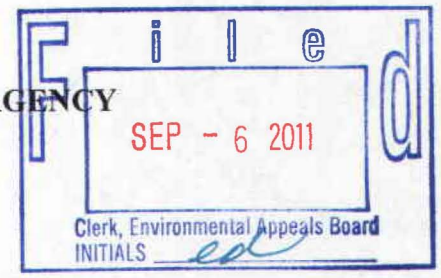
ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:	)
	)
Buena Vista Rancheria	)
Wastewater Treatment Plant	) NPDES Appeal Nos. 10-05, 10-06, 10-07 & 10-13
	)
NPDES Permit No. CA 0049675	)
	)

ORDER DENYING REVIEW

I. Statement of the Case

Mr. Glen Villa, Jr., the County of Amador ("County"), Friends of Amador County, and the Ione Band of Miwok Indians ("Ione Band") (collectively "Petitioners") each petitioned[1] the Environmental Appeals Board ("Board") to review the final National Pollutant Discharge Elimination System ("NPDES") permit ("Permit") that Region 9 ("Region") of the U.S. Environmental Protection Agency ("EPA") issued on June 25, 2010, under the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1342, to the Buena Vista Rancheria of Me-Wuk Indians ("Tribe" or "Rancheria") to operate the Buena Vista Casino Wastewater Treatment Plant ("Facility"). *See* Permit, Administrative Record ("A.R.") 3-24.[2]

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[1] Mr. Villa's petition was designated as NPDES Appeal No. 10-05, the County's petition was designated as NPDES Appeal No. 10-06, Friends of Amador County's petition was designated as NPDES Appeal No. 10-07, and the Ione Band's petition was designated as NPDES Appeal No. 10-13.

[2] The administrative record is loosely organized by subject matter. For clarity, this order references documents in the record by their title and by their page number in the administrative record. The Region prepared a certified index to the administrative record that is accessible through the Board's public docket for these appeals at www.epa.gov/eab (click on EAB Dockets). *See* Dkt. #12.01.

The Permit authorizes the Facility, located on the Rancheria's sixty-seven acres in Amador County, to discharge tertiary treated wastewater generated from the operation of the Buena Vista Casino into a constructed, vegetated swale located south of the parking garage and casino. NPDES Permit No. CA 0049675 Fact Sheet at 3 (June 2010) ("Fact Sheet") (A.R. 27); *see also* EPA Region IX's Response to Petitions for Review at 5 (Sept. 27, 2010) ("Region's Response"). The discharge will flow onsite for approximately one-half mile to the northwest corner of the Rancheria at Coal Mine Road and then pass through a reverse siphon into a drain under Coal Mine Road to the receiving water, an unnamed tributary/drainage channel of Jackson Creek, which then flows into Dry Creek and to the lower Mokelumne River. Permit at 1 (A.R. 3); Fact Sheet at 1, 3 (A.R. 25, 27); Region's Response at 5-6 & n.9. For the reasons discussed below, the Board denies review of the Permit.

II. Issues on Appeal

A. Did the Region have jurisdiction to issue the NPDES Permit?

B. Did the Region err in issuing the NPDES Permit in the following respects:

1. Did the Region err when it calculated wastewater flow rates for the Facility based on the reduced design capacity of the proposed gaming casino?

2. Did the Region properly set the Facility's effluent limitations?

3. Did the Region err by failing to identify the location of the outfall, define the receiving waters for purposes of monitoring requirements, specify where erosion protection measures will be located, or require a monitoring well to assess the effects on potable water from contact with reclaimed water?

4. Did the Region err when it did not include in the Permit a condition to

address potential flooding of the roads leading to the casino, including Coal Mine Road?

5. Did the Region err when it did not include in the Permit a condition to address downstream and offsite impacts of the Facility's discharge?

C. Did the Region satisfy its obligation under section 106 of the National Historic Preservation Act?

III. Standard of Review

When determining whether to grant review of petitions filed pursuant to 40 C.F.R. § 124.19(a), the Board will first consider whether each petitioner has fulfilled certain threshold procedural requirements including timeliness, standing, and issue preservation. 40 C.F.R. 124.19(a); *accord In re Circle T Feedlot, Inc.*, NPDES Appeal Nos. 09-02 & 09-03, slip op. at 4 (EAB June 7, 2010), 14 E.A.D. ___; *In re Avon Custom Mixing Servs.*, 10 E.A.D. 700, 704-08 (EAB 2002). Specifically, petitions must be filed within thirty days after issuance of the NPDES permit.[3] 40 C.F.R. § 124.19(a). Each petitioner must have participated in the permit proceeding

[3] The Ione Band of Miwok Indians filed their petition for review on August 14, 2010, well after the thirty-day deadline for appealing the Region's issuance of the NPDES permit. *See* Ione Band Petition at 3; Declaration of William Wood in Support of Petition for Review (Aug. 13, 2011) (describing Ione Band's participation throughout permitting process) ("Wood Declaration"). The Ione Band avers it was inadvertently omitted from the Region's distribution list and thus did not receive notice of issuance of the NPDES permit until August 6, 2010. Ione Band Petition at 3 & Exs. 7, 9 (documenting Ione Band's receipt of final permit decision on August 6, 2010, and subsequent phone call with personnel from Region regarding inadvertent omission from notification list); Wood Declaration at ¶¶ 8-9. The Board notes that the Region does not dispute this assertion, and that the Region responded to the Ione Band's challenges to the NPDES permit in its response to the petitions for review. *See* Region's Response at 2 (summarizing the Ione Band's challenges to the permit).

Failure to file a petition for review by the filing deadline will ordinarily result in dismissal of the petition on timeliness grounds, as the Board strictly construes threshold procedural requirements. *In re Town of Marshfield*, NPDES Appeal No. 07-03, at 4 (Mar. 27, 2007) (Order (continued...)

by either filing comments during the public comment period, or participating in a public hearing if one was held, or both.[4] *Id.*; *see also Avon Custom Mixing Servs.*, 10 E.A.D. at 704; *In re Sutter Power Plant*, 8 E.A.D. 680, 686 (EAB 1999). Petitioners must also establish that issues are preserved for review by demonstrating that they or another commenter "raise[d] all reasonably ascertainable issues and submit[ted] all reasonably available arguments supporting their position by the close of the public comment period." 40 C.F.R. §§ 124.13, 124.19(a), *quoted in In re Chukchansi Gold Resort and Casino Waste Water Treatment Plant*, NPDES Appeal Nos. 08-02 through 08-05, slip op. at 7, (EAB Jan. 14, 2009), 14 E.A.D. ___. Further, petitioners must include specific information supporting their allegations, and state why the Region's response to objections voiced during the comment period is clearly erroneous or otherwise warrants review. *See In re Phelps Dodge Corp.*, 10 E.A.D. 460, 508 (EAB 2002). Finally, petitioners bear the burden of demonstrating that review is warranted. *See id.* at 508-09 (citing 40 C.F.R. § 124.19(a)). That burden is particularly heavy in cases where a petitioner seeks review of issues that are fundamentally technical or scientific in nature, as the Board typically defers to the

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[3](...continued)
Denying Review); *accord In re Puma Geothermal Venture*, 9 E.A.D. 243, 273 (EAB 2000). However, consistent with the well-settled principle that an administrative agency maintains discretion to relax or modify its procedural rules for the orderly transaction of business when "in a given case the ends of justice require it," the Board occasionally has entertained untimely petitions where special circumstances warrant. *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970), *quoted in Town of Marshfield*, at 5 & n.4. In particular, the Board previously relaxed the filing deadline where the permit issuer failed to serve all parties that had filed written comments on the draft permit. *In re Hillman Power Co.*, 10 E.A.D. 673, 680 n.4 (EAB 2002). For the same reason, the Board is relaxing the filing deadline and will consider the Ione Band's petition timely filed.

[4] Any person who failed to file comments or participate in a public hearing may petition for administrative review, but only to the extent of the changes from the draft to the final permit. 40 C.F.R. § 124.19(a).

expertise of the permit issuer on such matters if the permit issuer adequately explains its rationale and supports its reasons in the record. *See In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3rd Cir. 1999); *accord In re Dominion Energy Brayton Point*, LLC, 12 E.A.D. 490, 510 (EAB 2006).

The Board will not ordinarily review a NPDES permit decision unless the permit conditions at issue are based on clearly erroneous findings of fact or conclusions of law or involve important policy considerations that the Board, in its discretion, should review. 40 C.F.R. § 124.19(a); *accord In re San Jacinto River Auth.*, NPDES Appeal No. 09-09, slip op. at 5 (EAB July 16, 2010), 14 E.A.D. ___; *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 332-33 (EAB 2002). The Board's review of NPDES permits is guided by the preamble to the permitting regulations, which states that review "should be only sparingly exercised" and that "most permit conditions should be finally determined at the Regional level." 45 Fed.Reg. 33,290, 33,412 (May 19, 1980); *accord Circle T Feedlot*, slip op. at 6, 14 E.A.D. ___; *Chukchansi*, slip op. at 6, 14 E.A.D. ___; *In re Mille Lacs Wastewater Treatment Facility*, 11 E.A.D. 356, 363 (EAB 2004).

Despite the stringency of the aforementioned threshold procedural requirements, the Board endeavors to construe liberally objections raised by parties proceeding pro se, those unrepresented by counsel, so as to fairly identify the substance of the arguments being raised. *See Circle T Feedlot*, slip op. at 6, 14 E.A.D. ___; *Chukchansi*, slip op. at 7, 14 E.A.D. ___; *Sutter Power Plant*, 8 E.A.D. at 687. The Board nonetheless expects such petitions "to articulate some supportable reason or reasons as to why the permitting authority erred or why review is otherwise warranted." *Sutter Power Plant*, 8 E.A.D. at 688 (citing *In re Beckman Prod. Servs.*,

5 E.A.D. 10, 19 (EAB 1994)); *see also Chukchansi*, slip op. at 7, 14 E.A.D. ___.

IV. Summary of Decision

The Board concludes that Petitioners Mr. Villa, the County, Friends of Amador County, and the Ione Band have not demonstrated that their petitions warrant review on any of the grounds presented. Petitioners have not shown that in issuing the Permit, establishing the NPDES permit conditions Petitioners challenge, or complying with the requirements of the National Historic Preservation Act, the Region clearly erred or abused its discretion. The Board therefore denies review for the reasons explained in detail below.

