from the San Carlos watershed consistently exhibited the greatest concentrations of metals, both in background and down gradient samples . . . The source of the mercury is the New Idria mine works in the Management Area that between 1858 and 1972 yielded the second largest mercury production in North America. High levels of mercury in soils likely come from a combination of natural dispersion and human mining activity.” This discussion is followed by an explanation of the analytical approach that was used to characterize the transport of mercury and other metals from the CCMA and New Idria mine (pg. 3-15).

Finally, the Final EIS states on page 3-16:

The Clear Creek mercury monitoring program is in compliance with the Central Coast Regional Board Resolution R3-2004-0029 (effective date 2004), which adopted a Total Maximum Daily Load (TMDL) for mercury in Clear Creek. This program requires BLM to conduct quarterly water quality monitoring for five years and to document compliance with the numeric standard of 0.05 parts per million (ppm) of total mercury in the surface water in Clear Creek . . . The water quality results that have been submitted to date, did not meet the mercury numeric objective; one sample was taken on December 16, 2004 and the result was 0.19 ppm, the second sample taken on March 30, 2005 was 0.19 ppm, a third sample on May 26, 2005 was 0.21 ppm. Samples taken before the TMDL reporting requirements were in effect ranged from 0.49 ppm (Dec. 2003), 8.10 ppm (Feb. 2004), 0.07 ppm (April 2004), and 0.11 ppm (July 2004).

The values reported to the Regional Board in 2005 were higher than expected, perhaps due to the above average rainfall and associated high stream-flow during this sampling period. These values also seem to contradict the findings of the Regional Water Board’s report that seemed to indicate a downward trend in mercury in the water. BLM is pursuing funding to conduct scientific field studies to determine if natural levels of mercury in selected geologic formations are eroding and producing sediment high in mercury which are contributing to the high levels of mercury in the water column.

Therefore, the BLM has considered the issues raised by the protestor through the planning process. The purpose and need for the planning process does not include remediation of mining sites. The BLM will work with the appropriate agencies to address remediation of mining sites with high concentrations of heavy metals in the CCMA.

Issue 24: “I protest the continued OHV use at the CCMA in that the fact the CCMA is California Condor habitat and the impact on this federally protected species is unaddressed.”

Response 24: The Final EIS includes a discussion of the California Condor on page 3-25 of the Affected Environment, Chapter 3, and page 4-18 of the Environmental Consequences. In particular, Chapter 3 of the Final EIS states that “Potential condor foraging and nesting habitat exist within and around the CCMA within the serpentine foot hill pine-chaparral woodlands, southern ultramafic Jeffery pine forest and non-serpentine areas. The BLM will consider the habitat needs and food supply for California condors in future planning for the CCMA.” Chapter 4 concludes that “There would be a net positive effect to all animal species that occur or have the potential to occur within the CCMA by implementation of the proposed designations, compared to existing conditions . . . The following species will benefit through the designation of routes and trails, elimination of cross-country travel, recovery of impacted areas, and the habitat protection an increased SBMRNA would provide; . . .California condor, etc.”.

Issue 25: “I protest the continued OHV use at the CCMA in that the BLM specifies the damage rendered to the barrens by OHV use, and hence has knowledge of the environmental damage being done by continued OHV use. This damage is not repairable and hence is sufficient reason to close the CCMA to OHV use.”

Response 25: See responses to Issue 7 and Comment 5.

Issue 26: “I protest the continued OHV use at the CCMA as the BLM is in violation of Executive Order 131132. Lacking a wash rack and the mandatory use thereof the BLM violates the E.O. 131132 in the control on noxious weeds, i.e. starthistle.”

Response 26: The impacts of the Proposed Action on noxious weeds are discussed in the Final EIS, pages 4-19 and 4-20. Installation of a public vehicle wash facility is a proposed mitigation measure. For more on the installation of a wash facility, see response to Comment 7.

