

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

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

**BUENA VISTA RANCHERIA OF ME-WUK INDIANS’  
MOTION FOR LEAVE TO INTERVENE AND OPPOSE  
MOTIONS TO STAY ISSUANCE OF NOTICE TO PROCEED**

The Buena Vista Rancheria of Me-Wuk Indians (“Buena Vista”) respectfully moves the Environmental Appeals Board (“Board”) for leave to intervene in the above-captioned appeal and to oppose the Motions to Stay EPA’s issuance of a Notice to Proceed filed by Petitioner Amador County, Dkt. No. 22 (July 15, 2011), and by Petitioner Ione Band of Miwok Indians, Dkt. No. 24 (July 20, 2011), respectively.<sup>1</sup> Currently pending before the Board are four petitions seeking review of a Clean Water Act (“CWA”) National Pollutant Discharge Elimination System (“NPDES”) permit issued by U.S. EPA Region 9 (“Region”) in connection with wastewater treatment plant discharge associated with Buena Vista’s proposed casino project in Amador County, California. On July 5, 2011, the Region gave the Board notice that it planned to issue a Notice to Proceed authorizing Buena Vista to commence construction of the project, but not to commence any discharge of wastewater until the Board’s review is completed. *See* Dkt. No. 18.

---

<sup>1</sup> Petitioners Friends of Amador County and Glen Villa, Jr. have also written letters to the Board asking it to prevent issuance of the Notice to Proceed. *See* Ltr. from J. Cassesi to EAB, Dkt. No. 21 (July 13, 2011); Ltr. from G. Villa to EAB (July 12, 2011) (not docketed). To the extent the Board deems these letters to be motions to stay or for other relief, Buena Vista moves for leave to intervene to oppose those requests as well.

In response, Petitioners have filed Motions asking the Board to stay the Region's action. As the permit holder whose interests would be directly and adversely affected by the relief sought by Petitioners, Buena Vista seeks leave to intervene in this appeal and oppose the Motions to Stay.

### **BACKGROUND**

More than six years ago, Buena Vista proposed to construct a casino on the Buena Vista Rancheria in Amador County, California. In May 2005, Buena Vista applied to the Region for a NPDES permit for discharge from a wastewater treatment plant to be built on the Rancheria in support of the proposed casino. AR 101-12. The Region issued a proposed draft permit in December 2005 and received public comments, including the suggestion that the Region conduct a consultation under the National Historic Preservation Act ("NHPA"), 16 U.S.C. 470 *et seq.* AR 75.

The Region initiated NHPA consultation with appropriate parties, including Buena Vista, the California State Historic Preservation Office ("SHPO"), and other Tribes. AR 1301-02. Applying the NHPA regulations, the Region determined that the cultural affiliation between two cultural resources identified as "historic properties" may be adversely affected as a result of visual and audible intrusion from the proposed casino. AR 88-89. After being invited to participate in resolving those adverse effects, the Advisory Council on Historic Preservation concluded that its participation was not needed. Thereafter, in accordance with 36 C.F.R. § 800.6(c), the Region, the Army Corp of Engineers, the SHPO, and Buena Vista executed a Memorandum of Agreement ("MOA") to resolve the identified adverse effects. AR 1347-57. Under the NHPA regulations, the MOA "evidences" the Region's "compliance" with the NHPA and its regulations, and the MOA "shall govern" the historic preservation issues in the project. *See* 36 C.F.R. § 800.6(c).

In August 2009, the Region re-proposed the NPDES permit and sought additional public comments. AR 514-33; AR 554. The Region made certain changes and issued the final permit on June 22, 2010. AR 1-21. Four petitions to review the permit were submitted to the Board, each challenging various conditions of the NPDES permit under the CWA. In addition, Petitioner Amador County argues that the Region does not have jurisdiction on the theory that the Buena Vista Rancheria is not in Indian country. *See* Dkt. No. 2. Petitioners Glen Villa and the Ione Band of Miwok Indians contend that the Historic Properties Treatment Plan adopted by the MOA is inadequate. *See* Dkt. Nos. 1, 6.

Although certain conditions of the CWA permit are stayed during this Board's review, 40 C.F.R. § 124.16, the petitions do not preclude Buena Vista from commencing construction of the casino complex. The NPDES permit is necessary only to discharge wastewater; it is not a prerequisite to construction. *Natural Resources Defense Council v. EPA*, 822 F.2d 104, 130 (D.C. Cir. 1987) ("although issuance of a discharge permit is an absolute precondition to operation of a facility, we are persuaded that the NPDES process does not constitute sufficient federal involvement to 'federalize' the private act of construction"). The only legal barrier to construction derives from the MOA. It states that "EPA may issue Notices to Proceed" with work on a "particular construction segment" if "any" of the specified conditions are met. AR 1349-50 (MOA, at 3-4). As the Region has explained, on December 10, 2010, Buena Vista completed the fieldwork phase of the Archaeological Testing Program established in the MOA. *See* Region Ltr. to EAB, Dkt No. 18, at 2 (July 5, 2011). This satisfied one of the specified conditions and thus provides "a clear basis for issuance of the [Notice to Proceed]." *Id.* As a result, the only thing preventing Buena Vista from commencing construction now is actual issuance of the Notice to Proceed by the Region.

