

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

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ENVIR. APPEALS BOARD

In re:)
)
)
Dry Creek Rancheria)
Wastewater Treatment Plant)
)
)
NPDES Permit No. CA0005241)
)
_____)

NPDES Appeal No. _____

PETITION FOR REVIEW

SUBMITTED ON BEHALF OF
ALEXANDER VALLEY ASSOCIATION

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INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), the Alexander Valley Association ("AVA") petitions for review of the issuance and conditions of NPDES Permit Number CA0005241 ("Permit"), which was issued to the Dry Creek Rancheria Band of Pomo Indians ("Permittee" or "Tribe") on April 30, 2007, by the United States Environmental Protection Agency, Region Nine ("EPA").

AVA hereby joins and incorporates by reference the Petition for Review in this same matter filed by the County of Sonoma and Sonoma County Water Agency ("Sonoma County Petition"). For the reasons set forth both in this Petition and the Sonoma County Petition, AVA submits that in issuing the terms and conditions of the Permit EPA improperly relied on clearly erroneous findings of fact and conclusions of law. Moreover, EPA's responses to Petitioners' comments were insufficient and erroneous, failed to satisfy the standards established by federal regulations and warrant review by the Environmental Appeals Board ("Board").

The Permit authorizes the Tribe to discharge effluent from its wastewater treatment facility ("facility") located adjacent to the Tribe's River Rock Casino ("Casino") into Stream P1, an unnamed tributary of the Russian River, during certain months of the year. The Permit also authorizes application of the effluent to an unidentified 12 acres of land. The facility was initially constructed in 2003 – and later expanded in 2004 – to treat wastewater from the Casino, which has an average daily visitor rate of approximately 5,000 guests and employees. (*See* Statement of Basis at 1.) The wastewater treated by the facility includes sewerage, restaurant washwaters, and miscellaneous wastewater from guest support services. (*Id.*) Currently, the treated effluent is either recycled or land applied. (*Id.*) The Permit will allow the facility to essentially triple its operations, and will lead to a substantially larger development on the Rancheria. (*See* Comment Letter 4.) The planned expansion includes a major new hotel and resort. (*Id.*)

The Casino, which began operations in 2003 in a tent structure on a concrete slab, is located in the Alexander Valley of Sonoma County, approximately two miles southeast of the community of Geyserville. (Statement of Basis at 1.) It is situated on a hillside and accessible by a narrow winding private road off of Highway 128, a small state road. Sonoma County is renowned for its vineyards, dramatic coastline, winding Russian River, and old growth redwoods. The Alexander Valley is home to long-established premium grape producing vineyards, orchards, gardens and a variety of farms and cattle ranches. Redwood trees, oaks, palm trees and cactus all flourish in the Alexander Valley. Wine trails and tours are an integral part of the local economy. (See State of California Website; Alexander Valley Winegrowers' Website at www.alexandervalley.org.)

The Russian River, which winds through the Alexander Valley, provides critical habitat for threatened steelhead trout and chinook salmon. (See Draft Biological Evaluation.) This river supplies water for drinking, farming, and recreation from the point of proposed discharge all the way to the Pacific ocean. (Comment Letter 23.) It is the drinking water supply of approximately 700,000 people in the region. (Comment Letter 3.) The Russian River is subject to water quality standards based on the Water Quality Control Plan for the North Coast Region ("Basin Plan"), including a prohibition on discharges between May 15 and September 30. (See Statement of Basis at 8.) The Russian River is listed as an impaired waterbody for sediment and temperature pursuant to Section 303(d) of the Clean Water Act. (*Id.* at 11.)

The Alexander Valley Association is a non-profit organization comprised of more than 300 property owners. (Comment Letter 4.) Many AVA members have owned vineyards and farms in the Alexander Valley for generations and are deeply concerned that the authorized discharge of effluent will lead to wastewater running "into private vineyard land and into the

small waterways of [the] Russian River basin." (Comment Letter 32 from D. Clay and D. Cooper, whose family has owned vineyard acres in the Alexander Valley since 1942.) Another resident of the Alexander Valley expressed the views of many of his neighbors by writing that the "Casino represents the absolute epitome of the sort of things the EPA was created to prevent" and that if the Tribe expands the casino and wastewater treatment facility "it will be the equivalent of a small city, clinging to a hillside, dumping filth on the [bucolic] valley below." (Comment Letter 16.)

These concerns are both validated and exasperated by past tribal conduct at the Rancheria: "the Tribe has shown from past experience it is unlikely to rigorously observe Permit requirements." (Comment Letter 4; *see also* Comment Letter 3 from Sonoma County Water Agency describing the Tribe's "grossly inadequate" environmental study for a prior development of gaming facilities that failed to comply with the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* ("NEPA") and state or local environmental law.) Adding to the local concerns is the EPA's indifference to the fact that the operator for the wastewater treatment plant, HydroScience Engineers, Inc., has a similarly poor record of environmental compliance. For example, the Central Valley Regional Water Quality Control Board has recently documented 145 "serious violations" of wastewater pollution limits at a separate casino wastewater treatment plant also operated by HydroScience. (Sonoma County Comment Letter, dated March 21, 2006.) Nothing in the Permit provides comfort to the local community that poor past performance will not be repeated in this project; EPA simply is indifferent to the fact that past performance by the Tribe and its operator clearly points to future problems for the Alexander Valley.

Finally, the Tribe's sovereign status leaves local entities – including AVA and Sonoma County – with no legal ability to enjoin Permit violations or seek remediation for environmental

damages. This fact further and understandably exacerbates AVA concerns. (*See, e.g.,* Comment Letter 18 describing Dry Creek Rancheria's refusal to allow the Sonoma County Fire Marshall access to the Rancheria when it was cited for fire safety hazards.)

THRESHOLD PROCEDURAL REQUIREMENTS

Petitioner satisfies the threshold procedural requirements for filing a petition for review under 40 C.F.R. Part 124, and has standing by virtue of its participation in the public comment period on the Permit. (*See* 40 C.F.R. § 124.19(a).) (*See also AVA Comments Concerning Proposed/Draft USEPA NPDES Permit (CA0005241), Dry Creek Rancheria Band of Pomo Indians (River Rock Casino Site)*, dated September 27, 2006 ("AVA Comments"), attached hereto as Exhibit A.)

The issues raised by AVA in this petition were raised during the public comment period and therefore were preserved for review. (*See* Exhibit A.) (*See also County of Sonoma and Sonoma County Water Agency Comments on the Proposed National Pollutant Discharge Elimination System (NPDES) Permit No. CA 0005241, and Request for Voluntary National Environmental Policy Act (NEPA) Compliance*, dated September 29, 2006, attached hereto as Exhibit B.)