Pursuant to Executive Order 13112 of February 3, 1999, titled Invasive Species, Sec. 2. Federal Agency Duties, states:

- a. Each Federal agency whose actions may affect the status of invasive species shall, to the extent practicable and permitted by law,
 1. identify such actions;
 2. subject to the availability of appropriations, and within Administration budgetary limits, use relevant programs and authorities to: (i) prevent the introduction of invasive species; (ii) detect and respond rapidly to and control populations of such species in a cost-effective and environmentally sound manner; (iii) monitor invasive species populations accurately and reliably; (iv) provide for restoration of native species and habitat conditions in ecosystems that have been invaded; (v) conduct research on invasive species and develop technologies to prevent introduction and provide for environmentally sound control of invasive species; and (vi) promote public education on invasive species and the means to address them; and
 3. not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere unless, pursuant to guidelines that it has prescribed, the agency has

determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions.

Sec. 6. Judicial Review and Administration.

- a. This order is intended only to improve the internal management of the executive branch and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any other person.

In accordance with Executive Order 13112, Section 2(1), the Final EIS identifies actions that may affect the status of invasive species on page 4-19, with particular emphasis on the yellow starthistle.

Furthermore, the lack of a “wash rack” is not a violation of Executive Order 13112 because Section 2(2) provides that Federal agency duties under Executive Order 13112 are subject to the availability of appropriations, and within Administration budgetary limits.

Finally, Section 6(a), as identified above, clearly states that the Federal duties outlined in Executive Order 13112 are “not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any other person.”

Therefore, the BLM has considered the issues raised by the protestor through the NEPA process, and the CCMA Proposed Plan Amendment would benefit the BLM’s ability to manage and control the spread of noxious and invasive weeds on public lands in the CCMA.

Issue 27: “I protest the continued OHV use at the CCMA as there is no ‘multiple resource use’. The dust, noise, litter, and demeanor of the OHV users functionally precludes the policy of ‘multiple resource use’ required of the BLM.”

Response 27: See response to Issue 2.

Comment 1: “I protest the continued Off-Highway Vehicle (OHV) use in the Clear Creek Management Area as violations to the existing R.O.D. have been ongoing for years. These on-going violations require the Closure of the CCMA to OHV use.”

Response: The BLM maintains the authority under Sections 202 of FLPMA to “develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.”

Comment 2: “I protest the continued OHV use in the CCMA in that OHV use is out of control and can not be controlled. Fences are continually cut and trespass on to areas that are off limits to OHV use is continual and destructive.”

Response: Law enforcement staffing levels and enforcement of the route network is outside the scope of the Proposed Plan and Final EIS. However, the Proposed Action states on page 2-9 that “The current Compliance Monitoring Plan will be revised to improve the BLM’s ability to manage the CCMA in a manner that promotes the long-term conservation of *Camissonia benitensis* and makes efficient use of staffing and funding.”

Also, pursuant to 43 CFR 8340.0-7, “Any person who violates or fails to comply with the regulations of subpart 8341 and 8343 is subject to arrest, conviction, and punishment pursuant to appropriate laws and regulations. Such punishment may be a fine of not more than \$1,000 or imprisonment for not longer than 12 months, or both.”

Comment 3: “I protest the continued OHV use in the CCMA as the OHV use is in a delineated Asbestos Hazard Area. This public health hazard is admitted by the BLM. The BLM is promoting, maintaining and facilitating a facility that is a public health hazard.... The BLM should admit that the OHV use in the CCMA is a public health hazard and protect the public from on site and off site exposure to asbestos by closing the CCMA to OHV use.”

Response: This issue is outside the scope of this Final EIS and will be addressed in a separate planning process after release of the EPA’s Final Risk Assessment, as described in the Final EIS, page 1-10:

The U.S. Environmental Protection Agency is currently conducting an asbestos exposure evaluation study in the Clear Creek Management Area. This study will provide further information on the exposure levels from various types of activities in the CCMA. Upon completion of this study, BLM will work with EPA and the public to appropriately respond to the new information. If the information is significantly different than the 1992 risk assessment, BLM will expeditiously initiate a NEPA process to consider the new information and potential management responses at the CCMA in light of any new findings.