Nonetheless, as months pass, the Region still has not issued the Notice to Proceed. This delay threatens to cause serious harm to Buena Vista. As Buena Vista detailed in a letter to the Region dated May 26, 2011, the casino project requires financing from the high-yield bond market. *See* Dkt. No. 19. The high-yield bond market is extremely volatile and risks closing at any time. *Id.* In the wake of the financial crisis of 2008, the market was completely closed for a considerable period of time, and interest rates remained prohibitively high for even longer. *Id.* Although the market reopened, there is no guarantee that it will remain open or that favorable rates will remain available for long. *Id.* Buena Vista has an opportunity to secure financing now, but the opportunity may be lost at any time. *Id.* If Buena Vista cannot obtain financing, the project may be delayed indefinitely. *Id.* Buena Vista is currently responsible for approximately \$80 million in short-term loans to fund the project, and it must obtain long-term financing through the bond market soon. *Id.* Thus, a further delay in obtaining a Notice to Proceed would seriously harm Buena Vista, and would frustrate the Indian Gaming Regulatory Act's goals of "promoting tribal economic development, self-sufficiency, and strong tribal government." 25 U.S.C. § 2701.

On July 5, 2011, the Region gave notice to the Board that the Region "intend[s] to issue a [Notice to Proceed] to the Tribe no sooner than 21 days" from that date. Dkt. No. 18, at 3. The Region acknowledged that Buena Vista is "eligible" for a Notice to Proceed, and that the "potential risks to [Buena Vista's] financing" lead the Region to believe that "it is appropriate to issue the [Notice to Proceed] expeditiously." *Id.* at 3. Subsequently, Petitioners filed Motions to Stay the Region from issuing the Notice to Proceed. In order to defend its interest in obtaining the Notice to Proceed, Buena Vista now seeks leave to intervene and oppose the Motions to Stay.

## ARGUMENT

The Board's procedures do not address intervention before a petition has been granted; instead, the Board retains wide "discretion, where appropriate, to allow intervention." *See, e.g., In re USGen New Eng., Inc.*, NPDES Appeal No. 03-12, at 7 & n.13 (Feb. 20, 2004), *perm. remanded sub nom., In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490 (EAB 2006). The Board's practice is to allow permit holders to participate in and respond to challenges to their permits. *See* EAB Practice Manual at 45-47 (2010) ("The Board typically allows permittees not already a party to the proceeding to participate as interveners.") (citing cases). The Board should follow suit here and allow Buena Vista, as the permit holder, to intervene to protect its interests.

Buena Vista satisfies the factors typically considered in assessing intervention.<sup>2</sup> First, Buena Vista's motion is timely. *See* Fed. R. Civ. P. 24(a). Timeliness is not judged by any firm deadline but rather turns on equitable factors such as "(1) the stage of the proceeding at which the applicant seeks to intervene; (2) the prejudice to the other parties; and (3) the reasons for and length of the delay." *Tocher v. Santa Ana*, 219 F.3d 1040, 1044 (9th Cir. 2000); *cf.* 40 C.F.R. § 22.11(a) (motion to intervene filed after parties' exchange of information may be granted for "good cause").

Critically, "the focus is on the date the person attempting to intervene should have been aware his 'interest[s] would no longer be protected adequately by the parties,' rather than the date the person learned of the litigation." *Officers for Justice v. Civil Service Comm'n*, 934 F.2d

---

<sup>2</sup> *See* Fed. R. Civ. P. 24(a) (providing standard for intervention as of right); 40 C.F.R. § 22.11 (providing nearly identical standard for intervention in cases reviewable under the Consolidated Rules of Practice); *cf. In re Chemical Waste Mgmt.*, TSCA Appeal No. 84-3, 1 E.A.D. 851 (EAB 1984) ("The case law interpreting Rule 24 is therefore useful, although not necessarily dispositive, for purposes of construing § 22.11.").

1092, 1095 (9th Cir. 1991). Courts have permitted an applicant to intervene long after litigation commenced—indeed, even after judgment is entered—when there is a change in circumstances that affect the applicant. For example, an association’s post-judgment motion to intervene was deemed timely where “it only became apparent after the district court issued its final judgment that the City had failed to adequately represent [the association’s] interests.” *Tocher*, 219 F.3d at 1044-45; *see also, e.g., Civil Service Comm’n*, 934 F.2d at 1095 (reversing denial of police officer’s motion to intervene ten years after consent decree was entered because motion was filed just one month after officers’ association changed its position regarding the decree’s expiration date); *Low v. Altus Fin. S.A.*, 44 Fed. Appx. 282, 284 (9th Cir. 2002) (reversing denial of application to intervene filed three years after litigation commenced because applicant moved to intervene soon after learning that “its interests were not being adequately represented”).

