

APPENDIX 1



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

July 5, 2011

Sent via electronic and overnight mail

U.S. Environmental Protection Agency
Eurika Durr
Clerk of the Board
Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, DC 20005

Re: Buena Vista Rancheria Wastewater Treatment Plant, NPDES Appeal Nos. 10-05 - 10-07 & 10-13

Dear Ms. Durr:

Pending before the Environmental Appeals Board (Board) are four petitions filed in the above-referenced matter seeking review of a Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit issued by U.S. EPA Region 9 (Region) to the Buena Vista Rancheria of Me-Wuk Indians (Tribe) for a proposed casino project (proposed project) in Amador County, California. By this letter, the Region respectfully informs the Board of developments relating to the proposed project that have occurred subsequent to filing of the Petitions and the Region's Response to Petitions for Review.¹

National Historic Preservation Act Memorandum of Agreement

Two of the petitions pending before the Board challenge elements of the Region's compliance with the procedural requirements of Section 106 of the National Historic Preservation Act (NHPA). As explained in the Response to Petitions for Review, the Region determined that issuance of the federal NPDES permit was a federal undertaking subject to NHPA Section 106. Accordingly, as required by that statute, the Region engaged in a consultation process that included the California State Historic Preservation Office (SHPO), the Army Corps of Engineers (Corps), the Tribe, and all of the Petitioners. At the conclusion of this process, the Region entered into a Memorandum of Agreement (MOA) with the SHPO, the

¹ The four petitions were filed by Glenn Villa, Jr. (No. 10-05); County of Amador (No. 10-06); Friends of Amador County (No. 10-07); and Ione Band of Miwok Indians (No. 10-13).

Corps and the Tribe to resolve adverse effects on historic properties that were identified during the consultation. Under the NHPA Section 106 implementing regulations, such an MOA governs the undertaking, and the federal agency must ensure that the undertaking is carried out in accordance with the MOA. 36 C.F.R. § 800.6(c).

Under the NHPA MOA, the parties agreed to a variety of provisions relating to the Tribe's construction of the proposed project. Of relevance here, the parties established a process for EPA to issue Notices to Proceed (NTP) with construction of segments of the proposed project upon the occurrence of one or more specified conditions. These conditions were largely established as an additional safeguard to ensure that previously unevaluated historic properties did not exist at the site of, or would not be adversely affected by, construction of the project segment at issue.²

On December 10, 2010, the Tribe submitted to the Region the completed fieldwork phase of the Archaeological Testing Program established under the NHPA MOA and its related Historic Properties Treatment Plan. The Region has consulted with the SHPO and the Corps and believes that the Archaeological Testing Program's findings are acceptable, thus satisfying Section IV.C of the governing MOA and establishing a clear basis for issuance of a NTP.

By letter dated May 26, 2011, the Tribe requested that the Region issue a NTP as soon as possible. (Enclosure 1, Letter from Arnold D. Samuel, General Counsel, Buena Vista Rancheria Me-Wuk Indians, to Alexis Strauss, Director, Water Division, U.S. EPA, Region 9). As explained in this letter and in the attached supporting correspondence from the bank assisting the Tribe with its financing, the proposed project requires financing from a volatile high-yield bond market which "risks closing at any time," thus posing a risk to the "ultimate viability of the project." Enclosure 1 at pp. 1 and 2. Given these potential risks to the Tribe's financing – and

² AR at 1025-1035 (MOA at 3-4). Specifically, Section IV of the MOA provides:

IV. NOTICES TO PROCEED WITH CONSTRUCTION

EPA may issue Notices to Proceed (NTP) under any of the conditions listed below. Issuance of a NTP by the EPA does not constitute and shall not be interpreted to be authorization to discharge dredged and/or fill material pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344.

- A. EPA, in consultation with SHPO, determines that there are no unevaluated historic properties within the APE for a particular construction segment; or
- B. EPA, in consultation with SHPO, determines that there are no historic properties within the APE for a particular construction segment; or
- C. EPA, in consultation with SHPO and signatories, determines that for a particular construction segment: (1) the fieldwork phase of the "Archaeological Testing Program," provision of the HPTP has been completed; and (2) EPA has accepted a summary of the fieldwork performed and a reporting schedule for that work.
- D. EPA, in consultation with SHPO and signatories, determines that conditions resulting in the issuance of a "Stop Work," under the HPTP have been resolved.

thus to the proposed project as a whole – the Tribe urged the Region to issue the NTP, which is the only barrier to commencement of construction of the proposed project, as soon as possible.