The 1995 Final EIS and 1999 ROD discuss asbestos-related health risks and measures that the BLM is implementing to reduce these risks, including a “public asbestos hazard information program including information about asbestos risk and air sampling results in recorded messages and public outreach programs/materials.”

Comment 4: “I protest the continued OHV in the CCMA as the BLM is in the control of the OHV lobby. There is no concern for adjacent land owners, health concerns, erosion, soil loss, heavy metal dispersal, etc.”

Response: There are no specific part or parts of the Proposed Action identified as being protested (43 CFR 1610.5-2(a)(2)(iii)). The broad issues identified in the protest letter have been

considered by the BLM through the planning process and would be addressed under the Proposed Action.

Comment 5: “I protest the continued OHV use in the CCMA in that the BLM has continually failed to achieve acceptable soil loss and erosion standards.”

Response: Past actions are beyond the scope of the Proposed Plan Amendment and Final EIS. Nevertheless, implementation of the soil loss standards and monitoring program outlined in the Proposed Plan Amendment would have a beneficial impact to soil resources by significantly reducing soil loss and erosion in CCMA, as described in the Final EIS, pages 4-5 to 4-8.

Comment 6: “I protest the continued OHV use in the CCMA as the BLM is grossly deficient in publishing and educating OHV users as to the dangers of asbestos exposure. Regular and frequent OHV users are receiving asbestos exposure in excess of OSHA workplace standards. The BLM has not instituted registration of users, has no record of frequency of use by individuals, and seems oblivious of the fact that exposure in children is more dangerous than in adults.”

Response: Refer to response to Comment 3.

Comment 7: “The BLM has promised for years that a wash rack would be installed. There is no wash rack. The CCMA should be closed to OHV use until a wash rack is installed and the use thereof is made mandatory.... I protest any extension of the implementation period for installation of a mandatory wash rack, for any reason including but not limited to funding.”

Response: The details of location and design of the wash rack are outside the scope of this planning process. The BLM is currently in the design phase and will prepare an environmental assessment for public review. Public review is scheduled to take place before October 2006.

Comment 8: “I protest the continued OHV use at the CCMA as the BLM states at pg 3-22 that the BLM continues to manage the CCMA in conjunction with the Biological Opinion. This is a gross prevarication as the facts show that the CCMA has not been managed in conformance with the Biological Opinion.”

Response: No specific part or parts of the Proposed Action are identified as being protested (43 CFR 1610.5-2(a)(2)(iii)).

Comment 9: “I protest the continued OHV use at the CCMA as the BLM is relying on a signage strategy to gain control of an out of control OHV use. Signage has not worked in the past and without more field enforcement and more enforcement personnel the strategy is ineffective.”

Response: Law enforcement staffing levels and enforcement of the route network is outside the scope of the Proposed Plan and Final EIS. Appendix C of the Final EIS describes the BLM’s implementation strategy for the Proposed Action, which includes a combination of enhanced

signage, fencing, law enforcement patrols, monitoring, and public education efforts to enhance compliance with area route designations:

Patrol is a high priority task to minimize damage to cultural and sensitive plant and wildlife species. Patrols are critical to obtaining compliance with route designations. Patrols are also used to aid the Sheriff's Office in search and rescue operations and to provide first aid assistance to visitors. Scheduled patrols will be conducted by park rangers and law enforcement rangers. In addition, all BLM staff will be responsible for day to day monitoring of recreational activities. Law enforcement rangers will enforce violations of route designations and resource damage.

Therefore, the issues raised by the protestor with regard to signage and law enforcement have been considered in the Proposed Action and Final EIS and will improve compliance with BLM rules and regulations in the CCMA.