FACTUAL AND STATUTORY BACKGROUND

The factual and statutory background discussed in the Sonoma County Petition is incorporated herein by reference.

Both Sonoma County and AVA requested repeatedly that EPA take a hard look at the environmental effects attributable to the Tribe's expanded wastewater treatment plant discharges by conducting a comprehensive review and developing an environmental impact statement ("EIS") under NEPA. EPA refused to prepare an EIS for this Permit despite the identification of

a number of key issues warranting the careful and comprehensive examination of impacts and alternatives which are mandated for an EIS. EPA's public review process was deficient. For example, only after EPA conducted a public meeting after the close of the public comment period did members of the AVA "begin to understand the potential impacts" of EPA's issuance of the Permit. (Letter from Larry Cadd to EPA, dated December 26, 2006.)

Stream P1 is an unnamed tributary of the Russian River, a river that the State of California designates as water quality impaired for sediment and temperature under Section 303(d) of the Clean Water Act. 33 U.S.C. § 1313(d). Despite this designation, the Permit would authorize the Tribe to discharge warm effluent into Stream P1 annually between October 1 and May 14, even though October, November and December can be some of the warmer months of the year in the Alexander Valley. Although Stream P1 is not listed as critical habitat under the Endangered Species Act because NOAA Fisheries did not designate critical habitat on the Rancheria, it is documented that threatened Central California Coast steelhead and Coastal California Chinook salmon occupy and utilize Stream P1. As noted above, the Permit authorizes heated effluent discharge into Stream P1 annually through the winter and spring, and further authorizes the Tribe to utilize an unidentified 12 acres as a spray field between May 15 and September 30 in lieu of the stream discharge. As noted in Sonoma County's Petition, EPA's issuance of the permit condition authorizing this unidentified 12-acre spray field was based on clearly erroneous findings of fact and failed to afford adequate public review and comment.

The Permit was issued by the Environmental Protection Agency, Region Nine under 40 U.S.C. § 402(a). This appeal is filed under 40 C.F.R. § 124.19(a).

ISSUES PRESENTED FOR REVIEW

In addition to the issues presented for review in the Sonoma County petition, which are incorporated herein by reference, AVA presents the following issues for review by the Board:

1. Whether EPA committed reviewable error in failing to prepare an environmental impact statement pursuant to the National Environmental Policy Act.
2. Whether EPA committed reviewable error in failing to require a third-party enforcement mechanism as a condition of the permit.
3. Whether EPA committed reviewable error in failing to inquire, disclose, or analyze the Permittee's proposal to utilize an unidentified 12 acres of land located off the Rancheria for a spray field in violation of the Tribe's Class III Gaming Compact and the federal Indian Gaming Regulatory Act.
4. Whether EPA committed reviewable error by issuing or omitting permit conditions that rely on clearly erroneous findings of fact and conclusions of law, and by failing to adequately respond to comments on the draft permit, as required by EPA regulations.

SUMMARY OF THE ARGUMENT

Issuance of an NPDES permit is a major federal action under NEPA. AVA contends that EPA should have exercised its discretion and examined this major federal action through an EIS because the process utilized here failed to include a thorough public review process, leading EPA to inadequately respond to comments and base its decision on clearly erroneous findings of fact and conclusions of law.

Impacts to Central California Coast steelhead and Coastal California Chinook salmon, species listed as threatened under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, and present in the receiving waters, were not properly analyzed, publicly disclosed or adequately mitigated by EPA because EPA made substantial changes to the terms and the conditions of the Permit after completing consultation with NOAA Fisheries pursuant to Section 7 of the ESA. 16 U.S.C. § 1536(a)(2). Upon making substantial post-consultation changes from the terms and conditions in the draft Permit to the final Permit by adding a 12-acre spray field, EPA should

have reinitiated Section 7 consultation with both NOAA Fisheries and the U.S. Fish and Wildlife Service. It did not do so.

AVA proposes that another substantive flaw in the permit process was EPA's failure to exercise its discretion as to two important policy considerations, and they should be evaluated under the Board's discretionary review.

First, EPA failed to inquire, disclose or analyze adequately the Permittee's proposal to utilize a spray field on 12 unspecified acres which most assuredly are located outside the Rancheria's boundaries given that there is no 12-acre tract suitable for spray field use within the Rancheria. Despite the factual certainty that the Tribe intends to use an off-Rancheria location for the spray field, the Permit purports to legitimize use of that spray field in direct violation of the Tribe's Class III Gaming Compact's requirement that all "Gaming Facilities" be located only on lands that qualify for gaming under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.* An off-Rancheria spray field will violate that requirement.

Second, EPA's omission of a third-party enforcement mechanism as a condition of the Tribe's permit undermines the citizen suit provisions of the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.* The Tribe has sovereign immunity from suit that prevents any local entity, including AVA and Sonoma County, from suing it for Permit violations no matter how egregious. Given the extremely sensitive environment at the project site, EPA should have required a specific waiver of tribal sovereign immunity in favor of the County in order to insure an enforcement mechanism when Permit violations occur.

ARGUMENT

I. Standard of Review

In accordance with 40 C.F.R. Part 124, the Board should grant AVA's request for review of the Permit because the permit conditions in question are based on either "a finding of fact or conclusion of law which is clearly erroneous, or an exercise of discretion on an important policy consideration which the Board should, in its discretion, review." 40 C.F.R. § 124.19(a). Petitioner's issues were preserved for review because the issues presented for review were raised with sufficient specificity during the public comment period, either by AVA or by another commenting party. 40 C.F.R. § 124.13.

II. EPA's Refusal to Exercise Its Discretion to Prepare an Environmental Impact Statement and Comply with the National Environmental Policy Act Warrants Review by the Environmental Appeals Board.

NEPA requires federal agencies to prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). Both Sonoma County and AVA requested repeatedly that EPA take a hard look at the environmental effects attributable to the Tribe's expanded wastewater treatment plant discharges by preparing a comprehensive EIS. EPA refused to do so despite the identification of key issues demonstrating that issuance of this Permit is a major federal action having significant environmental effects to Stream P1 and the Russian River watershed.

EPA's response to AVA's request that it conduct an EIS was a dismissal which can only be characterized as arbitrary and cavalier: "EPA believes that all comments on the proposed permit and concerns related to the discharge of wastewater as allowed by the NPDES permit have been adequately addressed through the public comment process for the NPDES permit. EPA does not agree that additional NEPA analysis is warranted." (EPA Response to Comments

at 6.) In short, it is clear that EPA decided to issue the Permit without giving consideration to facts undermining that decision.

