

Grand Jury Report

Response Form

Grand Jury Report Title: Rubberized Asphalt Concrete in Mendocino County

Report Dated: April 2, 2012

Response Form Submitted By:

Christopher D. Brown, Air Pollution Control Officer
Mendocino County Air Quality Management District
306 E. Gobbi St.
Ukiah, CA 95482

I have reviewed the report and submit my responses to the FINDINGS portion of the report as follows:

The Mendocino County Air Quality Management District agrees with the Findings numbered:

1, 2, 3, 4, & 6

The Mendocino County Air Quality Management District disagrees wholly or partially with the Findings numbered below, and have attached, as required, a statement specifying any portion on the Findings that are disputed with an explanation of the reasons therefore.

5, 7, 8, 9, 10, 11, 12, & 13

I have reviewed the report and submit my responses to the RECOMMENDATIONS portion of the report as follows:

The following Recommendations have been implemented and attached as required is a summary describing the implemented actions:

4 & 7,

The following Recommendations have not yet been implemented but will be implemented in the future, attached as required is a time frame for implementation:

The following Recommendations require further analysis and, attached as required is an explanation and the scope and parameters of the planned analysis and a time frame for the matter to be prepared, discussed and approved by the officer and/or director of the agency or department being investigated or reviewed:

The following Recommendations will NOT be implemented because they are not warranted and/or are not deemed reasonable, attached as required is an explanation therefore:

1, 2, 3, 5, & 6

I have completed the above responses, and have attached, as required the following number of pages to this response form:

Number of Pages attached: 7

I understand that responses to Grand jury Reports are public records. They will be posted on the Grand jury website: www.co.mendocino.ca.us/grandjury . The clerk of the responding agency is required to maintain a copy of the response.

I understand that I must submit this signed response form and any attachments as follows:

First Step: E-mail (word documents or scanned pdf file format) to:


- The Grand Jury Foreperson at: grandjury@co.mendocino.ca.us
- The Presiding Judge: grandjury@mendocino.courts.ca.gov

Second Step: Mail all originals to:

Mendocino County Grand Jury
P. O. Box 939
Ukiah, CA 95482

Printed Name: Christopher D. Brown, AICP

Title: Air Pollution Control Officer

Signed:  _____

Date: 5/30/12

CHRISTOPHER D. BROWN, AICP
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**MENDOCINO COUNTY
AIR QUALITY MANAGEMENT DISTRICT**

**Air Quality Management District Response to
Grand Jury Report Titled:
“Rubberized Asphalt Concrete in Mendocino County”**

The Mendocino County Air Quality Management District acknowledges the hard work and dedication of the members of the Grand Jury. The District has reviewed the Grand Jury Report Titled: “Rubberized Asphalt Concrete in Mendocino County”. As required by Penal Code, Section 933.05, the District is submitting the following responses to the Findings and Recommendations contained in that Report.

Findings

Finding #1 - The County Board of Supervisors is the District Board of Directors.

AQMD Response: The District agrees with this finding. The Air Quality Management District actually has two Boards, the District Board of Directors and the Hearing Board. As established by California Health and Safety Code, Section 40100, the Board of Supervisors sits as the Air Quality Management District Board of Directors. The makeup of the Board could include members from the four incorporated cities if the Board so desired.

The Air Quality Management District Board establishes general policy direction for the District, approves the budget, adopts or amends regulations and appoints the Air Pollution Control Officer. The District is a legally separate and distinct entity from the County, created through legislation and charged with the primary responsibility for the control of air pollution from non-vehicular sources. (California Health and Safety Code, Section 39000, et seq.). The California Air Resources Board has primary oversight over all District programs in conjunction with US EPA, Region IX. The District is charged with enforcing District Regulations as well as State and Federal Law through delegation agreements.

As provided for by California Health and Safety Code, Section 40800, et seq, the Air Quality Management District Hearing Board is made up of volunteers from the community appointed by the District Board (five members plus five alternates). The Hearing Board issues abatement orders, rules on variance requests and hears appeals of individual permits issued by the District. As a Judicial body, their decisions are legal and binding and can only be overturned by a court of law.

The Hearing Board cannot adopt or modify regulations and the District Board cannot repeal or modify individual permits.

For further information on Hearing Boards and their function please review “Fairness in the Air by Kenneth Manaster of *Santa Clara University School of Law* available online at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1044&context=facpubs>

Finding #2 - RAC projects divert waste tires from the landfill.

AQMD Response: The District is unable to confirm or deny this finding. The origin of the products used in the production of Rubberized Asphalt Concrete is not under the purview of the District.

Finding #3 - RAC street and highway surfaces provide a quiet ride for the traveling public.

