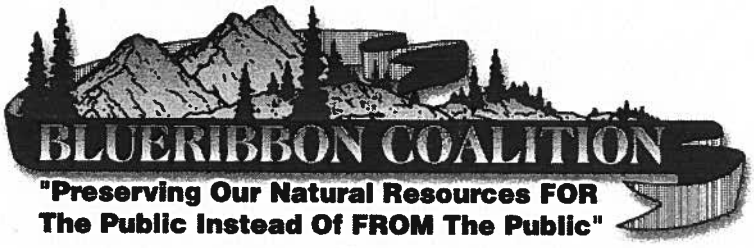

March 4, 2010

Sent via Email, FAX, and U.S. Mail

CCMA Draft RMP/EIS
Hollister Field Office, BLM
20 Hamilton Court
Hollister, CA 95023
Email: cahormp@ca.blm.gov

Re: Draft Resource Management Plan for the Clear Creek Management Area, California, and Associated Environmental Impact Statement

Dear Hollister Field Office:

These comments are submitted on behalf of the BlueRibbon Coalition (BRC), a national non-profit trail-based recreation group, and are directed to the Hollister Field Office's Draft Resource Management Plan for the Clear Creek Management Area, California, and associated Environmental Impact Statement (DEIS). This document shall not supplant the rights of other BRC agents and organizational or individual members from submitting their own comments and the agency should consider and appropriately respond to all comments received.

Submission of these comments does not imply that BRC agrees with or waives any possible means by which to challenge the May 1, 2008 Closure Order effectively banning OHV and other human access on approximately 75,000 acres of the Clear Creek Management Area (CCMA) or the recent seasonal June 1 through October 1 interim "dry-weather" closure. Neither does BRC cede its right to pursue remedies outside of the administrative process regarding the interim closure or final report issued by the Environmental Protection Agency (EPA). In fact, we are deeply disappointed with this action, which flies in the face of prior analysis, prior decisions by leadership, and broader BLM policy.

OVERVIEW OF NEPA

NEPA imposes a mandatory procedural duty on federal agencies to consider a reasonable range of alternatives to proposed actions or preferred alternatives analyzed during a NEPA process. 40 C.F.R. § 1502.14; 40 C.F.R. § 1508.9. "[A]gencies shall rigorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14. The alternatives section is considered the "heart" of the NEPA document. 40 C.F.R. § 1502-14 (discussing requirement in [D]EIS context).

A NEPA analysis must "explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14 (EIS). A NEPA analysis is invalidated by "[t]he existence of a viable but unexamined alternative." Resources, Ltd. v. Robertson, 35 F.3d 1300, 1307 (9th Cir. 1993).

The reasonableness of the agency's choices in defining its range of alternatives is determined by the "underlying purpose and need" for the agency's action. City of Carmel-by-the-Sea v. U.S. Dept. of Transportation, 123 F.3d 1142, 1155 (9th Cir. 1997); Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810, 815-816 (9th Cir. 1987), rev'd on other grounds, 490 U.S. 332 (1989). The entire range of alternatives presented to the public must "encompass those to be considered by the ultimate agency decisionmaker." 40 C.F.R. § 1502.2(e).

The agency is entitled to "identify some parameters and criteria—related to Plan standards—for generating alternatives...." Idaho Conservation League v. Mumma, 956 F.2d 1508, 1522 (9th Cir. 1992) (italics in original). However, in defining the project limits the agency must evaluate "alternative means to accomplish the general goal of an action" and cannot "rig" "the purpose and need section" of a NEPA process to limit the range of alternatives. Simmons v. U.S. Army Corps of Engineers, 120 F.3d 664, 669 (7th Cir. 1997) (emphasis added).