A. EPA did not provide a thorough public review process and failed to adequately respond to comments.

Again, AVA incorporates by reference the discussion contained in the Sonoma County Petition related to EPA's failure to provide a thorough public review process and failure to adequately respond to comments submitted by Sonoma County and AVA. Moreover, EPA's 11th hour review and *post hoc* justification related to land application and the unidentified 12-acre spray field could not have occurred if EPA had prepared an EIS.

Post hoc justifications and projections of responsibility on the commenter to ignore violations or fail to provide scientific data do not satisfy the permit issuer's duty to "articulate with reasonable clarity the reasons for its conclusions and [to] adequately document its decision making," nor do they demonstrate that the permit limits, as set in the final permit, will ensure compliance and conformity with all applicable water quality requirements. *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997); 40 C.F.R. §§ 122.4(d), 122.44(d).

B. Impacts to threatened salmon and steelhead, species protected by the Endangered Species Act, were not properly analyzed, publicly disclosed or adequately mitigated by EPA.

EPA's issuance of the Permit is subject to the requirements of Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2). (*See also* Biological Evaluation for NPDES Permit CA 0005241, attached hereto as Exhibit C.) EPA's Biological Evaluation and Section 7 consultation with NOAA Fisheries and the U.S. Fish and Wildlife Service did not consider the environmental effects attributable to the unidentified 12-acre spray field which were first

identified in the final Permit months after Section 7 consultation was completed.¹ EPA should have reinitiated Section 7 consultation with NOAA Fisheries when it made these substantial changes to the terms and conditions in the final Permit, but it did not.² Moreover, the local and downstream effects from the authorized discharge of wastewater into Stream P1, a stream supporting threatened anadromous fish species, is further evidence that the Permit constitutes a major federal action which can only be assessed in the manner dictated by NEPA, which is preparation of an EIS.

Section 7 requires EPA to insure that the Permit is "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of their designated critical habitat. (16 U.S.C. § 1536(a)(2).) This substantive obligation is implemented through a requirement that EPA enter into formal Section 7 consultation with NOAA Fisheries to evaluate the nature and extent of impacts to any listed species or its critical habitat that may be affected by the Permit. (*Id.* §§ 1536(a)(3), (4).) But the consultation cannot be a sham and it cannot be the environmental equivalent of a "carnival shell game."

Stream P1 is an unnamed tributary to the Russian River, a river that is designated critical habitat for endangered Central California Coast coho salmon ("endangered coho") and for threatened Coastal California Chinook salmon ("threatened chinook"). Threatened Central California Coast steelhead ("threatened steelhead") also reside in the Russian River watershed. Although the mainstem Russian River is designated critical habitat for endangered coho and

¹ The draft Permit would have authorized discharge into Stream A1, an intermittent, non-terminal stream on the Rancheria, each year between May 15 and September 30. (*See* draft Permit.)

² EPA's failure to reinitiate consultation with the U.S. Fish and Wildlife Service is also problematic because of the presence of threatened bald eagles, northern spotted owls and endangered Burke's goldfields on lands in the vicinity of the project area.

threatened chinook, remarkably, Stream P1 is not so designated where it runs through the Rancheria, but is so designated downstream of the Rancheria. (See Biological Evaluation.) Nevertheless, threatened chinook and steelhead occupy and utilize Stream P1 both on and below the Rancheria. (See *Id.*)

Pursuant to Section 7, EPA initiated consultation with NOAA Fisheries on April 18, 2006 to evaluate the local and downstream effects of the heated effluent discharge to the endangered and threatened salmon and threatened steelhead. (See NOAA Fisheries Concurrence Letter, dated July 25, 2006, attached hereto as Exhibit D.) EPA's Biological Evaluation correctly identified that there are known occurrences of endangered and threatened salmon and steelhead in the project area, including Stream P1, and further noted that juvenile salmon have been observed stranded on Stream P1 below the Highway 128 culvert near the confluence with the Russian River after heavy flows in the Russian River recede. (See Biological Evaluation.) The Biological Evaluation centered its analysis around the limiting factor of water temperature for the listed salmonids, and determined that the Permit "may affect, but is not likely to adversely affect" threatened chinook and steelhead. Biological Evaluation.

NOAA Fisheries concurred with EPA "that no listed anadromous salmonids or their designated critical habitats are likely to be adversely affected by this [Permit]." (NOAA Fisheries Concurrence Letter at 2.) However, NOAA Fisheries plainly stated that "*further consultation may be required* if "(1) *new information becomes available* indicating that listed species or critical habitat may be adversely affected by the project in a manner not previously considered [or] (2) *current project plans change that affects listed species or critical habitat in a manner not previously considered.*" (*Id.* at 3 (emphasis added).)

Despite the occurrence of the very things identified by NOAA Fisheries as triggering the requirement for further consultation, such consultation did not take place. EPA should have reinitiated consultation with NOAA Fisheries because the Section 7 consultation was initiated and concluded on the terms and conditions contained in the draft Permit, not the actual terms and conditions that are formally authorized in the final Permit.³ As noted in the Sonoma County Petition, EPA has made significant changes to the final Permit that EPA failed to disclose publicly or analyze adequately, and which are based on clearly erroneous findings of fact. Moreover, EPA made significant changes from the draft permit to the final permit when it replaced the authorized discharges into Stream A1 between May 15 and September 30 with authorizing the Tribe to apply the effluent onto an unidentified 12-acre spray field. These are significant changes in Permit conditions based on clearly erroneous findings of fact, changes which necessarily trigger NEPA's caveats as well as the regulatory criteria for reinitiating consultation under Section 7 of the ESA, which include, "new information reveal[ing] effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." (50 C.F.R. § 402.16.)

It is beyond dispute that EPA should have reinitiated Section 7 consultation when it changed the terms and conditions in the final Permit. The local and downstream effects from these changes have not been disclosed thoroughly, reviewed publicly or analyzed adequately by NOAA. If EPA had prepared an EIS, NEPA would have required a thorough endangered species review and adequate monitoring for temperature and sediment. All of these factors provide further evidence that the Permit constitutes a major federal action for which EPA should have prepared an EIS.

³ EPA's failure to comply with the regulations governing reinitiation of Section 7 consultation also likely amounts to a violation of the ESA.

- C. Preparation of an EIS in this matter will provide an opportunity for increased public understanding and involvement, to address controversial issues and to address impacts on the special resources of the Alexander Valley.

The members of the Alexander Valley Association are very concerned that the sewage discharge plan authorized by the Permit will permanently change the future of the local land, streams and the Russian River. They believe that there has been a woefully inadequate study of the environmental impacts on prime vineyard land and on the Russian River which serves as a drinking water supply to thousands of people and provides a habitat to protected species. They are particularly concerned about the last minute changes to the permit which would allow effluent to be sprayed on 12 acres of land. As thoroughly documented in the Sonoma County Petition, the environmental impacts of such a discharge have not been adequately addressed by EPA.