V. Procedural and Factual History

A. *Statutory and Regulatory History*

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). The CWA requires states to establish water quality standards ("WQSs") designed to protect the public health or welfare, enhance water quality, and serve the purposes of the Act. CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A). WQSs "serve as the goals for the water body and the legal basis for the water-quality based NPDES permit requirements under the CWA." Combined Sewer Overflow Control Policy, 59 Fed. Reg. 18,688, 18,694, *quoted in San Jacinto River Auth.*, slip op. at 9, 14 E.A.D. ___, *and In re Dist. of Columbia Water and Sewer Auth.*, 13 E.A.D. 714, 725 n.25 (EAB 2008). WQSs consist of: (1) the designated uses of the navigable waters involved; (2) water quality criteria, which are numerical concentration levels and/or narrative

statements specifying the amount of pollutants that may be present in each water body segment without impairing the designated uses of that water body segment, and; (3) an antidegradation policy. CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10-.12; *see* Water Permits Division, U.S. EPA, EPA-833-K-10-001, *NPDES Permit Writers' Manual* 6-3 to -4 (2010) ("NPDES Manual").

NPDES permits regulate the discharge of any pollutant from a point source into waters of the United States. CWA §§ 301(a), 402, 33 U.S.C. §§ 1311(a), 1342. Regulations specifically governing the process of issuing an NPDES permit are found in 40 C.F.R. part 122. NPDES permits generally contain either technology-based or water quality-based effluent discharge limitations and related monitoring and reporting requirements. CWA §§ 301, 304(b), 402(a)(1)-(2); 33 U.S.C. §§ 1311, 1314(b),1342(a)(1)-(2). Technology-based limitations for publicly owned treatment works are numeric limitations that establish the effluent reduction attainable through the application of secondary treatment, comprised of requirements expressed in terms of five-day biochemical oxygen demand ("BOD5 "), total suspended solids ("TSS"), and pH. CWA §§ 301(b)(1)(B), 304(d)(1), 33 U.S.C. §§ 1311(b)(1)(B), 1314(d)(1); 40 C.F.R. part 133. When technology-based limitations are insufficient to meet applicable state water quality standards, more stringent water quality-based effluent limitations are implemented to protect the designated and existing uses of the receiving water body. CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d); *see also In re City of Moscow*, 10 E.A.D. 135, 139 (EAB 2001). NPDES permits are effective for a fixed term not to exceed five years, and in general contain discharge limitations and establish related monitoring and reporting requirements. *See* CWA § 402(a)(1)-(2), (b), 33 U.S.C. § 1342(a)(1)-(2), (b); 40 C.F.R.

§§ 122.45, .46(a), .48; *accord Circle T Feedlot*, slip op. at 16, 14 E.A.D. ___.

In passing the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 to 470x-6, Congress declared that "the historical and cultural foundations of the Nation should be preserved" and established a statutory scheme intended to preserve historic properties significant to the Nation's heritage. NHPA § 1(a)-(b), 16 U.S.C. § 470(a)-(b). One of the key terms of the NHPA and its implementing regulations is an undertaking, which is defined as any project, activity, or program that, among other things, requires a federal permit. *See* 16 U.S.C. § 470w(7); 36 C.F.R. § 800.16(y). Section 106 of the NHPA, 16 U.S.C. § 470(f), in turn requires that a federal agency "having authority to license any undertaking shall * * * prior to the issuance of any license * * * take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places]."[5] This process, commonly referred to as the "section 106 process," or "section 106 consultation," seeks to integrate historic preservation concerns with the needs of federal undertakings by affording parties with an interest in the effects of the undertaking the opportunity to consult with federal agency officials. 36 C.F.R. § 800.1(a). Once a federal agency official determines that a proposed undertaking has the potential to cause effects on historic properties, the official shall identify the appropriate State Historic Preservation Officer ("SHPO") and contact the SHPO to initiate consultation. 36 C.F.R. § 800.3(a), (c). In consultation with the

[5] The National Register of Historic Places ("National Register") is maintained by the Secretary of the Department of the Interior ("DOI") and is "composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture." NHPA § 101, 16 U.S.C. § 470(a)(1)(A); *see also* 36 C.F.R. § 800.16(q). The Secretary of DOI has established criteria and procedures for evaluating the eligibility of properties for listing in the National Register that are available at 36 C.F.R. parts 60 and 63. *See* 36 C.F.R. § 800.16(r); *accord Phelps Dodge*, 10 E.A.D. at 503 n.31.

SHPO, the federal agency official must determine and document the area of potential effects, the geographic area or areas in which an undertaking may directly or indirectly alter the character or use of any historic properties that may exist there. *See* 36 C.F.R. §§ 800.16(d), .4(a). Ultimately the goals of the section 106 consultation are to identify historic properties[6] potentially affected by the undertaking, assess the undertaking's effects,[7] and pursue ways to avoid, minimize, or mitigate any adverse effects on historic properties. *Id.* §§ 800.1(a), .4-.6.

The Advisory Council on Historic Preservation ("Council") generally oversees section 106 consultations, advising and providing comments to agency officials on individual undertakings, and sometimes formally entering the section 106 process, either of its own accord or by the request of any individual, agency or organization. *Id.* §§ 800.2(b), .9(a). In addition to the Council and federal agency officials, other parties that may participate in the section 106 consultation, collectively referred to as consulting parties, include the State Historic Preservation Officer, Indian tribes and/or Native Hawaiian organizations, local government representatives,

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[6] A historic property is any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. 36 C.F.R. § 800.16(*l*)(1). This includes artifacts, records, and remains that are related to and located within such properties, as well as properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization that meet the National Register criteria. *Id.*

[7] The agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects in consultation with the SHPO and Indian tribes that attach religious or cultural significance to identified historic properties. 36 C.F.R. § 800.5(a). An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. *Id.* § 800.5(a)(1). Examples of adverse effects include, among other things, introduction of visual, atmospheric, or audible elements that diminish the integrity of the property's significant features. *Id.* § 800(a)(2)(v); *see id.* § 800(a)(2)(i)-(vii) (non-exhaustive list of adverse effects on historic properties).

the permit applicant, and other individuals and organizations with a demonstrated interest in the undertaking. *Id.* § 800.2; *see also id.* § 800.6(a). The NHPA regulations also specifically provide for public involvement in the section 106 consultation. *Id.* §§ 800.2, .3(e), .6(a)(4). The section 106 consultation culminates in a memorandum of agreement that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking on historic properties. *Id.* §§ 800.6(b)-(c) (noting that a memorandum of agreement evidences the agency's compliance with section 106 and "shall govern the undertaking and all of its parts"), .16(o) (defining memorandum of agreement).

B. *Factual & Procedural History*

1. *2005 Application and Proposed Permit*

In support of its proposal to develop, construct, and operate a gaming and entertainment facility ("proposed project"), the Tribe submitted an application to the Region in May 2005 for a NPDES permit to operate a waste water treatment plant that would discharge tertiary treated wastewater generated from the proposed Facility. Buena Vista Rancheria NPDES Permit Application (Apr. 2005) (A.R. 101-112) ("Permit Application"); *see* Region's Response at 7. The engineering report attached to the Permit Application indicated that the wastewater treatment facility's design capacity would be 250,000 gallons per day ("gpd"), with projected weekday flows of 100,000 gpd and weekend flows of 180,000 gpd, with an annual average flow of 170,000 gpd. Wastewater Treatment Plant Engineering Report at 8-9 & Tbl.3-2 (May 2005) (A.R. 126-27) ("Engineering Report"); *see also* Permit Application at 3 (A.R. 105). The proposed project's design was based on a projected gaming facility that would include 2,000 slot machines and eighty gaming tables. *See* Engineering Report at 5 (A.R. 122); *see also* Buena

Vista Casino Comparison of TEIR Project vs. Current Project (A.R. 1333) ("Project Comparison Chart").

The Region issued a proposed permit and accompanying fact sheet on December 15, 2005, and held a public hearing on March 21, 2006 in Ione, California to solicit public input on the proposed permit. *See* Region's Response at 7 (A.R. 47-49) (cataloging written comments received during comment period for proposed 2005 permit and written and oral comments received at the March 2006 public hearing). Among other issues, multiple commenters stated that EPA had not conducted a consultation under the National Historic Preservation Act. *See* Final Response to Comments Document at 29 (June 2010) (A.R. 75) ("RTC") (including comments referring to cultural resources and lack of consultation from 2005 proposed permit); Region's Response at 7.

2. *NHPA Section 106 Consultation*

The Region determined that the proposed project was an "undertaking" subject to the NHPA section 106 process, and initiated consultation with the State Historic Preservation Officer ("SHPO").[8] Letter from Alexis Strauss, Director, Water Division, U.S. EPA Region 9, to Milford Wayne Donaldson, State Historic Preservation Officer, CA Dept. of Parks and Recreation 1 (Feb. 17, 2007) (A.R. 1301) ("NHPA Initiation Letter"). The Region also contacted federally recognized Indian tribes that might attach religious or cultural significance to historic properties that may be affected, *see* 36 C.F.R. § 800.2(c)(2)(ii), to solicit information and request consultation, including the Ione Band, Jackson Rancheria of Me-Wuk Indians, and Shingle

[8] Pursuant to 36 C.F.R. § 800.2(a)(2), the Region and the U.S. Army Corps of Engineers, to whom the Tribe had applied for a permit under CWA section 404, 33 U.S.C. § 1344, agreed that EPA would be the lead federal agency for purposes of complying with the NHPA.