AQMD Response: The District is unable to confirm or deny this finding. The quality of street and highway surfaces using Rubberized Asphalt Concrete or non- Rubberized Asphalt Concrete is not under the purview of the District.

Finding #4 - The design thickness of RAC is less than AC.

AQMD Response: The District is unable to confirm or deny this finding. The design thickness of street and highway surfaces using Rubberized Asphalt Concrete or non- Rubberized Asphalt Concrete is not under the purview of the District.

Finding #5 - RAC is not a new, untested product.

AQMD Response: The District partially disagrees with this finding. Although there have been studies and testing done on Rubberized Asphalt Concrete, the District is unaware of any studies conducted at a facility where homes are located less than 200 feet from the Asphalt Batch Plant. The North State Street Asphalt Batch Plant is surrounded on three sides by residential neighborhoods and is less than 200 feet from low income housing. Because of the geography in the area, the North State Street Asphalt Batch Plant sits at a lower elevation than the surrounding residential housing. In addition, the North State Street Asphalt Batch Plant is of an older design, although significant upgrades occurred in 2010 some of its components date back to the 1970s. The production of Rubberized Asphalt Concrete for the 2011 project was a new process at the facility.

In 2003, the District issued a permit for a temporary Asphalt Batch Plant on property adjacent to Hwy 101 and directly across from the North State Street facility. Although the temporary Asphalt Batch Plant did not involve the production of Rubberized Asphalt Concrete, the residents adjacent to the project had concerns regarding its placement and the potential odors. In response to public comments the District included a requirement that an “odor control plan” be developed by the facility operator within 10 days of notification from the District that a violation of California Health and Safety Code, Section 41700 or District regulations had occurred.

Based on all of the above information the District determined that careful evaluation of the new Rubberized Asphalt Concrete process and its associated equipment was necessary for the protection of public health and to alleviate concerns from the public.

Finding #6 - There are State Tire Recycling Grant Funds available to Public Works agencies that use RAC on their projects.

AQMD Response: The District is unable to confirm or deny this finding. The State Tire Recycling Grant Funds are not available to the District therefore the District is not aware of the requirements for public works agencies receiving those grant funds for their projects.

Finding #7 - Extensive studies and testing of RAC by numerous government agencies and industry associations indicate that there are no significant differences between AC and RAC air emissions.

AQMD Response: The District disagrees with this finding. Although there have been studies and testing done on Rubberized Asphalt Concrete, indicating that emissions from Rubberized Asphalt Concrete are similar to traditional Hot-Mix Asphalt, the potential increase in emissions of air toxics and other regulated compounds, in addition to State law and District regulations, require the District to evaluate emissions based on the specific facility as well as the new process and/or specific equipment used. The CalTrans Highway 20 Study conducted in 2005 in Lake County in which the District took part, included emissions testing at the Asphalt Batch Plant and involved four different types of asphalt product. The CalTrans Report published in November 2005 indicated that the draft source test results were similar for all four products. The Report did not include any final conclusive data.

Finding #8 - Extensive studies and testing of RAC by numerous government agencies and industry associations indicate that there is not an issue with RAC regarding odor.

AQMD Response: The District disagrees with this finding. Although there have been studies and testing done on Rubberized Asphalt Concrete, the District is unaware of any studies conducted at a facility where homes are located less than 200 feet from the Asphalt Batch Plant. The CalTrans Highway 20 Study conducted in 2005 involved an Asphalt Batch Plant located more than 3/4 of a mile from homes. During the Highway 20 Study (in which District staff took part) objectionable sulfur odors were detected during the production of the Rubberized Asphalt Concrete as well as during the transport and lay-down activities.

A sulfur odor was detected by District staff during the production of Rubberized Asphalt at the North State Street plant and during the transport and lay-down activities in 2011. However, the odors during the transport and lay-down activities were transitory in nature and dispersed fairly quickly.

Proper oversight by facility operators is required to ensure that the materials are not heated excessively and that the oil additive is mixed properly to avoid excessive odors. The District is required to ensure that the operator complies with the permit conditions and excessive odors are not produced.

Finding #9 - Methods to mitigate any possible RAC odor at the manufacturing plant are to use “warm-mix” RAC, maintaining low temperatures, or inclusion of an “asphalt additive” to the RAC mix.

AQMD Response: The District disagrees with this finding. The use of ‘warm-mix’ rubberized asphalt is not approved for all road projects. For example, CalTrans used warm mix for the Highway 1 project in 2011, but chose not to use warm mix for similar work at the same time on Highway 128. The District cannot mandate the use of “Warm Mix” or “Hot Mix” on a project.