AVA members are very concerned about the potential runoff from the spray application of effluent into nearby streams and onto farmland and the potential impact of this effluent on the groundwater which could affect their livelihood and health. They are very concerned that there are inadequate monitoring, reporting and enforcement mechanisms in place to protect the Valley and its inhabitants. The potential for negative impacts from the issuance of this permit will facilitate a major casino development and extend far beyond the boundaries of the Rancheria. The NEPA process is the best mechanism available to address these substantial concerns.

According to EPA's policy for voluntary preparation of NEPA documents, criteria that may be considered in making such a determination include the potential for using an EA or an EIS to expand public involvement, to address controversial issues and to address impacts on special resources or public health. (See 63 Fed. Reg. 58,046 (October 29,1998).) Clearly this

permit is very controversial, affecting historic vineyards and a way of life, and the NEPA process would allow for full public participation.

EPA's 11th hour inclusion of applying effluent on an unidentified 12-acre spray field as a condition of the Permit is especially problematic because no interested party had a chance to review or analyze this element. If EPA chose instead to prepare an EIS, members of the AVA would have had adequate opportunity for public comment and would have requested that a Best Management Practices Plan be required for this facility and the discharge. Indeed a NEPA review would have better facilitated development of such a plan to address the concerns of AVA.

III. EPA's Issuance of the Permit Was Based on an Inappropriate Exercise of Discretion Involving Important Policy Considerations that Warrant Review by This Board.

Two important policy considerations warrant the Board's review of the permit issuance in this petition. First, EPA ignores and almost certainly sanctions a significant violation of the Tribe's Class III Gaming Compact by authorizing the Tribe to apply effluent onto an unidentified 12-acre spray field, an area which cannot be used for that purpose under the Compact and the Indian Gaming Regulatory Act. Second, EPA failed to include a third-party enforcement mechanism to ensure the Tribe complies with the terms and conditions of the Permit.

A. The Permit both ignores and almost certainly authorizes a violation of the Tribe's Class III Gaming Compact requirement and federal law (by tribal agreement) that the 12 acres of spray fields be located only on lands that qualify for gaming under the Indian Gaming Regulatory Act.

EPA failed to inquire, disclose or analyze adequately the tribal Permittee's proposal to utilize a spray field on 12 unidentified acres.⁴ The 12 acres has to be land outside the Rancheria because the Rancheria terrain simply does not contain a 12-acre tract suitable for spray field use.

⁴ AVA incorporates by reference the discussion on the 12-acre spray field contained in the Sonoma County Petition.

With factual certainty, it can be said that the Tribe intends to use an off-Rancheria location for the spray field, meaning that the Permit authorizes a project which will violate the Tribe's Class III Gaming Compact requirement that Gaming Facilities must be located only on lands that qualify for gaming under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, and cannot be located on lands which do not.

The Tribe's Compact requires that all "Gaming Facilities" be operated "only on those Indian lands on which gaming may lawfully be conducted under the [IGRA]." (Compact Section 4.2.) The Compact defines "Gaming Facility" as "any building in which Class III gaming activities or gaming operations occur . . . and all rooms, buildings, and areas, including parking lots and walkways, *a principal purpose of which is to serve the activities of the Gaming Operation.*" (Compact Section 2.8 (emphasis added).) Because the Tribe's wastewater treatment facility will exclusively serve the activities of the Tribe's casino, it falls within the Compact definition of "Gaming Facility;" by operation of federal law, the 12-acre spray field must be located on "Indian lands on which gaming may be lawfully conducted" under IGRA.

Indian lands on which gaming may be lawfully conducted under IGRA are limited to: (1) "all lands within the limits of any Indian reservation" and (2) "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power" as of October 17, 1988, the date on which IGRA became law. (25 U.S.C. § 2703(4).) Unless an exception is met under 25 U.S.C. § 2719, either of these land provisions must have been satisfied under IGRA. There can be no dispute that the 12-acre spray field is to be developed on land off the Rancheria and therefore does not satisfy the Compact requirement that Gaming Facilities be located exclusively on lands that

qualify for gaming under IGRA. EPA's abject failure to investigate, analyze, and disclose this illegal use of land goes to a fundamental decision to issue the Permit and is a matter which should be reviewed by this Board.

B. EPA failed to include a third-party enforcement mechanism

The Permit currently provides no specific language for enforcement of the terms and conditions in the event that those terms and conditions are violated.⁵ Under existing law, enforcement would be at the discretion of the EPA and the Department of Justice since EPA is the agency with authority, jurisdiction and ability to take action against the tribal permittee should violations occur and Justice is EPA's lawyer.

Sonoma County is the local government with jurisdiction over the lands surrounding the Dry Creek Rancheria – including the unidentified 12-acre spray field which almost certainly will be sited on land not within the Rancheria boundaries.⁶ For this reason, the County certainly has an undeniable and vital interest in preserving the integrity of the environment in the immediate vicinity of the Rancheria, including the Russian River and its tributaries.

Violations of the permit could easily cause contamination of the local environment if left uncorrected for any period of time, yet as the Permit is written, no third party – including the AVA and Sonoma County – has a direct ability to protect the local environment by initiating legal action to ensure compliance with the terms and conditions of the permit as contemplated by

⁵ As noted above, the Permit prohibits the direct discharge of effluent from the wastewater treatment plant annually between May 15 and September 30. The presence of threatened salmon and steelhead in Stream A1 increases the need for adequate and timely inspections and enforcement of the Permit terms and conditions.

⁶ As noted above, AVA contends that the Permit impliedly authorizes the use of the 12-acre spray field in support of the Tribe's Gaming Facility in contravention of the Tribe's Gaming Compact and IGRA. Because of the high likelihood that the use of the spray fields is illegal due to its location off the Rancheria, timely inspections and enforcement of the Permit terms and conditions are critical.

Section 505 of the Clean Water Act, 33 U.S.C. § 1365. Instead, the only legal option available would be to bring suit against the EPA seeking injunctive relief requiring the agency to take legal action against the tribal Permittee to cure the violations. Only after the County litigation has been successfully concluded would the EPA be required to move against the Permittee to correct the violations. This two-step process would be time-consuming and defeat any expeditious enforcement of the Permit's terms and conditions, as is contemplated by Section 505 of the Clean Water Act.

The reason for this convoluted two-step enforcement process is that the Tribe enjoys sovereign immunity from suit by the interested local parties, but not by the federal government. This means that EPA can file enforcement actions, but AVA and the County cannot. Only if there is an enforceable waiver of tribal sovereign immunity as to violations of the Permit can a non-federal entity have any legal rights at all. AVA proposes that EPA should require in the Permit a tribal waiver of sovereign immunity in favor of the County so that violations could be quickly corrected through County enforcement action. It should be noted that any such waiver must be specific and limited to only allow the County to seek enforcement of violations of the Permit.