An agency must perform a reasonably thorough analysis of the alternatives before it. "The 'rule of reason' guides both the choice of alternatives as well as the extent to which an agency must discuss each alternative." Surfrider Foundation v. Dalton, 989 F. Supp. 1309, 1326 (S.D. Cal. 1998) (citing City of Carmel-by-the-Sea v. United States Dep't of Transportation, 123 F.3d 1142, 1154-55 (9th Cir. 1997)). The "rule of reason" is essentially a reasonableness test which is comparable to the arbitrary and capricious standard. Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998) (quoting Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 n. 23 (1989)). "The discussion of alternatives 'must go beyond mere assertions' if it is to fulfill its vital role of 'exposing the reasoning and data of the agency proposing the action to scrutiny by the public and by other branches of the government.'" State of Alaska v. Andrus, 580 F.2d 465, 475 (D.C. Cir. 1978), vacated in part on other grounds, Western Oil & Gas Ass'n, 439 U.S. 922 (1978) (quoting NRDC v. Callaway, 524 F.2d 79, 93-94 (2nd Cir. 1975)).

The Hollister Field Office (HFO) appears to have created a fatally-flawed DEIS by unreasonably restricting the "range" of alternatives. This assertion is based on BRC's following concerns/issues related to the scientific integrity or lack thereof of the EPA's 2008 Risk Assessment and the BLM's failure to comply with the aforementioned NEPA tenets associated with a "robust analysis. Even if the EPA analysis is ultimately deemed to establish valid parameters, we urge BLM to at least consider in detail options beyond the narrow constraints imposed by EPA's most recently-stated conclusions. There is much at stake and it is illogical for BLM to assume that EPA's current analysis is the last or only word on this issue.

SCIENCE FLAWS

SCIENCE ISSUE ONE – Failure to Include BRC Scientific Submissions into the DEIS

BRC staff and consultants submitted numerous scientific citations (e.g. papers, articles, etc). in a timely manner during the scoping process. These documents brought into question the methodology, findings, and conclusions of the 2008 EPA Risk Assessment. Yet, no discussion of said documents can be found in the DEIS.

SCIENCE ISSUE TWO – BLM's Attempt to Ignore or Discredit Public Comment

According to documents discovered through FOIA, BRC finds the BLM acted in a deliberate and non-transparent manner in an attempt to discredit and discount BRC science materials. See July 8, 2009 Turcke letter (exhibit A) with FOIA attachments.

SCIENCE ISSUE THREE – BLM Does Reference Questions in the DEIS by its own Toxicologists Regarding the EPA's Risk Assessment

BLM's Toxicology expert, Dr. Karl Ford, on more than one occasion called into question the science and/or methodology of the RA. (See exhibit A). This information should be acknowledged by BLM. In fact, the questions raised by Dr. Ford imply that possible mitigation measures could be included in (or form the basis of) alternatives omitted from the DEIS. Instead, BLM appears to advance an "err on the side of closure" premise and withholds information inconsistent with or contradictory to that premise.

SCIENCE ISSUE FOUR –RA Study Design Flaw Regarding Distance Between Riders

The RA's narrative directs riders to "ride in the dust cloud" of the lead rider, yet the BLM has directed riders for 20 years via educational outreach NOT to ride in a lead rider's dust. This study design flaw does NOT meet the RA's mandate to "realistically simulate" the riding experience.

SCIENCE ISSUE FIVE – Over use of Clear Creek Road in RA Sampling
Overuse of roads by the RA test riders is a design flaw because it does not realistically simulate the trail-based nature of the historic CCMA OHV experience. Most OHVers prefer to ride on trails and, in fact, try to avoid road use because roads do not provide a satisfying experience, and present possible safety concerns (e.g. collisions with full-sized jeeps or pickups). It appears that road-based recreation comprised approximately 30% of the RA sample routes. The true CCMA trail-based OHV experience would be only 5-10% of road use in a day's ride.

SCIENCE ISSUE SIX – The RA Sample Routes Do Not Simulate a Typical CCMA OHV Experience

The RA sample route was improperly restricted to basically the lower elevations of the Clear Creek canyon area. The study route network does not realistically simulate the CCMA trail-based experience since OHVers usually seek the higher elevation trails and only use the lower elevation trails in transport from staging areas to the more scenic views and challenging trails at higher elevations.