Springs Band of Miwok Indians. RTC at 37-38 (A.R. 83-84); Region's Response at 8. The Ione Band and the Jackson Rancheria of Me-Wuk Indians expressed interest in participating in the section 106 process, whereas the Shingle Springs Band of Miwok Indians declined the Region's invitation to consult. RTC at 37-38 (A.R. 83-84); Region's Response at 8. The County also expressed interest to the Region in participating in the section 106 consultation. *See* Memorandum of Agreement Among the U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers, the California State Historic Preservation Officer, and the Buena Vista Rancheria of Me-Wuk Indians Regarding the Buena Vista Rancheria of Me-Wuk Indians Gaming and Entertainment Facility Project 2 (effective June 1, 2010) (A.R. 1348) ("Memorandum of Agreement").

Based on a review of the plans for the proposed Casino and wastewater treatment Facility, the Region determined the undertaking's area of potential effects pursuant to 36 C.F.R. § 800.4(a)(1), and then made a "reasonable and good faith effort" to identify historic properties located within the area of potential effects. 36 C.F.R. § 800.4(b)(1); *see* RTC at 38 (A.R. 84); Region's Response at 8. This effort included review of existing information and studies, and consultation with representatives from the SHPO, the Tribe, the U.S. Army Corps of Engineers, the County, the Ione Band, and the Jackson Rancheria of Miwok Indians, which included four separate meetings and a site visit to the Tribe's proposed site for the Casino and wastewater treatment Facility so that parties could view the exact locations of the proposed project. RTC at 38-40 (noting that meetings were held in the SHPO's Sacramento offices on May 1, 2007, November 20, 2008, March 12, 2009, and June 30, 2009, and that the site visit occurred on March 25, 2009) (A.R. 84-86); Region's Response at 8; *see also* Dkt. #12.01 (noting dates of

meetings and site visits in confidential portion of NHPA-related administrative record).

The Region determined, with concurrence from the SHPO as required by the section 106 process, *see* 36 C.F.R. § 800.4(c)(1)-(2), that two cultural resources located in the area of potential effects were historic properties eligible for inclusion in the National Register, namely the Buena Vista Peaks and CA-AMA-411/H [hereinafter referred to as "Upüsüni Village"]. Letter from Milford Wayne Donaldson, State Historic Preservation Officer, Office of Parks and Recreation, to Douglas E. Eberhardt, NPDES Permit Officer, U.S. EPA Region 9 (Apr. 10, 2009) ("SHPO Concurrence Letter") (expressing concurrence that Region appropriately defined area of potential effects and that Region's efforts to identify historic properties represent a reasonable good faith effort) (A.R. 1323-24); *see also* RTC at 38 (A.R. 84); RTC at 8 (A.R. 54); Memorandum of Agreement at 2 (A.R. 1348). In addition, the Region determined that CA-AMA-650, the area between Buena Vista Peaks and Upüsüni Village where the Tribe proposes to construct the Casino and wastewater treatment Facility, does not have any intact or potentially eligible cultural resources and confirmed that this central portion of the area of potential effects is not included within the recorded site areas for either the Buena Vista Peaks or Upüsüni Village. RTC at 38, 42 (A.R. 84, 88); *see also* SHPO Concurrence Letter at 2 (A.R. 1324); Region's Response at 23; Memorandum of Agreement at 2 (A.R. 1348).

Upon determining that the Buena Vista Peaks and Upüsüni Village were historic properties the Region, in conjunction with the consulting parties, applied the adverse effects criteria and determined that the undertaking would have adverse effects on the two historic properties. *See* Region's Response at 9; RTC at 38, 42 (A.R. 84, 88). Specifically, the Region determined that the cultural affiliation between the Buena Vista Peaks and Upüsüni Village, both

traditional cultural properties, would be adversely affected as a result of visual and audible intrusions from the proposed project. Region's Response at 9, 24; RTC at 38, 42 (A.R. 84, 88) (noting that while CA-AMA-650 is not a historic property, it was the consideration of the potential effects from the construction of the proposed project in this area that formed the entire rationale and basis for EPA's determination that the project would result in adverse effects on Buena Vista Peaks and Upüsüni Village due to the relationship between the two historic properties); Memorandum of Agreement at 2 (A.R. 1348) (same); *see also* SHPO Concurrence Letter (concurring in Region's finding of adverse effects). As part of the assessment of adverse effects, the Region also concluded that the proposed project would not substantially impair the use of either property for traditional cultural practices because the proposed project: (1) does not, in itself, restrict access to either of the historic properties; (2) would not physically damage either historic property; (3) will not alter existing access routes to the Peaks, and; (4) will not block the visual connection between the two properties. RTC at 38, 42-43 (A.R. 84, 88-89).

Upon finding that the Buena Vista Peaks and Upüsüni Village would experience adverse effects due to the undertaking, the Region continued to consult with the SHPO and consulting parties to seek ways to avoid, minimize, or mitigate the adverse effects. 36 C.F.R. § 800.6(a); *see also* Region's Response at 9; Letter from LaShavio Johnson, Historic Preservation Technician, Advisory Council on Historic Preservation, to Douglas E. Eberhardt, NPDES Permit Office, U.S. EPA Region 9 (Aug. 13, 2009) (acknowledging receipt of Region's documentation of adverse effects on historic properties required pursuant to 36 C.F.R. § 800.11 and stating that based on the information provided the Council "do[es] not believe that our participation in the consultation to resolve adverse effects is needed") (A.R. 1306). Prior to development of a

memorandum of agreement and historic properties treatment plan, the Tribe made several changes to the project design to attempt to address adverse effects.[9] RTC at 46 (A.R. 92). The Region, in consultation with the SHPO and consulting parties, developed a draft memorandum of agreement and accompanying historic properties treatment plan ("HPTP"). The HPTP[10] includes measures to minimize impacts to historic properties, including an Archaeological Testing Program, Archaeological Discovery Plan, and design measures to reduce the visual impacts associated with the operation of the facilities that include the use of minimum lighting standards, use of an earth tone color scheme for buildings, use of visual barriers, and landscaping. RTC at 47 (A.R. 93). The Memorandum of Agreement includes, among other things, authorization for the Region to issue Notices to Proceed with construction when any of four conditions in the Memorandum of Agreement are met. Memorandum of Agreement at 3-4 (A.R. 1349-50). The Region, the Army Corps of Engineers, the California State Historic Preservation Officer, and the

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[9] These changes include shifting the location of the proposed Casino southward to avoid direct impacts to the Upüsüni Village; downsizing the proposed Casino's capacity from 71,525 sqaure feet to 25,332 square feet; changing the location of the parking structure to keep it outside the boundaries of Upüsüni Village and making it a multi-level structure rather than a larger surface lot; reducing the parking structure from nine levels to six levels, and reducing the height of the proposed Casino by twenty-one feet. RTC at 46 (A.R. 92); *see also* Project Comparison Chart (noting reductions in gaming tables, slot machines, and restaurant seating).

[10] The HPTP was not included in the administrative record for these appeals due to the confidential nature of certain information it contains. Materials in the administrative record developed in conjunction with the NHPA section 106 process may be claimed as confidential when they contain information regarding the location, character, or ownership of historic resources. *See* 16 U.S.C. § 470w-3; 16 U.S.C. § 470hh; CA Govt. Code § 6254.10 (cited in Dkt. #12.01). Thus, the Board considers arguments pertaining to the adequacy of the HPTP based on the public information that is available in the record. The Board notes that while the Ione Band has included the HPTP as an exhibit to one of its filings, and no parties have otherwise objected, the Tribe objects to the disclosure of the information pursuant to 36 C.F.R. § 800.6(a)(5), and thus the Board will not consider the substance of the HPTP in its decision.

Buena Vista Rancheria of Me-Wuk Indians executed the Memorandum of Agreement effective June 1, 2010. *See* Memorandum of Agreement at 10 (A.R. 1356) (stating that in accordance with 36 C.F.R. § 800.6(b)(1)(iv), EPA has taken into account the effect of the undertaking on historic properties in order to resolve any adverse effects on historic properties and thereby comply with section 106 of the NHPA). The Memorandum of Agreement also notes that the Ione Band,[11] the Jackson Rancheria Band of Me-Wuk Indians, and the County participated in the consultation process but declined an invitation to concur in the Memorandum of Agreement. *Id.* at 2 (A.R. 1348).

3. *2009 Proposed Permit*

Subsequent to the preparation of a draft Memorandum of Agreement and Historic Properties Treatment Plan, the Region proposed a permit for the wastewater treatment Facility on August 5, 2009, and published a public notice to solicit comments on the Memorandum of Agreement, the Historic Properties Treatment Plan, and the proposed permit. Notice of Proposed

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[11] In January 2010, the Ione Band contacted the Advisory Council on Historic Preservation ("ACHP") to request that the ACHP participate in the ongoing section 106 consultation. Letter from William Wood, Holland & Knight, LLP, to Reid Nelson, Director, Office of Federal Agency Programs, Advisory Council on Historic Preservation (Jan. 8, 2010) (A.R. 1307-15). The ACHP declined to participate, responding in relevant part:

> Based upon our review, we have concluded that no new information has been introduced in this consultation to cause the ACHP to revisit its decision not to participate in this case. The section 106 process has been inclusive and considered the full range of effects. As we understand, the mitigation set forth in the draft [memorandum of agreement] will address effects on known and potentially known sites of religious and cultural significance to tribes. We do not see where our involvement at this juncture will alter this mitigation strategy.

Letter from Charlene Dwin Vaughn, Asst. Dir., Federal Permitting, Licensing, and Assistance Section, Office of Federal Agency Programs, Advisory Council on Historic Preservation, to William Wood, Holland & Knight, LLP (Apr. 20, 2010) (A.R. 1319-20).