Such an enforcement provision would allow prompt action by the local government to compel corrective steps should violations occur, rather than requiring a two-step process which could consume months or even years. AVA's request for a third-party enforcement mechanism is consistent with Section 505 of the Clean Water Act, is fair and should be acceptable to the tribal Permittee in light of its expressed concern for the environment surrounding the Rancheria.

The process for adopting a waiver of sovereign immunity is not obscure. To the contrary, it is well-defined and known to the Tribe. The waiver must be in the form of a formal tribal

resolution of limited waiver of sovereign immunity which is adopted by the Tribe's governing body.

Thus, the AVA respectfully proposes the Permit should be amended to establish a third party enforcement mechanism by requiring the Tribe to execute a formal waiver of sovereign immunity in favor of the County as a condition of the Permit. Only with the protection afforded by such a requirement can the County and AVA be assured that permit violations will be promptly identified and enforced in a timely manner that protects the environment.

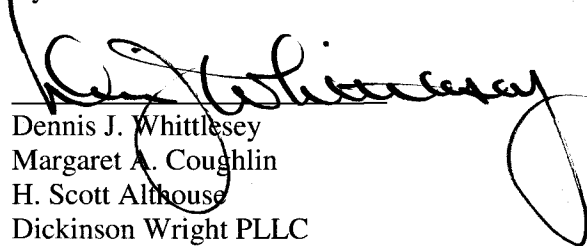
CONCLUSION

For the foregoing reasons, Petitioner requests that the Board grant Petitioner's request for review of NPDES Permit CA0005241. Petitioner requests that the permit be remanded for further review by the Regional Administrator so that the permit limits for the discharge of effluent into the unnamed tributary of the Russian River can be reviewed and amended to ensure compliance with the Clean Water Act, the Endangered Species Act, the National Environmental Policy Act and their implementing regulations.

Respectfully submitted this 4th day of June 2007.

Alexander Valley Association

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LIST OF EXHIBITS

- Exhibit A: *AVA Comments Concerning Proposed/Draft USEPA NPDES Permit (CA0005241), Dry Creek Rancheria Band of Pomo Indians (River Rock Casino Site), dated September 27, 2006.*
- Exhibit B: *County of Sonoma and Sonoma County Water Agency Comments on the Proposed National Pollutant Discharge Elimination System (NPDES) Permit No. CA 0005241, and Request for Voluntary National Environmental Policy Act (NEPA) Compliance, dated September 29, 2006.*
- Exhibit C: *EPA Biological Evaluation for New NPDES Permit for the Dry Creek Rancheria Waste Water Treatment Plant (NPDES Permit CA 0005241).*
- Exhibit D: *NOAA Fisheries Concurrence Letter, dated July 25, 2006.*

DC 114086v2

EXHIBIT A

004



ALEXANDER VALLEY ASSOCIATION

September 27, 2006

US Environmental Protection Agency
Region IX, WTR-5
75 Hawthorne Street
San Francisco, CA 94105-3901

Board of Directors
Alexander Valley Association
P.O. Box 1195
Healdsburg, CA 95448

Subject: Comments Concerning Proposed/ Draft USEPA NPDES Permit
(CA 0005241), Dry Creek Rancheria Band of Pomo Indians (River Rock
Casino Site)

Ladies / Gentlemen:

These comments concerning the referenced Permit are offered by the Board of Directors of the Alexander Valley Association (AVA) and supplement the verbal comments that were delivered by our representatives at the Public Hearing on September 7, 2006.

The AVA is a not-for-profit organization of more than 300 property owners in the Alexander Valley of Sonoma County, CA where the Tribe's Rancheria and Casino are situated. The proposed permit directly affects the interests of our Members because, among other things, the proposed discharges will impact surface and ground waters in the Valley as well as tributaries of the Russian River, all of which are receiving water bodies into which the proposed discharges would be made.

Our Association opposes issuance of this Permit as drafted for the reasons contained in this memorandum as well as those stated previously at the

Public Hearing by our representatives, Candy Cadd, Ralph Scales, Pete Dayton and Bill Esselstein, all of whom are AVA Directors. The AVA also adopts and incorporates in its comments the written and verbal comments of the many other individuals and organizations that have entered objections in the record concerning shortcomings of the draft permit.

The general view of the AVA is that the proposed discharges are a bad idea. While some potential adverse impacts probably could be eliminated or mitigated if the discharges were adequately regulated, our experience with the Tribe's Casino enterprise is that even a very carefully conditioned permit poses substantial risks to persons, properties and resources off-site because the Tribe has shown from past experience it is unlikely to rigorously observe the Permit requirements. Moreover, while EPA has indicated it will not concern itself at this time with the Tribe's site development plans, it is undisputed public knowledge that the Tribe has firm intentions of developing the site as a destination resort which will generate vastly increased volumes of wastewater and storm water that are certain to greatly exceed the amounts anticipated under the present permit application. And, defoliation of the site for development already has and undoubtedly will continue to exacerbate the Tribe's ability to dispose of wastewater without imposing ever increasing impacts on its neighbors. We believe these are highly relevant factors that ought to be, but have not been taken into consideration with respect to the conditions of the draft permit.

But irrespective of those considerations, by authorizing the proposed discharges at all, the Tribe will have gained the ability, should it choose to do so, to discharge quantities and qualities of effluent that can violate permit conditions. We fear they are likely to do so unless vigorous and vigilant oversight and enforcement measures are undertaken by governmental authorities. The realities are, however, that even the most aggressive oversight and enforcement program can not prevent, nor can it fully remediate, the harmful consequences of unlawful discharges which once begun may, and often do, continue unabated for a significant time. Added to those concerns, common to any potential NPDES permit, is the circumstance that the Tribe has a long history of resisting, rightly or wrongly, any perceived impositions on its claims of sovereignty. It is well known that enforcement of NPDES permit requirements is never a simple task. In this case, it can be expected that any enforcement would be arduous and prolonged.

As discussed below, strong evidence already exists indicating that the Tribe has undertaken and is likely to continue, activities and practices on-site that are conducive to non-compliance. Understandably, this evidence, along with the Tribe's poor history of co-operation with governmental agencies in other contexts, contributes to our angst. While these justifiable concerns may not qualify as grounds for denial of the Permit, they compel us to urge in the strongest possible terms that even if the Permit does not presume the likelihood of non-compliance, it must not presume the likelihood of compliance either. At the very least, the terms, provisions, conditions and other permit requirements should be no more lenient, or any more permissive, than they would in the case of any other discharger.