In light of these standards, Buena Vista is moving to intervene quickly after a material change in circumstances—namely, Petitioners’ filing of Motions to Stay issuance of the Notice to Proceed. The earliest of these Motions was filed just over a week ago, a shorter time than is typically deemed timely. *Cf. Civil Service Comm’n*, 934 F.3d at 1096 (“Because [applicant] filed his motion to intervene *one month* after the [association] changed its position, we conclude [applicant’s] motion was timely.”) (emphasis added). Before that point, Buena Vista reasonably assumed that the Region would adequately represent its interests in defending the NPDES permit, which, in fact, the Region did in its responses to the petitions. Dkt. Nos. 12, 14, 17. Now, however, Petitioners have raised a new issue by seeking to prevent the Region from issuing a Notice to Proceed under the NHPA MOA, which, the County candidly concedes, “has no bearing on issues raised under the Clean Water Act.” Dkt. No. 22, at 5. Buena Vista’s motion to intervene therefore is timely.

Second, Buena Vista has direct and substantial interests related to the petitioners' claims because Buena Vista is the permit holder. *See* EAB Practice Manual at 45-47 (2010). If successful, the petitioners' claims would obviously impair Buena Vista's ability to protect those interests. *See* 40 C.F.R. § 22.11(a); Fed. R. Civ. P. 24(a). Buena Vista has already invested substantial sums in the casino project, and its ultimate success may depend upon the Notice to Proceed as a predicate to securing project financing. *See* Dkt. No. 19 (Letter from Buena Vista to Region (May 26, 2011)). Petitioners' Motions to Stay threaten to delay Buena Vista's ability to secure financing at a time when the markets are highly volatile. *See id.*

Third, intervention is warranted because the Region may not adequately represent Buena Vista's interests in obtaining the Notice to Proceed. *See* 40 C.F.R. § 22.11(a); Fed. R. Civ. P. 24(a). Generally, "the burden of showing inadequacy is 'minimal,' and the applicant need only show that representation of its interests by existing parties 'may be' inadequate." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001) (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). That minimal showing is often made even when a private party seeks to intervene to defend governmental action because, in many cases, "[t]he interests of government and the private sector may diverge." *Id.*<sup>3</sup> Here, the Region is balancing a broad set of public interests. In contrast, Buena Vista has a substantial, focused interest in

---

<sup>3</sup> *See, e.g., Natural Resources Defense Council v. Norton*, No. 05-16581, 2006 U.S. App. LEXIS 10087 (9th Cir. Apr. 19, 2006) (reversing denial of private contractors' motion to intervene in defense of federal biological opinion proposing changes to the operation of water storage and diversion projects); *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (contrasting a government's duty to represent the public interests with a private company's "more narrow . . . financial interest"); *Natural Resources Defense Council v. Kempthorne*, 539 F. Supp. 2d 1155, 1187-88 (E.D. Cal. 2008) ("the Federal Defendants cannot adequately represent the interests of absent contractors" who sought to defend against an Endangered Species Act suit, because the Federal Defendants "represent the government and a broad set of interests that are not the same as public or private water contractors").

obtaining the Notice to Proceed expeditiously in order to secure financing and commence construction. Although that interest is not necessarily in conflict with the Region's broader interests, Buena Vista is concerned that the Region may not advocate as forcefully or fully for issuance of the Notice to Proceed as Buena Vista will. This minimal showing is adequate to allow Buena Vista to intervene.

Finally, no one will be unduly prejudiced by Buena Vista's participation in this appeal. Buena Vista seeks to participate with regard to issues related to issuance of the Notice to Proceed. Opposition to issuance of the Notice to Proceed was first raised before this Board less than two weeks ago. Thus, Buena Vista's response to the Motions to Stay is timely and need not cause any delay in the Board's consideration of the Motions. In addition, to the extent Buena Vista's arguments implicate other issues raised by Petitioners, there is no risk of delay or prejudice because the Board has not yet acted on any of the petitions for review. To the contrary, Buena Vista's participation will aid the Board's decision-making by providing information and a perspective that would likely not be presented by the other parties to this appeal. Buena Vista has intimate knowledge of the project site and the project itself, which may be relevant to the Board's consideration.<sup>4</sup>

WHEREFORE, Buena Vista respectfully requests that it be given leave to participate in the above-captioned appeal and to file an Opposition to the Motions to Stay issuance of the Notice to Proceed.

---

<sup>4</sup> In the alternative, Buena Vista requests leave to participate as *amicus curiae*. See *In re Carolina Power & Light Co.*, 1 E.A.D. 425 (Adm'r 1978) (denying motion to intervene but allowing movant to participate as *amicus curiae*). Buena Vista asks the Board to accept the Opposition submitted with this Motion as Buena Vista's non-party brief.

Respectfully submitted,

/s/ David T. Buente, Jr.

David T. Buente, Jr.

Roger Martella, Jr.

Peter R. Steenland

Matthew D. Krueger

SIDLEY AUSTIN LLP

1501 K Street, N.W.

Washington, DC 20005

Telephone: (202) 736-8000

Facsimile: (202) 736-8711

Email: dbuente@sidley.com

rmartella@sidley.com

psteeland@sidley.com

mkrueger@sidley.com

*Counsel for the Buena Vista Rancheria of Me-Wuk  
Indians*

Date: July 22, 2011