Action, Proposed NPDES Permit CA0049675, Buena Vista Rancheria: Buena Vista Casino (formerly Flying Cloud Casino) ("2009 Public Notice") (A.R. 554); *see also* Region's Response at 9. Because the Tribe reduced the size of the proposed project originally envisioned in the 2005 proposed permit, the 2009 proposed permit reflected a proposed Facility with lower flows and smaller capacity. Region's Response at 9; *see also* Project Comparison Chart (noting reductions in gaming tables, slot machines, and restaurant seating). The 2009 proposed Facility's design capacity is 200,000 gallons per day ("gpd"), and based on that design capacity the Permit limits discharges to 100,000 gpd average monthly and 200,000 gpd daily maximum. Permit at 3 (A.R. 5); *see* Fact Sheet at 2 (A.R. 26); Region's Response at 5. The 2009 proposed project is expected to generate flows of 50,000 gpd on weekdays and 100,000 gpd on weekends, with an average of 60,000 gpd annually.[12] Fact Sheet at 2 (A.R. 26); Region's Response at 5. The public comment period was open from August 5, 2009, to September 4, 2009, and after making minor changes to the Permit and accompanying Fact Sheet, the Region issued the Permit on June 25, 2010. *See* 2009 Public Notice (A.R. 554); Region's Response at 10.

4. *Motions Relating to the Notice to Proceed*

[12] The Region notes, both in the Fact Sheet accompanying the Permit and in its response to comments, that the Casino will be built in two stages. Fact Sheet at 2 (A.R. 26); Final Response to Comments Document at 5-7 & Tbl.2 (June 2010) (A.R. 51-53) ("RTC"); *see also* Region's Response at 29 (referencing County's argument regarding Casino expansion). The Permit at issue in these appeals reflects the same overall design capacity of the Facility, 200,000 gpd, but only the first phase, Phase 1, of Casino construction. The Casino's second phase, Phase 2, when constructed, is expected to generate weekday flows of 90,000 gpd and weekend flows of 160,000 gpd, with an annual average flow of 100,000 gpd. RTC at 7 Tbl.2 (A.R. 53). The Facilty's design capacity (200,000 gpd) was based on anticipated Phase 2 weekend capacity (160,000 gpd) plus contingency capacity of 25% greater than expected Phase 2 weekend flows (40,000 gpd). *Id.* at 5-6 & Tbl.2 (A.R. 51-53).

On July 5, 2011, during the pendency of these appeals, the Region notified the Board of its intention to issue a Notice to Proceed ("NTP") with a construction segment of the proposed project, based on the Tribe's submission of, and the Region's subsequent approval of, findings from the fieldwork phase of the Archaeological Testing Program that satisfy section IV.C of the Memorandum of Agreement. *See* Region's Letter Regarding Buena Vista Rancheria Wasterwater Treatment Plant at 2-3 & n.2 (July 5, 2011) ("Region's Letter"). The Region informed the Board of the Region's intention to issue an NTP to Buena Vista no sooner than twenty-one days from the date of the Region's letter. *Id.* at 3. In response, Petitioners Friends of Amador County, the County, and the Ione Band all filed motions requesting that the Board stay the Region's issuance of the NTP. *See* Friends of Amador County Letter (July 20, 2011); Motion Requesting Environmental Appeals Board to Stay EPA's Issuance of Notice to Proceed (July 15, 2011); Ione Band of Miwok Indians' Motion to Stay Issuance of Proposed Notice to Proceed (July 20, 2011). The Tribe, which until then had not participated in these appeals, filed on July 22, 2011, two motions requesting that Buena Vista be granted leave to intervene and opposing Petitioners' motions to stay the issuance of the NTP. *See* Buena Vista Rancheria of Me-Wuk Indians' Motion for Leave to Intervene and Oppose Motions to Stay Issuance of Notice to Proceed (July 22, 2011); Buena Vista Rancheria of Me-Wuk Indians' Opposition to the Motions to Stay Issuance of Notice to Proceed (July 22, 2011).

On July 26, 2011, the Board issued an order granting the Region an extension of time to file a response to Petitioners' motions to stay the issuance of the NTP, and requiring the Region to respond no later than August 15, 2011. Order Granting Region's Motion for Extension of Time to Respond to Petitioners' Motions to Stay Issuance of Notice to Proceed (July 26, 2011).

In the same order the Board directed the Tribe to contact the parties to these appeals and file a supplemental statement no later than July 29, 2011, indicating whether the parties oppose or do not oppose the Tribe's motion to intervene.[13] *Id.* at 4.

The Region filed its Response to the Motions to Stay Issuance of the Notice to Proceed on August 15, 2011. Both the County and the Ione Band subsequently filed motions requesting leave to file reply briefs. *See* Motion for Leave to File Reply Brief to Opposition to Request for Stay of Notice to Proceed and [Proposed] Reply Brief (Aug. 24, 2011); Ione Band of Miwok Indians' Motion for Leave to File Reply in Support of Motion to Stay Issuance of Proposed Notice to Proceed (Aug. 26, 2011).

The Board's order denying review of these petitions moots Petitioners' requests for the Board to stay the issuance of the Notice to Proceed and Petitioners' Ione Band and the County's respective requests to file reply briefs regarding the Notice to Proceed. The Tribe's motion to intervene in these proceedings is granted.

VI. Analysis

As explained above, the four petitions for review filed before the Board present three issues for review. The Board addresses each issue in turn below.

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[13] The Tribe's supplemental statement indicates that the Region is the only party that does not oppose the Tribe's motion to intervene. Buena Vista Rancheria of Me-Wuk Indians Supplemental Statement in Support of Motion for Leave to Intervene at 2 (July 29, 2011). Petitioners Mr. Villa and Friends of Amador County indicated they oppose the Tribe's motion to intervene. *Id.* at 2-3. Petitioners' Ione Band and the County both conditioned their non-opposition to the Tribe's motion to intervene on their ability to file replies to both the Tribe's proposed opposition to the motions to stay the NTP and the Region's response to the Petitioners' motions to stay the NTP. *Id.* at 2.

A. *The Region Properly Exercised Jurisdiction Over the Proposed Facility in Issuing the NPDES Permit*

The Board first considers the County's challenge to the Region's jurisdiction to issue the Permit under the NPDES program set forth in CWA § 402, 33 U.S.C. § 1342. The County alleges that the Region lacks jurisdiction to issue the NPDES permit for the proposed Facility because the land on which the Tribe intends to build the proposed Facility is mistakenly classified as "Indian country," and thus California should have issued the NPDES permit as opposed to the Region.[14] Petition for Review at 2-4 (July 23, 2010) ("County Petition").

The Region responds that it properly asserted its jurisdiction to implement the NPDES program on "Indian lands" when, as here, neither the state nor tribe in question has the authority to administer the NPDES program on "Indian lands." RTC at 30 (A.R. 76); Region's Response at 15-16. The Region further states that it properly issued the Permit because a class action settlement restored the original boundaries of the Buena Vista Rancheria and established that all land within the restored boundaries is declared "Indian country." Region's Response at 16-17; RTC at 30-31 (A.R. 76-77). The Region also cites a letter from the National Indian Gaming Commission declaring that the Rancheria property constitutes "Indian lands" pursuant to the

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[14] EPA has authorized most states to administer all or part of the NPDES program within their jurisdiction, typically within state boundaries excepting Indian country located therein. *See* Office of Wastewater Management, Office of Water, U.S. EPA, NPDES State Program Status, http://cfpub.epa.gov/npdes/statestats.cfm (last visited Sept. 1, 2011) (noting that California operates an approved state NPDES program); *see also* 40 C.F.R. § 123.1(h) (stating that lack of authority to regulate activities on Indian lands does not impair the state's ability to obtain full NPDES program approval). EPA administers the NPDES program in most of Indian country within the United States, including California. *See* Final Modification of NPDES General Permit for Storm Water Discharges from Construction Activities, 69 Fed. Reg. 76,743, 76,744-45 (Dec. 22, 2004) (explaining that the modified general permit applied to areas where EPA was the permitting authority, explicitly including Indian country).

Indian Regulatory Gaming Act ("IRGA"), 25 U.S.C. § 2703(4)(A).

The Board's recent decision *In re Circle T Feedlot, Inc.*, NPDES Appeal Nos. 09-02 & 09-03, slip op. at 16-19 (June 7, 2010), 14 E.A.D. ___, undertook a thorough review of NPDES permitting authority on "Indian lands" or in "Indian country," and thus the Board's analysis of the statutory and regulatory provisions applicable to issuance of a NPDES permit in this instance is guided by its previous analysis in *Circle T*. Congress added section 518 of the CWA in 1987, which authorizes EPA to treat an Indian tribe as a state for purposes of several CWA provisions, including the NPDES program under section 402, where certain criteria are met. CWA § 518(e), 33 U.S.C. § 1377(e); *see also Circle T*, slip op. at 17, 14 E.A.D. ___. EPA promulgated in 1993 final regulations implementing section 518 as it pertained to numerous CWA provisions, including section 402. Treatment of Indian Tribes as States for Purposes of Sections 308, 309, 401, 402, and 405 of the CWA, 58 Fed. Reg. 67,966 (Dec. 22, 1993); *see also Circle T*, slip op. at 17-18. Significantly, the 1993 rule explained that "EPA will administer the [NPDES] program on Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands." 40 C.F.R. § 123.1(h); *see also Circle T*, slip op. at 18, 14 E.A.D. ___. Although part 124 regulations do not explicitly define "Indian lands," they do define "Indian country." 40 C.F.R. § 122.2.