Attached to these comments, and previously entered in the record at the Public Hearing, is the engineering report of our consultant, Tom Grovhoug of Larry Walker Associates, dated August 9, 2006, commenting in detail on the proposed Permit. Once again we adopt and request responses to all of Mr. Grovhoug's comments and we urge EPA to require the applicant not only to supply and disseminate to the public the information listed at the end of the report but to accept revisions to the draft Permit to eliminate the deficiencies noted. [Note: While some additional information has been provided very recently, the close proximity to the end of the comment period has precluded anything but a very cursory review, which is not a reasonable outcome.]

Furthermore, with respect to the overall character of the Permit, we say as forcefully as we can, that there should be no "free passes" on standard permit requirements. As Mr. Grovhoug's report enumerates:

- Monitoring of existing discharges for temperatures, toxicity and toxic pollutants must be required of the applicant and data from that review should be released for public review and used to perform a reasonable potential analysis and to modify the permit and fact sheet accordingly before adoption of the permit.
- An engineering analysis showing the capability of the treatment facility to comply with receiving water limitations for temperature must be furnished by the applicant.
- Language in the permit documents that appears to indicate the discharges would be exempt from the Russian River Basin Plan

prohibitions and other limitations is unquestionably presumptuous and inappropriate, and it ought to be deleted.

Even more fundamental are the following matters:

First, before the permit is issued, the applicant must be required to provide adequate engineering and scientific justification for the proposed effluent disposal scheme; in other words, a basic "water balance" analysis is essential. From the current record, it cannot be determined how much wastewater will be generated or whether it is even theoretically possible to dispose of treated wastewater as planned. When the many, many apparent fallacies surrounding the proposed discharges to Stream A1 (see below) are added to these ambiguities, the entire effluent plan, especially for summer discharges, becomes suspect.

Second, the proposed discharges to Stream A1, as pointed out by my many speakers at the Public Hearing, are decidedly problematic and ought not to be allowed. Putting aside for these purposes the very interesting question of the Tribe's evident lack of any legal entitlement to discharge wastewater onto neighboring private properties (which this Permit certainly seems to be facilitating), the proposal to use Stream A1 as a discharge channel is, frankly, bizarre.

Notwithstanding that the Permit expressly and quite properly prohibits any sheet flows from either Stream P1 or Stream A1 to surrounding property, the Tribe itself has acknowledged in earlier filings with the federal government that sheet flow is the usual and invariable outcome of waters transported through Stream A1. We call EPA's attention to the "Dry Creek Rancheria Fee to Trust Project Final Environmental Assessment" dated August 2005, which was prepared by the Tribe's environmental consultants, ESA, for the US Department of Interior's Bureau of Indian Affairs. In that FEIS, a "Wetland Delineation Report," included at Appendix C, discusses at some length the characteristics of Stream A1. Of particular interest here is Figure 4-2, which depicts very clearly the sheet flow condition that is an inherent characteristic of this watercourse. Figure 4-2 candidly demonstrates that waters reaching its terminus will be discharged by sheet flow to the surrounding vineyards located on private property south and east of Highway 128. (A copy of Figure 4-2 is attached.)

To authorize a discharge that almost certainly will result in violations of permit conditions seems nonsensical, especially in the absence of reliable hydrologic evidence that the flows can be managed effectively under all conditions of use to preclude a violation. The preliminary "Adaptive Management Plan" (April 2006 by Curtis Lam) is, according to Tom Grovhoug, inadequate for these purposes. In an email message to AVA dated September 24, 2006 (excerpt attached), Mr. Grovhoug points out the unreliability of the approach taken. He also notes the anomalous circumstance, commented on by several speakers at the Public Hearing, that allowing the Tribe to postpone the field testing required for preparation of its final AMP until after issuance of the Permit almost certainly guarantees that the prohibition against sheet flows will be violated and impacts to vineyard operations will occur.

The foregoing comments highlight the very large hole in the record of any showing that the Tribe's effluent disposal plan will be able to appropriately dispose of effluent during the summer months when discharges to P1 are precluded. These concerns become magnified when recent events on the site are considered.

During the summer, it is reasonable to assume that land application of effluent through on-site irrigation and spraying will be a very significant component of the Tribe's effluent disposal plan because of the inherent limitations on other forms of reuse, the lack of significant on- or off-site impoundment capacity, the probation on discharge to Stream P1, and the already mentioned shortcomings of discharges to Stream A1. The reuse of effluent for land application depends to a great extent on the availability of landscaping and naturally occurring vegetation to absorb the water; otherwise erosion, which the Permit obliges the applicant to control through best management practices, will be encouraged with likely adverse impacts on receiving waters. [Note: AVA believes that a comprehensive storm water management and erosion control plan for new construction on the entire Rancheria site should be required by USEPA, either under this permit or under a separate storm water discharge permit.]

With this sort of scenario, one assumes that the Tribe would do all that it could to maintain the natural character of the site so as to promote absorption of land applied effluent. The actual facts are to the contrary. Attached are copies of very recent photographs which demonstrate that not only is the natural character of the site not being preserved, large portions of

the remaining natural open space are being denuded of all vegetation. As this year's rainy seasons gets underway in the next month or so, it is hardly to be doubted that erosion will occur on steeply sloped areas and that Steams P1 and A1, as well as other watercourses on the site will become conveyances of large quantities of silt and other materials detrimental to the Russian River and other downstream receiving water bodies. [Note: As stated previously, these conditions merit attention by EPA to ensure, through appropriate Permit conditions, that future development activities are conducted in conformance with approved plans to avoid exacerbation of erosion of soils that can be transmitted off-site to receiving waters.]

This occurrence reveals several important "truths" about the Tribe's Permit application:

- The probable effectiveness of the Tribe's effluent management plan must be evaluated in relation to actual conditions and in the context of the Tribe's previous and intended actions on the site. No such evaluation appears to have been done.
- The environmental consequences of the plan need to be accurately assessed. It is foolhardy to issue this Permit without regard for obvious environmental implications of known conditions. It may be one thing to exempt compliance with environmental regulations where there is no indication that significant environmental impacts are expected. It is another when those impacts are known and likely. A thorough environmental assessment must be demanded and released for public review.
- In evaluating this application, it is unreasonable to assume the Tribe can be counted on to voluntarily disclose relevant information. Factual information necessary to properly fashion a satisfactory permit cannot be based on assumptions; EPA must ensure, one way or another, that all pertinent information is available. One available tool is a comprehensive site inspection which, in the light of recent events reported above, may need to be repeated, given recent changes to conditions on site, if one was performed previously.