Because the Tribe has satisfied the condition at Section IV.C of the NHPA MOA, the Region believes the Tribe is eligible for a NTP as contemplated by the governing MOA. In addition, in light of the information contained in the Tribe's letter, the Region believes it is appropriate to issue the NTP expeditiously. Following issuance of the NTP, the Tribe would be able to commence construction of the proposed project consistent with the terms of the NHPA MOA.³ The Region by this letter informs the Board that we intend to issue a NTP to the Tribe no sooner than 21 days from the date of this letter.

Federal Court Litigation Re: the Buena Vista Rancheria

In addition, as a courtesy, the Region would like to bring to the Board's attention a recent decision in a federal court litigation currently ongoing between the County of Amador (County), one of the Petitioners before the Board, and the U.S. Department of the Interior (DOI). *Amador County v. Salazar*, No.10-5240 (D.C. Cir. May 6, 2011) (Enclosure 2). We note that the Region had been unaware of this litigation until very recently when the Tribe and its project developer informed the Region of the D.C. Circuit's decision.

Amador County involves a challenge by the County to DOI's approval through inaction of an amendment to the Tribe's gaming compact with the State of California. The County challenged the Compact Amendment on the basis that, as alleged by the County, the Buena Vista Rancheria fails to qualify as "Indian land" as required under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701, *et seq.* *Amador County*, slip op. at 6. The district court had dismissed the County's case without addressing the merits of the "Indian land" issue, finding that DOI's approval of the gaming compact was unreviewable. *Amador County v. Kempthorne*, 592 F. Supp.2d 101, 106-07 (D. D.C. 2009). The D.C. Circuit reversed and remanded for consideration of the merits, holding that judicial review of DOI's action was available consistent with both IGRA and the Administrative Procedure Act. *Amador County*, slip op. at 11-17, 20.

We note that in its Petition for Review of the instant NPDES permit and in certain related filings with the Board, the County asserts an argument that the Buena Vista Rancheria is not Indian country for purposes of the Region's NPDES permitting authority. The Region addressed this argument in its Response to Petitions for Review as well as in responding to the County's related submissions. Because the federal district and circuit court decisions in *Amador County* address solely jurisdictional and judicial reviewability issues – and do not reach the merits of the "Indian land" issue – they do not affect the Region's position regarding the land status of the Buena Vista Rancheria and the Region's authority to issue the NPDES permit for the proposed project. In particular, it continues to be EPA's position that the Rancheria is an Indian reservation, and thus Indian country, for purposes of federal NPDES permitting authority. The Region notes that this position is entirely consistent with that of the United States as a whole

³ The Region notes that the CWA does not prohibit the commencement of construction of a facility prior to final issuance of an NPDES permit for discharges of wastewater from the constructed facility. *Natural Resources Defense Council, Inc. v. U.S. EPA*, 822 F.2d 104, 128 (D.C. Cir. 1987).

regarding the Rancheria's land status, as evidenced by the U.S. Department of Justice's filings in the *Amador County* case.

Respectfully submitted,



Jo Ann Asami
Assistant Regional Counsel
EPA Region IX
75 Hawthorne St.
San Francisco, CA 94105
(415)972-3929
asami.joann@epa.gov

Of Counsel:
Dawn Messier
Tod Siegal
Office of General Counsel, U.S. EPA
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
messier.dawn@epa.gov
siegal.tod@epa.gov

Enclosures

cc: Mr. Arnold D. Samuel
General Counsel
Buena Vista Rancheria of Me-Wuk Indians
P.O. Box 62283
Sacramento, CA 95816
arnold@buenavistatribe.com

Ms. Cathy Christian
Mr. Kurt R. Oneto
Neilsen, Mersamer, Parrinello, Mueller & Naylor, LLP
Legal Counsel for County of Amador
1415 L Street, Suite 1200
Sacramento, CA 95814
cchristian@nmgovlaw.com

Mr. Jerry Cassesi
Chairman, Friends of Amador County
100 Cook Road
Ione, CA 95640
lucydog@wildblue.net

Mr. Glen Villa, Jr.
901 Quail Court
Ione, CA 95640
glenvilla@sbcglobal.net

Mr. William Wood
Holland & Knight LLP
Legal Counsel for Ione Band of Miwok Indians
633 W. Fifth Street, 21st Floor
Los Angeles, CA 90071
William.wood@hklaw.com