The County does not mention in its petition for review the class action settlement in *Hardwick v. U.S.*, No. C-79-1710 SW (N.D. Cal. May 14, 1987) (Stipulation for Entry of Judgment (Amador County)). In litigation challenging the administrative implementation of the

California Rancheria Act of 1958,[15] the Tribe, in conjunction with several other tribes, overturned their Rancheria terminations in a series of lawsuits wherein federal courts found the Secretary of the Interior had failed to comply with a condition precedent to termination, making the supposed Rancheria terminations unauthorized and void. *See* Region's Response at 16 & n.40. A federal court order and accompanying stipulation for entry of judgment resulting from this litigation stated that "[t]he plaintiff Rancheria and the Plaintiffs were never and are not now lawfully terminated under the California Rancheria Act * * * in that the requirements of section 3 of the Act were not fulfilled prior to the conveyance of deeds" to the original reservation. *Hardwick v. U.S.*, No. C-79-1710 SW at 4 (N.D. Cal. May 14, 1987) (Stipulation for Entry of Judgment (Amador County)); *see also* Region's Response at 16 & n.40. Further, the court held that it had authority as a court of equity to remedy the effects of the premature and unlawful termination of the Rancheria, and restored the original boundaries of the Rancheria, declaring that all land within the restored boundaries is "Indian country." *Id.* The court continued that "[t]he Plaintiff Rancheria shall be treated by the County of Amador and the United States of

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[15] Prior to 1958, the United States had purchased and held in trust 67.5 acres of land for the Buena Vista Rancheria of Me-Wuk Indians' use. *Amador County v. Salazar*, 640 F.3d 373, 375 (D.C. Cir. 2011). Congress enacted the California Rancheria Act of 1958 in furtherance of the then-popular policy of assimilating Native Americans into American society. *Id.* The Rancheria Act authorized the Secretary of the Department of the Interior ("DOI") to terminate the federal trust relationship with several California tribes, including the Me-Wuk tribe, and transfer tribal trust lands to individual fee ownership. *Id.* (citation omitted). Pursuant to the California Rancheria Act of 1958, the Tribe's land was transferred to two members. *Id.* Twenty years later, other members of the Tribe joined with members of sixteen other California Rancherias and filed a class action lawsuit to undo the effects of the California Rancheria Act of 1958. *Id.* at 375-76. Specifically, they sought an injunction requiring the Secretary of the DOI "unterminate" the subject Rancherias. *Id.* at 376 (citation omitted). The lawsuit ended in a settlement between the tribes and the federal government, and resulted in a series of separate stipulated judgments between individual tribes and the counties in which the tribe's land lay. *Id.*

America, as any other federally recognized Indian reservation." *Id.* As a party to the *Hardwick* proceedings, and a signatory to the stipulation and order, the County has previously agreed that the Buena Vista Rancheria is both Indian country and reservation land.[16] *See id.* at 6 (reflecting signature of counsel for Amador County); *see also* Region's Response at 17. The Tribe's restored land is "Indian country," and EPA has consistently interpreted "Indian lands" to be equivalent to "Indian country." *Circle T*, slip op. at 18, 14 E.A.D. ___; *accord In re Mille Lacs Wastewater Treatment Facility*, 11 E.A.D. 356, 366 (EAB 2004). Thus, the Region has the authority to administer the NPDES permitting program on the Tribe's land pursuant to 40 C.F.R. § 123.1(h).

The County also fails to address the NPDES implementing regulations that essentially make the Agency, in this case the Region, the default permit issuer in the NPDES program where a state or (Indian tribe) does not seek or have the authority to regulate NPDES-related activities in Indian country. 40 C.F.R. § 123.1(h); *see Circle T*, slip op. at 17, 14 E.A.D. ___. As demonstrated above, *see supra* note 14, the state of California does not have the authority to administer a NPDES permit to the Rancheria, and the Rancheria as an Indian tribe similarly lacks authority to issue such a permit. Thus, as the only government authority properly authorized to issue the NPDES permit, *see generally Circle T* at 16-19, the Region properly issued the Permit pursuant to 40 C.F.R. § 123.1(h). The Board denies review of this issue, and concludes that the

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[16] However, the County is a party to an action in federal court challenging the Secretary of the Department of the Interior's no-action approval of the Rancheria's gaming compact with the state of California. *Amador County v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011). The County challenges the validity of the compact issued pursuant to the Indian Regulatory Gaming Act ("IRGA"), 25 U.S.C. §§ 2701-2721, claiming that the Tribe's land fails to qualify as "Indian land" under the IRGA. *Id.* (remanding to the district court to determine the County's intent to be bound by the *Hardwick* judgment).

Region acted within its jurisdiction when it issued the Permit to the Tribe.

Similarly, the County's assertion that the proposed Facility is not a publicly owned treatment works ("POTW") must also fail. *See* County's Petition at 4. The County asserts that the proposed Facility cannot be a POTW because it fails to meet the provision in CWA section 518(f)(2), 33 U.S.C. § 1377(f)(2), that requires the tribe to exercise governmental authority over a "federal Indian reservation."[17] *Id.*

The Region responds that a publicly owned treatment works ("POTW") is defined in 40 C.F.R. § 403.3 as "a treatment works as defined by section 212 of the Act, which is owned by a State or municipality (as defined by section 502(4) of the Act)." Section 502(4) of the Act in turn defines municipality to include, among other things, an "Indian tribe." 33 U.S.C. § 1362(4). As the Region correctly points out, a wastewater treatment facility owned by the Tribe would be a POTW if the Tribe meets the definition of an Indian tribe. Region's Response at 18. The regulations implementing the CWA define an Indian tribe as "any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation." 40 C.F.R. § 122.2.

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[17] Just as the County appears to challenge the authenticity of the Tribe's status, Mr. Villa asserts that the Rancheria does not constitute an Indian tribe "in the true sense of the definition" because it consists of "a lone individual" that had "no affiliation with the prior membership of the individuals recognized by the BIA as members of the Buena Vista Rancheria." Petition for Review at 1 (July 21, 2011) ("Villa Petition"). Despite Mr. Villa's objections, the Buena Vista Rancheria of Me-wuk Indians is a federally-recognized Indian tribe. *See* Indian Entities Recognized and Eligible to Receive Services from the U.S. Bureau of Indian Affairs from the U.S. Bureau of Indian Affairs ("BIA"), 75 Fed. Reg. 60,810, 60810 (Oct. 1, 2010); *see also* 74 Fed. Reg. 40,218, 40,219 (Aug. 11, 2009) (recognizing Buena Vista Rancheria as an Indian tribe); 73 Fed. Reg. 18,553, 18,553 (Apr. 4, 2008) (same). The United States government thus recognizes the Buena Vista Rancheria's inherent governmental authority, under which the Tribe has the authority to make decisions regarding land use for land located within its reservation boundaries that is consistent with applicable law. RTC at 54 (A.R. 100).

In this instance, the Tribe is both a federally recognized Indian tribe, *see supra* note 16, and its land was restored to "Indian country" pursuant to the *Hardwick* court's order, which includes reservation land. *Hardwick v. U.S.*, No. C-79-1710 SW at 4 (N.D. Cal. May 14, 1987) (Stipulation for Entry of Judgment (Amador County)) (noting that plaintiff Rancheria shall be treated by the County of Amador * * * as any other federally recognized Indian Reservation") *see* Region's Response at 18. The County's argument must fail because the Tribe is thus an Indian tribe as defined in 40 C.F.R. § 122.2 based on its listing in the Federal Register as a federally-recognized tribe and the *Hardwick* decision's restoration of its land as an Indian reservation. Thus the Tribe's proposed wastewater treatment Facility is a POTW.

B. *Petitioners Have Not Demonstrated That the Region Clearly Erred in Issuing an NPDES Permit That Includes the Terms Petitioners Challenge*

The Board next turns to Petitioners' NPDES-related challenges to several conditions of the Permit. As explained below, the Board denies review of all NPDES-related challenges in these appeals because the Petitioners have failed to demonstrate that the Region clearly erred in issuing the Permit.

1. *The County Has Not Demonstrated That the Region Erred When it Calculated Wastewater Flow Rates For the Facility Based on the Reduced Design Capacity of the Proposed Gaming Casino*

The County alleges that the Region improperly calculated wastewater flow rates for the proposed Facility. County Petition at 5-6 (citing RTC at 4, 7 (A.R. 50, 53)). The Region responds that it based the limitations required by the permit on the current design flow of the Facility as required under 40 C.F.R. § 124.45(b)(1). Region's Response at 28-29.[18] As explained

[18] The Region also explains in its response to the petitions for review that the first (continued...)

in more detail below, the Board denies review of this issue because the County's allegations are both unsupported and contrary to the administrative record.

The Region's Response to Comments explains that the Facility will be smaller than what was originally envisioned in the 2005 proposed permit, and that the Facility will be built in two phases.[19] RTC at 7 (A.R. 53); Region's Response at 29; Fact Sheet at 2 (describing the phases of construction of the proposed facility).

The County fails to demonstrate why this Board should review the Region's calculation of the projected flows for the proposed Facility. The County offers no support for its assertion that the Region erred in its calculations, and seems more concerned that the Rancheria will proceed to Phase 2 of the Facility's operation immediately as opposed to the Region's calculations of flow rates themselves. The Board finds the County's bald assertion that the Rancheria intends to immediately expand the gaming facility not only perplexing, but also

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[18](...continued)
NPDES application the Region received from the Rancheria in May 2005 contained flow calculations based on the projected size of the casino at that time, and that subsequently the Rancheria reduced the proposed size of the casino and concurrently recalculated the projected flow rates from the proposed Facility based on the smaller casino size. RTC at 29 (A.R. 75); *see supra* Section V.B.

[19] During the first phase of the Facility's operation, the Region explains that it will have annual average flows of 60,000 gallons per day ("gpd"), with weekday flows approximating 50,000 gpd and weekend flows approximating 100,000 gpd. During Phase 2, the annual average flow is expected to be 100,000 gpd, while weekday flows will bew 90,000 gpd and weekend flows will approximate 160,000 gpd. The total design capacity for the Facility will equal 200,000 gpd, which will allow for contingency capacity during both phases of the Facility's operation. RTC at 7 (A.R. 53) & Tbl.2 (listing flows for both phases of the Facility's operations).

unsubstantiated.[20] The County offers nothing except "mere allegations" to support its petition for review. *See, e.g., In re New England Plating Co.*, 9 E.A.D. 726, 737 (EAB 2001). Without more, the County cannot meet its burden to demonstrate that review of this issue is warranted.

2. *The Region Properly Set the Facility's Effluent Limitations*

The County alleges that the Facility's treatment system is inadequate to meet the Permit's effluent limitations. County Petition at 6-8. The County bases its assertion on the compliance history of the Thunder Valley Casino, a different but similar facility. *Id.* at 7-8.