The production of all forms of asphalt require proper temperature control, however production temperature and odors must be balanced with other factors. Lowering the production temperature may not comply with the bid specifications required due to the typically long haul times that occur in Mendocino County.

In discussions with District staff the operators of the North State Street Asphalt Batch Plant have stated that, in their experience, use of the asphalt additive for odor control was not effective when used at other plants and its use may increase costs with little benefit.

In addition to the factors listed above, successful odor management also requires proper control equipment for the production process, proper plant design, regular maintenance cycles, and well trained, attentive, operators. The majority of the factors for successful odor management are met at a modern well managed plant, such as the North State Street Facility.

Finding #10 - The District uses California Health and Safety Code, which defines odor as a public nuisance.

AQMD Response: The District disagrees with this finding. The District is a regulatory enforcement agency. The District enforces the California Health and Safety Code as well the Federal Clean Air Act and District regulations. Public Nuisance is defined in California Health and Safety Code, Section 41700. Specifically Section 41700 states:

“...A person shall not discharge from any source whatsoever quantities of air contaminants or other material that cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public, or that endanger the comfort, repose, health, or safety of any of those persons or the public, or that cause, or have a natural tendency to cause, injury or damage to business or property...”

The above definition is not exclusive to odors. It is also reasonable to assume that the discharge of air contaminants from Rubberized Asphalt Concrete may “endanger the comfort, repose” or “health” of the neighbors surrounding the production facility – separate from odors.

It is important to note that odor is not the only pollutant regulated by the District in relation to the production of Rubberized Asphalt Concrete. The District enforces Federal, State and District Regulations which require controls of Particulate emissions, NOx, CO, Sulfur, Lead, Mercury, Air Toxics, Ozone Depleting Chemicals and most recently Carbon Dioxide Equivalents (CO₂e).

Finding #11 - The District has determined that odor is considered a “public nuisance violation” when there are three or more complaints to the District in a 24 hour period.

AQMD Response: The District disagrees with this finding. The District has not made the determination as stated above. Three or more complaints in a 24-hour period do not automatically constitute a “public nuisance violation”. Three or more complaints from unrelated individuals who are not operating in concert, is a general guideline for enforcement staff. Odors must be confirmed by District staff and the source of the odors must be clearly identified. Each case is reviewed individually taking into consideration all available evidence.

Finding #12 - There have never been three RAC odor complaints to the District in any 24-hour period.

AQMD Response: The District disagrees with this finding. The District has not received more than three complaints in a 24-hour period from unrelated individuals concerning the production of Rubberized Asphalt Concrete. The Rubberized Asphalt Concrete produced at the North State Street facility in 2011 did result in complaints from local residents however there were not three complaints within any 24-hour period. District staff also detected excessive odors on North State Street from haul trucks leaving the facility.

The District tracks complaints by address. Complaints regarding the use of Rubberized Asphalt Concrete at a job site would not be associated with the address for the production facility therefore the District cannot state definitively that “at no time were three or more complaints received in a 24-hour period regarding Rubberized Asphalt”.

From 2001 through 2011 the District received over 25 odor complaints regarding the North State Street Facility, including complaints specific to Rubberized Asphalt Concrete production in 2011.

The District is aware of at least one instance where the previous owner of the North State Street facility purchased a neighboring property from the resident in order to resolve a long standing dispute regarding impacts from the facility.

Finding #13 - The District requires construction contractors to prepare an “odor control plan” and to conduct “neighborhood odor patrols” as conditions on their RAC permits.

AQMD Response: The District disagrees with this finding. Contrary to the Grand Jury Report, the District does not permit, track or regulate the transport and lay-down activities associated with the use of Rubberized Asphalt Concrete at a job site. Therefore, the District has never required odor control plans or neighborhood odor patrols from construction contractors, although District inspectors have observed lay-down activities, checked temperatures and recorded odors as part of their normal duties. The requirement for an “odor control plan” in the case of Rubberized Asphalt Concrete production is a permit condition contained in the permit issued to the production facility only.

Finding #14 - The District is the only Air Quality Management District in Northern California to require contractors to provide RAC odor mitigation plans and conduct RAC odor patrols.

AQMD Response: The District disagrees with this finding. As stated in the District’s response to Finding #13, the District does not permit, track or regulate the transport and lay-down activities associated with the use of Rubberized Asphalt Concrete. Therefore, the District has never required odor control plans or neighborhood odor patrols from contractors. The requirement for an “odor control plan” in the case of Rubberized Asphalt Concrete production is a permit condition contained in the permit issued to the production facility only.

Finding #15 - Mendocino County taxpayers continue to pay the additional costs associated with manufacture and hauling of RAC from outside Mendocino County.