Comment 10: "I protest the continued OHV use at the CCMA as specifying roads and trails does not solve the ongoing problem of trail proliferation. Only enforcement with penalty will solve the problem and BLM cannot enforce the use of specific trails and roads. Additionally, there is no stated penalty for violations by the OHV users."

Response: See response to Comment 9. Pursuant to 43 CFR 8340.0-7, "Any person who violates or fails to comply with the regulations of subpart 8341 and 8343 is subject to arrest, conviction, and punishment pursuant to appropriate laws and regulations. Such punishment may be a fine of not more than \$1,000 or imprisonment for not longer than 12 months, or both."

Comment 11: "I protest the continued OHV use at the CCMA in that the BLM has the authority to initiate a dry season closure, due to elevated asbestos risk, and has no history of doing so. The BLM has never initiated such a closure, until under scrutiny by the court during the California Native Plant Society litigation with the BLM. This is evidence that the BLM is not serious about the asbestos risk. There is no standard established by the BLM for the amount of airborne asbestos particles that would initiate a closure. Until the BLM establishes a standard or the EPA establishes a standard the CCMA should be closed to OHV use. There is no assurance that a dry season closure will be implemented, given past experience. The BLM has not implemented dry season closure as the BLM finds it *impractical*."

Response: Dry season closures are outside the scope of this planning process. As noted on page 3-14 of the Final EIS,

Dry season use restrictions have been identified as a management tool in previous plans for the CCMA The 1995 FEIS/Plan Amendment for the CCMA refers to 'seasonal access closures' during 'months of extreme dry and dusty. . .' road conditions (p. 23). The 1999 Record of Decision (ROD) reaffirms limiting the number of vehicles within CCMA, or establishing vehicle quotas during certain seasons.

Pursuant to 43 Code of Federal Regulations (CFR) subpart 8364, BLM seasonally restricted public access to certain BLM-administered public lands at the CCMA during the period of June 4, 2005 through October 15, 2005. This seasonal closure was needed to ensure visitor safety and protect public land users from potential health risks associated with naturally occurring asbestos found within the closure area.

This seasonal closure affects public lands located within the 30,000-acre Serpentine Area of Critical Environmental Concern (ACEC) situated within the Clear Creek Management Area (CCMA) . . . The dry season closure was a temporary measure in response to advice and ongoing studies by the U.S. Environmental Protection Agency (EPA). EPA is expected to release the Final Report on the exposure evaluation during 2006.

Comment 12: “I protest the continued OHV use at the CCMA in that the BLM relies heavily on fencing to protect the *camissonia benetensis* and this fencing is continually cut and removed. There is inadequate enforcement and there is no penalty for violations.”

Response: See response to Comment 9.

Comment 13: “I protest the continued OHV use at the CCMA in that the BLM has not initiated a registration of users program. In the Biological Opinion registration of users is addressed. Yet It has not happened.”

Response: Registration of users is outside the scope of the current planning process. It was addressed in the 1995 Final EIS. The BLM started registration of visitors in 2004. These registration lists are maintained at the BLM Hollister Field Office.

Comment 14: “I protest the continued OHV use at the CCMA in that law enforcement is grossly inadequate. One enforcement officer for 50-70,000 acres with 50,000 public visitors is ludicrous.”

Response: See response to Comment 2.

Comment 15: “I protest the continued OHV use at the CCMA in that it is a monumental liability exposure of the State of California, as it supplies funds to the CCMA via the OHV COMMISSION, and it is a monumental liability exposure to the Federal Government. An OHV participant will develop an asbestos related affliction and generate litigation, it is only a matter of time.”

Response: See response to Comment 3.

Comment 16: “I protest the continued OHV use at the CCMA in that the BLM is aware of the human health risks associated with asbestos and continues to promote, maintain and facilitate asbestos exposure.”

Response: See response to Comment 3.