SCIENCE ISSUE SEVEN – Under-Supervised Test Riders

At San Jose's DEIS public meeting, BRC and Ed Tobin discussed the issue of EPA supervision of the test riders staying on the test course. EPA's, Arnold Den, told both of us that riders were at times riding unsupervised "off the test course"

SCIENCE ISSUE EIGHT – Skewed New Health Risk Scenarios in DEIS

Based on public scoping comments, EPA recalculated the new health risks in the DEIS. These "new calculations" are inherently flawed because they are based on the original calculations in the equally flawed RA.

SCIENCE ISSUE NINE – Staging at and Riding Through Commercial Mill Sites

At the San Jose May 2008 public scoping meeting it was brought to the EPA's attention that the test course included several historic mill sites where commercial asbestos (amphibole) was used. EPA responded they DID NOT know they were having riders stage at or ride through those historic mill sites or ride on roads where said commercial was being transported or was there because of automobile brake dust .

SCIENCE ISSUE TEN – Non-Representative Sampling Times

The pre-interim closure riding season is basically during the wet or moist time of the year with the heaviest use being during the winter months. Yet, less than 50% of the test samples were collected when CCMA is open for public use. This is a fatal design flaw because it does not "realistically simulate" the OHV riding experience at CCMA.

SCIENCE ISSUE ELEVEN - Modification of Test Protocol

The ISO 10312 ostensibly supplies the methodological foundation for the RA. However, EPA modified several specifications, including fiber size/structure protocol and more than doubled the criterion for filter overloading. See, RA at 4-5. Nowhere does EPA or BLM discuss the need for these changes or consider whether the changes might confound results.

AGENCY LIABILITY – New Agency Health Risk Paradigm

In BRC's June 19, 2008 public scoping letter the following suggestions were articulated... "*BRC believes BLM should consult with sister land management agencies (e.g. Forest Service, CA State Parks, etc.) regarding mitigation or alternative management strategies such as adding soil or road treatments, public outreach and education, or how they handle similar low risk public health issues or if they even consider the findings in the EPA report as mandating a closure.*"

TORT ISSUE ONE – No Consultation with BLM or Sister Agencies

BRC could not find a reference to any consultation in the DEIS regarding how the BLM addresses similar health risk/public access issues in other areas or how sister agencies address such issues.

TORT ISSUE TWO - HFO Creates New Legal Paradigm

A review the Federal Tort Claims Act, 28 USC §2671-2680, shows that Congress has already addressed this issue regarding agency liability and public access. This act has created the "acted negligently" legal high-bar that all plaintiffs must meet in any court action. This law indemnifies federal agents from civil or criminal action in cases where recreationists have fallen off a cliff while rock-climbing at a National Park, drowning in a federally-managed lake or waterway, or running into livestock or wildlife while the public is driving on a highway through lands managed by BLM or another federal agency, or allowing pregnant women or young children to fish for mercury-laden fish in a federal waterway.

Historically federal and state agencies address the aforementioned and similar health hazards in a number of ways. One such tool is the use of signs warning of said dangers. At the recent DEIS public meeting in San Jose, BRC asked the HFO's Area Manager, Rick Cooper, if he consulted with his own agency or sister agencies regarding the use of signs to meet the "acted negligent" high-bar? Mr. Cooper's answer was "no." His answer is substantiated in the DEIS by the obvious exclusion of this topic.

The BLM risks creating a new and arbitrary "health risk paradigm" at CCMA that is unwarranted and in fact actually creates a liability for the agency at CCMA and other recreation sites (naturally occurring asbestos is in 43 counties in California) where none has historically existed. Again, Congress has indemnified the agency as long as the land manager informs the public (usually through signing prescriptions and educational outreach) of the health or safety risks.