AQMD Response: The District disagrees with this finding. The District did not receive an application for the production of Rubberized Asphalt Concrete until 2011. A permit was issued for the project at the time and has since expired.

The District cannot issue a permit for the production of Rubberized Asphalt Concrete unless an application has been submitted. At the time of the Grand Jury Report, the District had not received an application from any facility for a permit to produce Rubberized Asphalt Concrete in Mendocino County. Since there have been no applications for the production of Rubberized Asphalt Concrete in Mendocino County and the District does not permit, track or regulate the transport and lay-down activities associated with the use of Rubberized Asphalt Concrete, any additional costs associated with the manufacture and hauling of Rubberized Asphalt Concrete are unrelated to the District.

Recommendations

Recommendation #1 - Mendocino County Public Works agencies (Cities of Willits, Fort Bragg, and Ukiah and the DOT) use RAC for their projects for pavement top lift and overlays. (Findings 2-6)

The District will not be implementing this recommendation. The District does not participate in the decisions of public works agencies regarding project bid specifications.

Recommendation #2 - Mendocino County Public Works agencies take advantage of the State Tire Recycling Grant funds. (Findings 2-6)

The District will not be implementing this recommendation. The District does not participate in the decisions of public works agencies regarding grant funds available for their projects.

Recommendation #3 - To increase transparency, Mendocino County Public Works agencies clearly state in their bid documents for RAC projects those District permit requirements that could increase the bid prices. (Findings 13-15)

The District will not be implementing this recommendation. As stated in the District's response to Findings 3, 4, 13, 14, and 15 above, the District does not issue permits for transport and lay-down activities therefore, the District does not impose permit requirements that could increase the bid prices for projects using Rubberized Asphalt Concrete. Until the District receives an application for the production of Rubberized Asphalt Concrete in Mendocino County any additional costs associated with the manufacture and hauling of Rubberized Asphalt Concrete in Mendocino County are unrelated to the District.

Recommendation #4 - The District work cooperatively with the owner-operators of all asphalt plants to help each other achieve their desired goals. (Findings 2-9)

The District has implemented this recommendation. There are currently two permitted asphalt batch plants in the District, although one of these facilities is quite small and has very limited production. The District continues to maintain an excellent relationship with representatives of each of the facilities.

Recommendation #5 - The District conduct self-funded odor monitoring. (Findings 5, 7-14)

The District will not be implementing this recommendation. The District does not receive any tax dollars. The District is primarily funded through permit fees, motor vehicle fees. Motor Vehicle fees are restricted in their use and cannot be used to fund activities associated with permitted stationary source facilities. Any costs associated with odor monitoring, complaint response, and compliance inspections can only be funded through permit fees. There is no source of 'self-funding'.

Recommendation #6 - The District reconsiders the need and value to the taxpayers for RAC odor plans and neighborhood patrols. (Findings 5, 7-15)

The District will not be implementing this recommendation. The District is a regulatory enforcement agency. The District is directly responsible for the regulation of air pollution from business and industry in Mendocino County and for the protection of the public from the negative impacts of air pollution.

The District is required to comply with state and federal law and District regulations when evaluating any project or proposed project that emits or may emit air contaminants, including the production of Rubberized Asphalt Concrete. Issuing permits allows the District to work with businesses to ensure that their operations comply with applicable state and federal law and District regulations and allows the District to identify possible problems before they impact the public and/or the operation of a business. Any permit conditions imposed by the District on projects or proposed projects that emit or may emit any source of air contaminants are required to ensure the protection of the public from the negative impacts of air pollution. As required by state and federal law and District regulations, the District must also consider sensitive receptors including hospitals, schools, residential care facilities, retirement communities, and residential neighborhoods in addition to environmental justice requirements regarding low income and minority groups.

Recommendation #7 - The District be aware of what other Air (Quality) [sic] Management Districts in the State are doing. (Findings 5, 7, 12, 15)

The District has implemented this recommendation. The District Air Pollution Control Officers have been Members of the California Air Pollution Control Officers Association (CAPCOA) since its inception in 1975 and the current APCO has been elected to the CAPCOA Board of Directors. The Air Pollution Control Officer attends the CAPCOA Rural Managers section meetings, and receives regular updates from ARB, EPA and the National Association of Clean Air Agencies (NACAA) on various permitting and enforcement issues.

District staff also participate in multi-district enforcement, engineering, planning, grants, fuels and vapor recovery meetings and attend state and federal trainings related to the control of air pollution from stationary and portable sources.

As members of these associations and groups, the District has a network of resources available for information regarding air quality decisions and requirements in districts throughout California and other states.