The Region responds first that the Board should deny review of this issue because the County's comment does not address a specific permit condition and thus is inappropriate for Board review. Region's Response at 48. More specifically, the Region asserts that the treatment system itself is not a condition of the Permit. Rather, it is the appropriate technology-based and water quality-based effluent limitations that the permittee, in this instance the Tribe, must meet by installing a treatment system capable of meeting the effluent limits in the Permit. *See* Region's Response at 48. The Board agrees. The County has not asserted that the Region included a permit condition in error. While the Facility's responsibility is to meet the effluent limitations included as conditions of the Permit, the treatment system itself is not permit condition this Board will review. *See* 40 C.F.R. § 124.19(a) (noting that any person may petition the Board "to review any *condition* of the permit decision") (emphasis added); *see, e.g., In re Knauf Fiber Glass GmbH*, 8 E.A.D. 121, 161-62 (EAB 1999) (stating that the Board's

[20] The County's assertions are also inconsistent with the Intergovernmental Services Agreement, entered into by the Tribe and the County, which provides for a one-time expansion of the Facility's operation at any time after the first year of operations. *See* County Petition at 5-6; RTC at 4, 7 (A.R. 50, 53). The Board notes that the Intergovernmental Services Agreement is not included in the administrative record of this proceeding.

jurisdiction, and thus review power, is limited, extending only to those issues related directly to permit conditions that implement the federal program). Thus the County has failed to demonstrate that the Region erred in setting the Permit's effluent limitations, and it has failed to meet its burden to demonstrate that review of this issue is warranted.

The County also failed to demonstrate that the Region erred in its Response to Comments. Contrary to the County's statement that the Region "dodged" the County's comment challenging the Facility's treatment system, the Region in fact provided a detailed three-page response to the County's comment. RTC at 8-10 (A.R. 54-56); *see also* Region's Response at 49-50. Despite the Region's argument above that the County does not assert a specific condition of the permit for review, the Region nonetheless undertook a detailed explanation of the proposed Facility's treatment system, explaining why the Region has every expectation the treatment system will achieve compliance and even some of the reasons underlying Thunder Valley's past exceedances.[21] RTC at 8-10 (A.R. 54-56). The County does not address the

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[21] Upon closer inspection, the administrative record contains the following information that undercuts the County's assertions regarding Thunder Valley's performance:

> [Cease & Desist] orders are routinely issued by the [Regional Board] after a Reasonable Potential Analysis ("RPA") to provide the [Regional] Board with an enforceable compliance schedule for dischargers to comply with limitations for constituents identified by the RPA as having a reasonable potential to exceed water quality standards. It does not mean that the discharger has necessarily exceeded limitations for the constituents identified by the RPA.

Memorandum from George Harris, Hydroscience Engineers, Inc., to John Tinger, U.S. EPA, *Response to Technical NPDES Permit Comments for Buena Vista Rancheria* 3 (Feb. 7, 2006) (A.R. 1241). Indeed, the two orders that the County cites in its Petition, *see* County Petition at 7 nn.12-13, styled respectively as a cease and desist order (R5-2005-0033) and a time schedule order (R5-2010-0006), were each issued on the same day as the Regional Board issued an NPDES permit to the Thunder Valley WWTP facility. *Compare California Water Resources*

(continued...)

Region's response to its comments, and instead goes on to describe violations that the Thunder Valley facility has experienced over a period of several years. County Petition at 7. Here again, the County cannot meet its burden to demonstrate that review is warranted where it has not demonstrated why the Region's response to its objections or the Region's rationale for its decision is clearly erroneous or otherwise warrants review. *In re Phelps Dodge*, 10 E.A.D. at 508. To the extent that the County's request for review involves the Region's technical expertise, the County has failed to meet its particularly heavy burden that review of the Region's exercise of technical expertise is warranted. *See, e.g.*, *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3rd Cir. 1999).

3. *Friends of Amador County Has Not Demonstrated That the Region Clearly Erred in Identifying the Outfall Location, Defining the Receiving Water, Specifying Where Erosion Protection Measures Will Be Located, Or Deciding Not to Require a Monitoring Well to Assess the Effects of Contact Between Reclaimed Water and Potable Water*

Friends of Amador County asserts that the Permit fails to identify the location of the discharge outfall, and that the Permit also does not define the receiving waters, making the permit requirements for monitoring ten feet upstream and 100 feet downstream of the "'location

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[21](...continued)
Control Board, Central Valley Region, Cease and Desist Order No. R5-2005-0033 (Mar. 17, 2005) *and* Time Schedule Order No. R5-2010-0006 (Jan. 28, 2010) *to* Waste Discharge Requirements/Monitoring & Reporting Program/NPDES Permit No. CA0084697 (Mar. 17, 2005) *and* Waste Discharge Requirements/Monitoring & Reporting Program/NPDES Permit No. CA0084697 (Jan. 28, 2010). All of the Regional Board's adopted orders pertaining to the Thunder Valley Casino Wastewater Treatment Plant are *available at* http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/ (search for United Auburn Indian Community, Thunder Valley Wastewater Treatment Plant under the Placer County heading).

where the discharge enters the receiving waters' * * * entirely unclear and problematic." Friends of Amador County Petition at 1-2 (quoting Fact Sheet at 3 (A.R. 27)). Friends of Amador County further claims that this lack of specificity makes it difficult to ascertain where erosion protection measures, intended to prevent erosion from the discharge point to the receiving water, will be located. *Id.* at 2. Finally, Friends of Amador County asserts that the Permit's reclaimed water limitation terms may negatively impact potable water based on contact between reclaimed surface water and groundwater. *Id.* at 2-3.

At the outset, the Board notes that Friends of Amador County is proceeding pro se, representing itself in its appeal of this NPDES permit. While the Board endeavors to construe liberally petitions such as the Friends of Amador County's, the burden of demonstrating that review is warranted still rests with the petitioner challenging the permit decision. *See, e.g.*, *Circle T Feedlot*, slip op. at 6, 14 E.A.D. ___. In particular, the petitioner must "comply with the minimal pleading standards and articulate *some* supportable reason why the [r]egion erred in the permit decision" in order for the Board to meaningfully address the petitioner's concerns. *In re Beckman Prod. Servs., Inc.*, 5 E.A.D. 10, 19 (EAB 1994), *quoted in Chukchansi*, slip op. at 7, 14 E.A.D. ___ (emphasis in original).

The Region analyzes Friends of Amador County's comments, but states that Friends of Amador County did not raise below its claims that the location of the discharge outfall is not clearly identified, the receiving water is not clearly defined, and that the area referred to in the permit term requiring erosion protection measures is unclear. The Region argues that since these issues were not raised during the public comment period, Friends of Amador County is precluded from raising them here. Region's Response at 38-39 & n.100, 43 (referencing RTC document

and stating that none of Friends of Amador County's comments address the location of the outfall, definition of the receiving water, or location of erosion protection measures); *id.* at 40-44 (responding to Friends of Amador County's substantive concerns regarding monitoring requirements and erosion protection).

The Board agrees with the Region that these issues were not preserved for review. As this Board has stated before, a clear goal of the public comment process is to provide the Region the opportunity to respond to and address concerns identified in a draft permit prior to issuing a final permit. *See, e.g.*, *In re Upper Blackstone Water Pollution Abatement Dist.*, NPDES Appeal Nos. 08-11 to 08-18 & 09-06, slip op. at 78 (May 28, 2010), 14 E.A.D. ___ (citing cases). Friends of Amador County has not established that these concerns were identified prior to the Region's issuance of the Permit, and thus Friends of Amador County cannot demonstrate that the Board should review these issues.[22]

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[22] The Region nonetheless addresses Friends of Amador County's substantive arguments in its response. Region's Response at 39-44. The Region acknowledges that the permit's weekly water quality monitoring requirements at locations ten feet upstream and 100 feet downstream of the point where the discharge enters the receiving waters are defined in relation to the outfall, which is located upstream and thus may cause confusion. *Id.* at 41. The Region continues that had a commenter pointed this out the Region could have clarified the locations in its response to comments, but that it would not have modified the permit terms. *Id.* The Region further explains that Friends of Amador County's concerns about the specific water quality monitoring locations upstream and downstream of the discharge outfall are addressed by the fact that the effluent is required to meet all effluent limitations in the permit at the Facility, without dilution, in order to protect downstream state water quality standards, thus ameliorating Friends of Amador County's monitoring concerns. *Id.* at 41-42. Similarly, the Region substantively addresses Friends of Amador County's concerns regarding the location of the erosion control measures, again acknowledging that while the erosion protection condition "might have been drafted in more specific terms," the permit condition applies to the entire length of the vegetated swale, from the outfall at the Facility to its terminus at Coal Mine Road, and is designed to protect the wetlands, located in the northwest corner of the property adjacent to Coal Mine Road, from erosion or increased sedimentation due to discharges from the Facility. *Id.* at 43-44.

Similarly, Friends of Amador County has not met its burden to demonstrate that review of the Permit's reclaimed water limitation terms is warranted. Friends of Amador County requests that Permit be modified to require the addition of at least one monitoring well, vaguely asserting that the permit limitations regarding reclaimed water "deal with surface contact of reclaimed water with potable water,"[23] and further alleging that surface water that goes into the ground "could quite likely be linked to tainted domestic wells." Friends of Amador County Petition at 2. The Region asserts, and the Board agrees, that the comments Friends of Amador County claims preserve this issue for review do not specifically address the Permit's reclaimed water limitations. Region's Response at 46-47 (referencing RTC at 26-29, 35). Even construing Friends of Amador County's petition liberally, Friends of Amador County cannot establish that the comments it references specifically raise this issue and thus Friends of Amador County has not complied with minimal pleading standards.[24] *Beckman*, 5 E.A.D. at 19; *see also In re City of*

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[23] The County asserts in its petition for review a related claim, stating that the Region's conclusions regarding groundwater testing are inaccurate. County Petition at 9. The County attempts to demonstrate that the Region contradicted itself in the response to comments, construing the Region's statement that it was not aware of any wells used to evaluate groundwater, RTC at 29 (A.R. 75), as inconsistent with a response to another comment that the Region does not believe the casino will be utilizing contaminated drinking water. County Petition at 9; RTC at 36 (A.R. 82). Here the County fails to fulfill the threshold procedural requirements required to obtain Board review, because it does not include specific information supporting its allegations. *See Phelps Dodge*, 10 E.A.D. at 508. The Region's one-paragraph attempt to demonstrate the Region's inconsistency in its responses to comments must fail because the County provides nothing more than vague allegations in its request for review of this issue. *In re New England Plating Co.*, 9 E.A.D. 726, 737 (EAB 2001) (explaining that "to warrant review allegations must be specific and substantiated").