TORT ISSUE THREE – HFO Becomes Health Agency and Assumes Agency Liability

The aforementioned liability discussion logically leads one to call into question the health related tenets of the Purpose and Need (DEIS pages 3/4). The BLM has illogically taken upon itself the role of a health agency and protector of public health rather than a land management agency with a multiple-use mandate. This working postulate of the DEIS is flawed and unnecessarily puts the DEIS and the agency in legal jeopardy if not amended.

This nanny-state paradigm is described on page 352 of the DEIS where the HFO takes responsibility for something the agency traditionally and historically has wisely steered away from. This new approach risks creating new agency liability where none has existed.

TORT ISSUE FOUR – Failure to Analyze Cumulative Environmental Impact on Other Recreation Sites and Associated Health Risks

If the agency is now a health agency, BRC could not find an analysis or substantive discussion in the DEIS of any direct health risk to the OHV public by forcing displaced users (if any of the anti-OHV alternatives are adopted including the preferred alternative) by forcing them to travel longer distances to, and recreate at, at other destination OHV areas including, but not limited to, Jawbone, Hollister Hills and Carnegie SVRAs, Metcalf Cycle Park. The cumulative effects mandate of any NEPA planning document requires at least some analysis of such an issue. A cursory review by BRC - based on public comments at the February 25, 2010 OHMVR Commission meeting – shows the BLM's closure of CCMA (or potential closure in the ROD) – is already having a negative impact at other OHV recreation sites not to mention the potential for traffic injuries or fatalities caused by the increased driving distances now being driven by traditional CCMA users. Yet, no such analysis is found in the DEIS.

RECOMMENDATION

Based on fatal flaws of the RA and the DEIS (as already pointed out in BRC/Turcke/Ilgren public scoping comments and follow up communications) which uses it as a foundation upon which the planning process is constructed, and the aforementioned science and tort issues, BRC recommends the following in the order of our preference;

HISTORIC OHV USE - Adopt a True No Action Alternative (NO RISK)– The agency would use this programmatic document to replace the 2005 EA/FONSI EA-CA-190-05-21 that resulted in the now infamous summer or dry-season closure. This would allow historic OHV use on up to 270 miles of routes and 478 acres of barrens/open play areas with no seasonal closures. Permitted OHV events would occur.

DEIS NO ACTION ALTERNATIVE (LOW RISK – No agency liability) – This would assume the EPA or 3rd party does a review of the RA or preferably undertakes a more valid or realistic study to assess a real health risk to the public. If some risk is identified, the BLM would use the liability protections afforded the agency by the Federal Tort Claims Act and allow for OHV use on up to 270 miles of routes and 478 acres of barrens/open play area. Permitted OHV events would occur.

DEIS MODIFIED NO ACTION (LOW RISK – Some Agency Liability) – The agency would use some of the use restrictions in Alt. B (wet weather closures, road/campsite mitigations, signing, educational outreach, signed liability release forms) and allow for OHV use on up to 270 miles of routes and 478 acres of barrens/open play areas. Permitted OHV events would occur.

DEIS MODIFIED ALTERNATIVE B (LOW/MODERATE RISK - Some Agency Liability) - The agency would use the use restrictions in the BRC DEIS MODIFIED NO ACTION ALTERNATIVE, but prohibit riders under the age of 16 and shorten the riding season to the time period between December 1 and April 15, annually. Permitted events would occur with age restrictions.

CONCLUSION

BRC believes the HFO has created a fatally-flawed DEIS and has unnecessarily created new liability issues for the BLM at CCMA and potentially statewide at other federal and state recreation facilities. A new RA should be undertaken by the EPA or independent qualified party/entity.

BRC urges the agency to at least consider extending the 90-day public comment period because of the undue hardship being placed on the public by concurrent travel planning processes ongoing on the 19 National Forests in California.

Preferably, BRC urges the agency to consider issuing a supplemental DEIS that uses a more valid and realistic study based on real OHV use patterns at CCMA or on new standards and guidelines being developed at the EPA regarding public health risks associated with naturally occurring asbestos. A supplemental DEIS should address the issue of the new "legal paradigm" that is being unwisely created by the HFO.