At the Public Hearing speakers commented on several aspects of this Permit that deserve serious consideration. We list some of them for completeness but without extensive elaboration.

- There is a reasonable probability that the discharges to Streams P1 and A1 could contain and deposit off-site materials that may, especially over time, contaminate nearby wells and/or damage adjoining vineyards (e.g.; boron deposits; ponding during non-dormant growing seasons; etc.).
- To the extent Tribal sovereignty is pertinent to this application, it is important to remember that only the Rancheria property on which the Casino enterprise is located qualifies for that status. The Tribe's recently acquired "Dugan" parcel, adjacent to but separate from the Rancheria, does not. Obviously, nearby properties owned by others but somehow being subjected to these discharges without their owners' consent, do not qualify either.
- It is an arguable environmental and economic consequence of the proposed discharges to Streams P1 and A1 that their proximity to long established premium grape producing vineyards could depreciate the value of the underlying lands to the point that these properties are no longer economically viable for their best use.
- The use of "on-call" wastewater treatment plant (WWTP) operators as a principal element of the WWTP operations plan is highly questionable. The Permit should mandate an arrangement that will ensure 24 hours per day/7 days per week responsiveness by individuals who are in immediate proximity to the site and by virtue of training and experience are qualified to make prompt, appropriate decisions in emergencies.
- The Permit should affirmatively require full compliance with all of the particulars of Title 22 of the California Administrative Code for treatment and discharge of recycled water as is expected of any other California permittee.
- Ongoing compliance monitoring and reporting for typical wastewater constituents and conditions (e.g. temperature, toxicity, etc.) are lax or even nonexistent in some respects in comparison with other similar permits. Adequate compliance monitoring must be added to the

permit for all parameters with effluent or receiving water limitations to ensure that the requirements and protections in the permit are being achieved. Absent substantial justification, not found in the record, there is no reason to excuse the Tribe from such standard permit monitoring and compliance provisions.

In closing we offer two additional comments we believe have great importance.

First, for a number of good reasons some of which are mentioned above, we have no doubt that the effectiveness of an NPDES permit issued to the Tribe is likely to be dependent on whether oversight and enforcement in support of the permit will be vigilant and robust. We join with the many other commenters who have urged EPA to take advantage of the excellent resources available through our North Coast Regional Water Quality Control Board to enhance the performance of those functions. We submit that issues of sovereignty, comity and other conditions of governmental status are not a barrier to using RWQCB capabilities as an adjunct to EPA's own resources. Federal government frequently operates through agents and with the assistance of other public agencies, and the circumstance that the agent or assistance is afforded through an entity of the State should make no difference if the lines of direction and authority are appropriately defined. A strong case can be made that it would be to the advantage and convenience of all parties if the Tribe elected to be subject to State jurisdiction for these purposes, but the lack of such consent should not preclude EPA from utilizing any lawful available resource to carry out the mandates of the Clean Water Act as efficiently and effectively as possible.

Second, we have pointed out previously the gaps in the record with respect to certain items of essential information (e.g. development plans, projected wastewater volumes, effluent disposal plan (i.e. "water balance"), water quality data, treatment capabilities, etc.). None of the information sought is extraordinary in the context of an NPDES application, nor is it unduly burdensome for the applicant to provide. Without the information, all parties are inadequately advised concerning relevant circumstances, and issuance of a permit in that state of ignorance is both unnecessary and perilous to anyone affected by deficiencies that could and ought to have been avoided. Not only should EPA require submission of the information, but reason and fairness, together with the impact of this information on the permit itself, also demand public dissemination and a reasonable opportunity for further public

comment, both in writing and at second public hearing. The public hearing process has proven to be exceptionally valuable in developing a complete and accurate record for this Permit, and we believe that the time and effort entailed in conducting a further hearing is easily justified for the same reason.

We would appreciate your timely response to these comments and request, given the urgency and importance of this matter to our association.

Respectfully submitted,

Candace Cadd
President
Alexander Valley Association

Copies to:

Senator Diane Feinstein
Congressman Mike Thompson
North Coast Regional Water Quality Control Board of the State of
California, Attn. Catherine Kuhlman, Executive Officer
Sonoma County Supervisor Paul Kelley
Sonoma County Water Agency, Attn. Pamela Jean, PE
Office of the Sonoma County Counsel, Attn. Bruce Goldstein, Esq.
Thomas R. Grovhoug, President, Larry Walker Associates

Attachments

MEMORANDUM

To: Ralph Sceales, Alexander Valley Association
From: Tom Grovhoug, Larry Walker Associates
Date: August 9, 2006
Subject: Preliminary analysis of the proposed NPDES permit for the discharge of treated wastewater from the Dry Creek Rancheria to local surface waters

As described in Task 1 of our proposal, I have read the proposed NPDES permit and supporting Statement of Basis and have prepared the following preliminary analysis of the issues embodied in the proposed permit for the Dry Creek Rancheria and River Rock Casino. This memorandum is divided into three sections: (1) Significant Concerns, (2) Other Concerns and (3) Document Requests. This information is provided to support our initial discussions of the proposed permit and to assist in decision making regarding the future course of action.

Significant Concerns

Review of the proposed permit revealed the following significant concerns:

1. **Effluent Limits for Priority Pollutants.** The Statement of Basis for the proposed permit (page 7) states that no data on priority pollutants is available because monitoring was not previously required. In the absence of data, it is concluded that effluent limits are not needed for any priority pollutants. This conclusion is not well supported and is not appropriate. In fact, effluent limits for priority pollutants are common for tertiary facilities discharging to effluent dominated waters in California.

In applying for a new surface water discharge, it is the responsibility of the discharger to provide data from the existing treatment facility to allow for the evaluation of the need for effluent limits. The discharger should be required to furnish adequate, representative data to allow for a proper evaluation of the need for effluent limits for priority pollutants prior to adoption of the NPDES permit. In my judgment, this should include performance of a minimum of three priority pollutant analyses on the effluent, laboratory analysis for hardness to complement the trace metals analysis, completion of a "reasonable potential analysis" and derivation of appropriate water quality based effluent limits for inclusion in the proposed permit. Because the new discharge must immediately comply with such limits, the Statement of Basis for the proposed permit should also include an evaluation/demonstration of the ability of the proposed treatment plant to immediately comply with all effluent limits.

The above concern also applies to a number of non-priority pollutants, including, at a minimum, electrical conductivity (or optionally total dissolved solids), ammonia, aluminum, iron, and manganese, and temperature.

In summary, the permit should not be considered for adoption until the fore-mentioned work has been completed and documented in the publicly available draft permit and Statement of Basis.