[24] Comment 17a and the Region's corresponding response do address groundwater quality, and the Region explains that no adverse impacts on groundwater are expected. *See* RTC at 35 (noting that effluent from the Facility must meet all water quality standards for the protection of beneficial uses of the receiving waters "at the end of the pipe," and that the effluent (continued...)

Pittsfield, NPDES Appeal No. 08-19, at 6 (EAB Mar. 4, 2009) (Order Denying Review), *aff'd*, 614 F.3d 7, 11-13 (1st Cir. 2010) ("Mere allegations of error are insufficient to support review.") (citations omitted).

4. *The County and Friends of Amador County Have Not Demonstrated That the Region Clearly Erred By Declining to Include in the Permit a Condition to Address Potential Flooding of Roads Leading to the Casino, Including Coal Mine Road*

Petitioners Friends of Amador County and the County allege that the operation of the Facility will exacerbate flooding along Coal Mine Road and roads leading to the proposed casino. Friends of Amador County Petition at 3 (stating that flooding will be "greatly exacerbated by wastewater discharge of the magnitude allowed by the permit"); County Petition at 8 (stating that a gaming facility will exacerbate already severe flooding on Coal Mine Road)

As an initial matter, the Region explains that no provision of the Clean Water Act or the corresponding NPDES permitting regulations require a permit issuer to include permit conditions to address downstream impacts on roadways due to flooding. Region's Response at 35; *see also Phelps Dodge*, 10 E.A.D. at 514 ("Under the regulations governing this proceeding, we have jurisdiction to decide challenges to NPDES permit conditions. We are not at liberty to resolve every environmental claim brought before us in a permit appeal but must restrict our review to conform to our regulatory mandate."). The Region also acknowledges that it did not explain in the response to comments document that the NPDES program does not require the Region to address potential impacts due to increased flows from the Facility, but goes on to assert that this

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[24](...continued)
is designed to meet drinking water quality standards as defined by the beneficial use "MUN" in the Basin Plan); *see also* Fact Sheet at 3-4.

amounts to harmless error. *See* Region's Response at 36. Nonetheless, the Region notes that although not required by the NPDES permit, the Facility will contain an underground detention system to retain flows during peak runoff events. *See id.* at 37; RTC at 27 (A.R. 73).

The County's claim that the Region clearly erred because its analysis, which compared existing flows in Jackson Creek to the increase in flows that may result from the Facility, did not address flooding on Coal Mine Road must fail. The County does not demonstrate why the Region's decision is clearly erroneous given that the NPDES program does not regulate potential flooding impacts. In addition, to the extent that the County complains that the Region ignored its comment,[25] the Board notes that while the permitting regulations require a permit issuer to "briefly describe and respond to all significant comments" submitted on a draft permit during the public comment period, 40 C.F.R. § 124.17(a)(2), a permit issuer need not respond to comments in an individualized manner, nor does it require the permit issuer's response to be of the same length or level of detail as the comment. *E.g. Circle T*, slip op. at 30, 14 E.A.D. ___ (citing cases). Without more, the County cannot sustain its burden of demonstrating review of this issue is warranted.

The Board similarly denies Friends of Amador County's request for review of annual flooding impacts on local roads. Friends of Amador County's petition contains only general statements about annual flooding, and thus fails to meet the threshold procedural requirements petitioners must satisfy to obtain Board review. In addition, as set forth above, flooding concerns fall outside the ambit of the NPDES program and thus outside of Board review, *see Phelps*

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[25] The County appears to complain that the Region responded to County comment 8a, but did not specifically respond to the County's comment 8h. County Petition at 8.

Dodge, 10 E.A.D. at 514.

5. *Mr. Villa and the Ione Band Have Not Demonstrated That the Region Clearly Erred By Declining to Address the Facility's Downstream and Offsite Impacts in the Permit*

Mr. Villa and the Ione Band both challenge impacts the permitted Facility may have on cultural sites downstream and cultural sites outside the Rancheria. Petition for Review at 8 (Aug. 14, 2010) ("Ione Band Petition"); Villa Petition at 2. In this instance both Petitioners have failed to meet the burden of demonstrating that review is warranted.

The Ione Band's challenge to the Facility's potential downstream and offsite impacts on cultural sites is exactly two sentences long, first repeating the comment it filed during the public comment period, and then simply repeating the Region's response. This Board has consistently denied petitions for review that merely restate, reiterate, incorporate, or cite comments previously submitted on the draft permit. *In re Peabody W. Coal Co.*, NPDES Appeal Nos. 10-15 & 10-16, slip op. at 7-8 (Aug. 31, 2011), 15 E.A.D. ___ (citations omitted). Here, the Board denies the Ione Band's petition for review because the Ione Band cannot demonstrate that it did more than repeat comments filed below.

Mr. Villa challenges the Region's analysis of the impacts flows from the proposed Facility will have on a cultural site, CA-AMA-56, eligible for listing in the National Register of Historic Places that is located downstream from the Facility. Villa Petition at 2. Specifically, Mr. Villa states that the Region's analysis is flawed because it does not account for a large portion of the effluent from Lake Amador that is pumped out of Jackson Creek before it reaches CA-AMA-56, that the Region failed to conduct a hydraulic analysis to determine the true impacts of the flows in conjunction with peak storm events, and that the Region did not analyze the

geometry of the channel that will receive discharge from the outfall. *Id.*

The Region responds that the issue is not properly preserved for review before the Board because it was not raised in the public comments below. Region's Response at 31-32. The Region explains that Mr. Villa's assertions regarding the Region's analysis, namely that it should have accounted for withdrawals from Jackson Creek for agricultural use, that the Region should have conducted an analysis of a 10-year storm event in addition to a 100-year storm event, and that the Region should have included more extensive modeling and analysis constitutes a challenge to the Region's technical decision not to include more sophisticated analysis of flow increases to demonstrate that there would not be an impact on CA-AMA-56. *Id.* at 34-35.

The Board agrees with the Region that the issue of downstream impacts on CA-AMA-56 due to increased flows from the Facility was not preserved for review because it was not raised during the public comment period below. *See* 40 C.F.R. § 124.19(a). Mr. Villa does not identify a place in the administrative record where either his comment was filed below, or that the Region responded to it. The intent of the rules set forth in part 124 is to ensure that the permitting authority has the first opportunity to address any objections to the permit. *Phelps Dodge*, 10 E.A.D. at 508; *accord In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 (EAB 1999). The Board cannot sustain Mr. Villa's challenge to the Region's determination of impacts on CA-AMA-56 due to increased flows from the Facility.

In addition, the Board agrees with the Region that even if the issue were properly preserved on appeal, Mr. Villa's challenges to the Region's decisions regarding analysis of flow impacts on CA-AMA-56 constitute a challenge to the Region's technical expertise. *See Phelps Dodge*, 10 E.A.D. at 517-18 (noting that in technical areas involving water quality protection

measures, the Board traditionally defers to the expertise of the Region in the absence of compelling evidence or argument to the contrary). Mr. Villa does not meet the particularly heavy burden a petitioner challenging a permit issuer's technical expertise must meet in order to demonstrate review is warranted.

C. *The Region Satisfied its Obligations Under the National Historic Preservation Act*

When federal laws other than the CWA are applicable to the issuance of an NPDES permit, EPA must follow those laws' procedures. 40 C.F.R. § 122.49. In this instance, section 106 of the National Historic Preservation Act, 16 U.S.C. §§ 470 to 470x-6, and its implementing regulations codified at 36 C.F.R. part 800, required the Regional Administrator, prior to issuing the NPDES permit at issue, "to adopt measures when feasible to mitigate potential adverse effects" of the NPDES permit-related activity on properties listed or eligible for listing in the National Register of Historic Places. 40 C.F.R. § 122.49(b). Mr. Villa and the Ione Band challenge several aspects of the Region's compliance with section 106 of the National Historic Preservation Act. For the reasons set forth below, the Board denies review of these issues.

Both the Ione Band and Mr. Villa challenge the Region's conclusion that only two areas of the project site are eligible for listing in the National Register, Buena Vista Peaks and the Upüsüni Village, and instead claim that the entire project site is part of a single tribal cultural property that is eligible for listing in the National Register. Ione Band Petition at 3-5; Villa Petition at 1; *see* Region's Response at 18-19. However, as the Region points out in its response, the Ione Band's and Mr. Villa's challenge to the Region's determination that only two of the

three areas located on the project site are eligible for listing in the National Register cannot survive because they both fail to identify how the Region clearly erred in making this determination. Region's Response at 19-20.