Comment 17: “I protest the continued OHV use at the CCMA as the BLM on the basis of a false statement at pg 3-35. The San Benito Sheriff’s office has abandon patrol of the CCMA and will only respond to search and rescue calls.”

Response: No part or parts of the Proposed Action are identified as being protested (43 CFR 1610.5-2(a)(2)(iii)).

The BLM’s current strategy “to direct visitors along the trails identified on the user map” is described on page 3031 of the Final EIS. This strategy includes law enforcement, primarily by BLM Law Enforcement Rangers, but the San Benito County Sheriff does have jurisdiction within the CCMA and may become involved in law enforcement efforts when BLM Law Enforcement Rangers are unavailable for search and rescue or when interagency coordination is required to carry out law enforcement duties in the CCMA.

Comment 18: “I protest the continued OHV use at the CCMA as a human health risk. The BLM is not exempt from the doctrine of an implied obligation to protect users, employees, and people off site from exposure to asbestos. The BLM admits to knowledge that frequency of use increases asbestos health risks.”

Response: See response to Comment 3.

Comment 19: “I protest the closure of Byles Canyon, Baker Canyon and Cane Canyon Roads. These roads give access to home owners and their invitees, numbering in excess of 300 people. This access constitutes limited public access. These people are adjacent land owners that respect, honor, and take care of the land. It is a conundrum that the BLM promotes, maintains, and facilitates an OHV facility that is an environmental travesty and wishes to preclude access to BLM lands by people who respect the land.”

Response: As discussed in the Dear Reader letter at the front of the Final EIS, proposed decisions on specific routes are implementation decisions. These decisions are not protestable, but are appealable to the Interior Board of Land Appeals (IBLA) upon adoption of the ROD.

The routes identified in the protest letter are designated for administrative use in the Proposed Action. Chapter 2 of the Final EIS provides the following definitions:

Closed Route. Access on route by motorized vehicles is prohibited except for: (1) fire, military, emergency or law enforcement vehicles when used for emergency purposes; (2) combat or combat support vehicles when used for national defense purposes; (3) vehicles whose use is expressly authorized by an agency head under a permit, lease, or contract; and (4) vehicles used for official purposes by employees, agents, or designated representatives of the federal government or one of its contractors. Use must be consistent with the multiple use guidelines for that area.

Authorized Use. Authorized use is the use of routes approved through a permitting process for specific activities (e.g., rights-of-way issued for development of communication sites, or circumstances of environmental sensitivity or organized events require a recreation permit).

Routes designated as closed do not affect existing rights-of-way issued to landowners. Local landowners who access their property on a route proposed to be closed, and who do not have an existing right-of-way, can gain authorized use of those routes through a permit, if they do not already have one (i.e., Byles Canyon, Baker Canyon, and Cane Canyon Roads). Upon approval, authorized use for local landowners would also apply to their guests and visitors traveling to and from their property on routes across BLM public lands.

After careful review of your protest letter, I conclude that the BLM California State Director and the Hollister Field Manager followed the applicable planning procedures, laws, regulations, and policies and considered all relevant resource information and public input in developing the CCMA Proposed Resource Management Plan Amendment and Final EIS. There is no basis for changing the Proposed Resource Management Plan Amendment and Final EIS as a result of your protest.

This completes my review and is the final agency action for the Department of the Interior on the issues and concern you raised in your letter. The IBLA does not review appeals from a decision by the Director of the BLM on protests concerning resource management plans. Any person adversely affected by a decision of a BLM official to implement some portion of the CCMA Resource Management Plan Amendment may appeal such action to the IBLA at the time the action is implemented.

Thank you for your participation in the Clear Creek Management Area planning effort. I encourage you to stay involved in BLM resource management activities and to provide information and input during implementation of the Amendment. If you have any questions, please feel free to contact Mr. George Hill, Hollister Field Manager, at (831) 630-5036.

Sincerely,

Edward Shepard
Assistant Director
Renewable Resources and Planning