The Ione Band repeats its own comments verbatim and then quotes extensively from the Region's response to comments and the HPTP.[26] Ione Band Petition at 3-5 (quoting RTC at 42 (A.R. 88) and HPTP at 13). The Ione Band also asserts that the Region erred when it concluded that the proposed project would not restrict access to either of the two properties eligible for listing, that it would not alter existing routes to the Buena Vista Peaks, and that the proposed project would not block the visual connection between the Buena Vista Peaks and Upüsüni Village. *Id.* at 5. Mr. Villa states in his comments that the middle portion of the project site "isn't lacking cultural sensitivity, rather it contains less archaeological materials than sites located adjacent to the section of land for the proposed project." Villa Petition at 1. Mr. Villa also states the proposed project will destroy the historic properties and the interconnectedness of the properties. *Id.*

The Ione Band's and Mr. Villa's assertions must fail. First, this Board has consistently denied review of petitions for review that merely restate their comments, and federal courts have upheld the Board's decision in these cases. *E.g.*, *In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review), *aff'd*, 614 F.3d 7, 11-13 (1st Cir. 2010), *cited in In re Peabody W. Coal Co.*, NPDES Appeal Nos. 10-15 & 10-16, slip op. at 7-8 & n.3 (Aug. 31, 2011), 15 E.A.D. ___. Second, the only support the Ione Band provides for its assertions regarding the Region's findings are unsubstantiated claims that EPA contradicted itself

[26] *See supra* note 10.

in a statement in the Fact Sheet accompanying the Permit, followed by an unsupported claim that the proposed project would block access to the Buena Vista Peaks via the historical aboriginal path of access from the north. *Id.* at 5-6. Similarly, Mr. Villa's petition does not provide any supporting information to substantiate his allegations that there are archaeological materials in the site where the proposed project will be located, nor does it address the Region's determination that the proposed project site does not have any intact or potentially eligible cultural resources. *See* RTC at 38, 42 (A.R. 84, 88). The Ione Band's and Mr. Villa's petitions do not include specific information to support its allegation, or sufficiently demonstrate how the Region erred in responding to its comments. *See Phelps Dodge*, 10 E.A.D. at 508.

The Ione Band also asserts that the Region failed to conduct archaeological testing of the proposed project site, noting the Region's determination that the proposed project site does not have any intact or potentially eligible cultural resources and the Region's confirmation that the central portion of the area of potential effects is not included within the recorded site area for the Buena Vista Peaks or the Upüsüni Village. Ione Band's Petition at 6. The Ione Band asserts this area where the proposed facility will be built will almost certainly be damaged based on the inclusion of a provision in the HPTP that mandates the use of a professional archaeological firm to conduct a geographical study within the footprint of the proposed project. *Id.* at 7 (quoting HPTP pp. 16-17, 20).

However, the Ione Band never acknowledges the Region's response to its comment, *see* RTC at 48-49 (A.R. 94-95), or explains why the Region's response is inadequate. In particular, the Region notes that the inclusion of a provision in the Memorandum of Agreement and accompanying HPTP to account for previously unidentified cultural resources is a common

practice encompassed in the NHPA implementing regulations. *See* RTC at 48 (citing 36 C.F.R. § 800.6(c)(6), which states that where signatories agree it is appropriate, the memorandum of agreement "shall include provisions to deal with the subsequent discovery or identification of additional historic properties affected by the undertaking"). The Ione Band makes no effort to illustrate why the Region's response is deficient, and the mere allegations of error are not enough to demonstrate that review of this issue is warranted. *See, e.g.*, *In re City of Moscow*, 10 E.A.D. 135, 172 (EAB 2001).

Mr. Villa makes several related assertions in his petition, namely that the HPTP is inadequate and was developed too hastily, the consulting parties were not provided information regarding the change in the scope of the project throughout the process, and the planting recommendations contained in the HPTP will impede the ability to see to and from the Buena Vista Peaks and the historic inhabitation area and cemetery area of the property. Villa Petition at 2-3. All three of Mr. Villa's assertions lack the requisite specificity to demonstrate that the Region's response to these objections is clearly erroneous or otherwise warrants review.

Regarding the hasty development of the HPTP, the Region responds to Mr. Villa by noting that the Region engaged in an intensive section 106 consultation process that spanned three years and included multiple meetings between the consulting parties and the preparation of voluminous materials to support the section 106 process. RTC at 39-40 (A.R. 85-86). In addition, the Region notes that it solicited feedback from participants "throughout the consultation process," and meaningfully consulted with affected parties to meet its responsibilities under section 106 of the NHPA. *Id.* at 40 (A.R. 86). Mr. Villa's comments seem to focus exclusively on the HPTP, which was developed in conjunction with the Memorandum of

Agreement that represents the conclusion and resolution of the section 106 process. *See* 36 C.F.R. § 800.6(c). Mr. Villa does not acknowledge the Region's response, and instead he asserts that there was only one opportunity to comment on the proposed HPTP. Villa Petition at 2.

With respect to the planting recommendations in the HPTP, the Region explained in its Response as well as its response to comments that upon finding that the undertaking would have an adverse impact on the Buena Vista Peaks and Upüsüni Village based on visual and audible intrusions, the Region developed the landscape plan that includes the planting recommendations to mitigate these effects. RTC at 48 (A.R. 94); Region's Response at 25. Under the landscape plan the Tribe intends to plant native trees and shrubs in a manner that will obscure views of the project facility from the cemetery but not block the views of the Buena Vista Peaks from the cemetery. *Id.*; Region's Response at 25. Shrubs will also be used to mitigate automobile sounds and to obscure views of automobiles from the cemetery. *Id.* Mr. Villa does not acknowledge the Region's response to his comments. Rather, he asks rhetorically how it is appropriate to obstruct the view of the proposed project when it is that project that will continue to impede the view Mr. Villa tried to protect by altering the size of the casino project. Villa Petition at 2.

Finally, with respect to Mr. Villa's claim that the Region never made available the details of project changes until the meetings to discuss the HPTP, the Region disagreed that it did not provide documents to stakeholders during the consultation and comment period. RTC at 51 (A.R. 97); *see also* Region's Response at 51. Specifically, the Region explained that at the meeting initiating the section 106 process held on May 1, 2007, consultants for the Tribe distributed maps of the area, a description of the project site, the proposed project, and a visual

rendering of the revised, smaller project. RTC at 51-52 (A.R. 97-98); Region's Response at 51-52. The Region also avers that it distributed to all consulting parties, including Mr. Villa, a hard copy of its October 8, 2008, letter from the Region to the SHPO containing several attachments describing the project and the area of potential effects. RTC at 51-52 (A.R. 97-98) (listing documents provided in October 8, 2008 letter to SHPO); *see id.* at 40 (A.R.86); Region's Response at 51-52. EPA further states that it provided full and complete descriptions of the project throughout the consultation process, *see* RTC at 40 (A.R. 86), and also coordinated a site visit in March 2009 that allowed consulting parties to physically walk the site, wherein the boundaries of the proposed project were staked out at the actual locations, and helium-filled balloons were raised to the height of the proposed buildings to provide an actual visual outline of the project. *See id.*; Region's Response at 52. The Region also notes that it distributed a copy of the table entitled "Comparison of TEIR Project vs. Current Project" to all section 106 consulting parties on March 25, 2009, and subsequently via email on April 14, 2009, which provided a direct comparison of the original design plans and the current, smaller design that was incorporated into the 2009 proposed permit. RTC at 40 (A.R. 86); Region's Response at 52; *see* Project Comparison Chart. Mr. Villa counters that formal changes to the proposed project due to ongoing negotiations never occurred, and consulting parties were never provided documentation of project changes due to the Tribe negotiating a smaller facility with the County. Villa Petition at 2-3.

In all three claims Mr. Villa makes in his petition, Mr. Villa makes assertions that not only are vague and unsubstantiated, but also fail to specify why the Region's substantive response to his comments is clear error or otherwise warrants review. In order to obtain review

of an issue, the petitioner must provide specific and substantiated reasons justifying Board review. *E.g., In re Mille Lacs Wastewater Treatment Facility*, 11 E.A.D. 356, 376 (EAB 2004); *In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 708 (EAB 2002); *In re New England Plating Co.*, 9 E.A.D. 726, 737 (EAB 2001). In this instance, Mr. Villa cannot meet his burden to demonstrate that review of these issues is warranted.

Finally, the Board must also reject the Ione Band's claims that the Region erred in finding that the proposed project would not damage the Upüsüni Village. Ione Band Petition at 8-9. The Ione Band repeats its comments that it is concerned that given the small size and narrow shape of the Rancheria, that construction equipment and personnel could actually be excluded from historic property identified as the Upüsüni Village, and also alleges that the Region failed to respond to this comment. *Id.* The Region responded that it did not address the Ione Band's comment in its response to comments because there was nothing specific to respond to, other than the Ione Band's question about whether the provision referenced in the HPTP, stating that "[n]o construction personnel, vehicles, or equipment are allowed within the restricted area," was true. Region's Response at 27.

Without more, the Ione Band cannot demonstrate that Board review is warranted. The Ione Band has not provided any support for its allegation that the Upüsüni Village will be damaged as a result of construction personnel and equipment inadvertently entering the area, and further, the Ione Band essentially repeats its comments in its petition for review. In both repeating its comments in its petition for review and in failing to specify any substantive reason why the Region's response or rationale for its decision is clear error, the Ione Band has failed to meet the threshold requirements to obtain Board review. *E.g.*, *City of Pittsfield*, NPDES Appeal

No. 08-19, at 6-7 (EAB Mar. 4, 2009) (Order Denying Review) (noting that generalized objections or vague and unsubstantiated arguments fall short, and continuing that "[b]ased on these principles, a long and consistent line of Board authority has required that petitioners do more than cite, attach, incorporate, or reiterate comments previously submitted on the draft permit").

VII. Conclusion and Order

For all of the reasons provided, the Board denies review of the issues addressed above. So ordered.[27]

ENVIRONMENTAL APPEALS BOARD

Date: September 6, 2011

By: Anna L. Wolgast
Anna L. Wolgast
Environmental Appeals Judge

[27] The two-member panel deciding this matter is comprised of Environmental Appeals Judges Anna L. Wolgast and Kathie A. Stein. Environmental Appeals Judge Charles J. Sheehan did not participate in this decision.

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Denying Review in the matter of Buena Vista Rancheria Wastewater Treatment Plant, NPDES Appeal Nos. 10-05, 10-06, 10-07 & 10-13, were sent to the following persons in the manner indicated:

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Dated: 9-6-11

Mildred Johnson for
Annette Duncan
Secretary