2. Compliance with Temperature Limitations. The proposed NPDES permit includes receiving water limitations (D.10. on page 7) that limit the temperature effects of the discharge. The Statement of Basis should include an analysis that adequately demonstrates that the proposed treatment facilities can comply with these receiving water limitations. The proposed treatment facilities do not appear to be adequate to attain compliance with these effluent limits.

3. Hydrologic Characteristics of Stream A. On page 3 of the Statement of Basis for the proposed permit, it is stated that the US Army Corps of Engineers has determined that Stream A1 is not a tributary to the Russian River or other navigable waters of the United States. The analysis and documentation supporting this finding should be provided for public review, since it is an uncommon finding. Questions that exist are (a) whether that determination included consideration of the effects of proposed effluent discharge volumes and (b) whether the determination considered extreme wet weather rainfall and runoff conditions.

4. Effluent Water Balance. The spreadsheet calculations supporting the effluent water balance during extreme wet year conditions should be provided for public review. It is not at all clear whether the proposed effluent disposal/storage scheme is feasible during either typical or extreme wet years, given the proposed limitations on discharge to surface waters, the limited land area for effluent disposal and the uncertainties described in the proposed permit.

5. Adaptive Management Plan. The Adaptive Management Plan that is proposed to be developed after adoption of the permit should be released for public review prior to adoption of the proposed NPDES permit to ensure that the proposed discharge to Stream A1 is adequate and feasible. Inspection of the stream and downstream roadside ditch indicates that significant effluent discharges to Stream A1 will lead to flooding of private property and resulting unacceptable nuisance conditions to the property owner. Until the magnitude of flow volumes that can be discharged seasonally to Stream A1 are understood, a proper effluent water balance cannot be determined. The feasibility and reliability of the overall effluent discharge scheme must be established before an NPDES permit can be properly considered and adopted.

6. Surface Water Discharge Operations Plan. The operations plan described in Part II. Special Conditions. C. should be fully developed and considered prior to the commencement of discharge and prior to approval of the proposed NPDES permit. This plan must also be consistent with the Adaptive Management Plan and the effluent water balance to ensure that the proposed discharge is properly managed. The notion that this plan should be developed "on the fly", after adoption of the permit and during actual discharge events is an unusual and unnecessary approach. Typically, operations plans are developed in concert with facilities design and well in advance of the adoption of

permits. Such prior adoption is even more appropriate in this case, since the proposal is for a new surface water discharge.

7. **Antidegradation analysis.** As part of an application for a new surface water discharge, an antidegradation analysis is required to address whether the proposed discharge is consistent with federal and state antidegradation policies. The analysis of antidegradation presented in the Statement of Basis is cursory in nature and does not include analysis of the increased pollutant loadings or incremental water quality changes that will occur as a result of the proposed discharge. Documentation (including assumptions and calculations supporting a water quality impacts analysis) should be provided for public review prior to the adoption of the proposed permit.

8. **Exception to discharge limitation of one percent of Russian River flow.** On page 14 of the Statement of Basis, it is stated that EPA has concluded that the proposed discharge would meet all of the five criteria required for an exception to the one percent of flow limitation. These criteria include:

- Reliability
- Protection of Beneficial Uses
- Maximize reclamation
- Meet antidegradation requirements
- Prohibition on discharge between May 15 and September 30

For reasons stated previously regarding the absence of adequate effluent data to evaluate protection of beneficial uses, absence of effluent water balance information to evaluate whether reclamation has been maximized, and inadequate antidegradation analysis, AWA should request that the language that the discharge would qualify for an exception be removed from the Statement of Basis.

9. **Effluent and Receiving Water Monitoring.** Given the pristine nature of water quality in the Russian River watershed, the effluent and receiving water quality monitoring requirements for the proposed discharge should be adequate to ensure that violations of prescribed limits will be detected, that unacceptable impacts are not allowed to occur and that the complicated and relatively uncertain effluent management scheme is functioning properly. It is recommended that the following analyses be performed more frequently than shown in Tables 1 and 2 of the proposed permit to provide a proper level of assurance that the proposed facilities are being properly operated and are functioning as designed:

Acute and chronic toxicity	Monthly (versus every other year)
Temperature	Continuous (versus no requirement)
Priority pollutants	Monthly (versus every other year)
Chlorine residual	Continuous (versus weekly)

Hardness	Weekly (versus no requirement)
Turbidity	Continuous (versus weekly)
pH	Continuous (versus daily)

10. **Inspection and Monitoring of the Proposed facilities and operations.** Concern exists that the USEPA NPDES permit division is not adequately staffed to maintain appropriate levels of inspection and monitoring of the proposed treatment and disposal operation. It should be suggested that USEPA delegate the authority for routine inspection and monitoring to the Regional Water Quality Control Board, Region 1, who is more routinely involved and in greater proximity to adequately perform these functions.

Other concerns

The following additional comments on the proposed NPDES permit and Statement of Basis exist. These comments are organized according to their occurrence in the two documents rather than according to a priority of importance, and may be deemed to be significant upon further review and discussion with AVA representatives.

NPDES Permit

Page 3, footnote (1): The limit on discharge should specify that the discharge shall not exceed one percent of the Russian River flow at any time, and that, in no case, shall the discharge flow exceed the daily river flow measurement at the Cloverdale USGS gauging station. The language that would allow the one percent limit to be evaluated on a monthly average basis should be deleted.

Page 4, Table 2: Monthly average BOD and TSS limits should be 10 mg/l rather than 30 mg/l to allow compliance with Title 22 requirements.

Page 6, C.2. Second sentence: The receiving water monitoring should be performed prior to 9 AM to detect critical conditions for dissolved oxygen. The phrase "when feasible" should be deleted.

Page 6, D. Receiving Water Limitations: Language should be added to clarify the discharger's responsibility in determining causation for violations of receiving water limitations.

Page 10, Part II. Special Conditions. D, Reporting of Capacity Attainment and Planning: The permittee should be required to report within 30 days after average dry weather flow for any month exceeds 75 percent (rather than 90 percent) of the rated capacity of the treatment facility. This notification is needed to ensure that adequate capacity will be provided in advance of demand.

Page 11, Special Conditions, E. Reclaimed Water Limitations: The application of reclaimed water should comply with all of the requirements of Title 22, Division 4, Chapter 3 of the California Code of Regulations for disinfected tertiary recycled water. These requirements define water recycling criteria and address treatment requirements, acceptable recycled water uses, area use requirements, methods for testing and analysis, engineering reports and operational requirements, requirements for plant personnel, preventive maintenance requirements, operating records and reporting, design requirements, alarm requirements, emergency storage and disposal requirements and backflow prevention.

Additionally, requirements for tail water recovery or control should be included in the permit to provide physical facilities to ensure that uncontrolled runoff not occur.

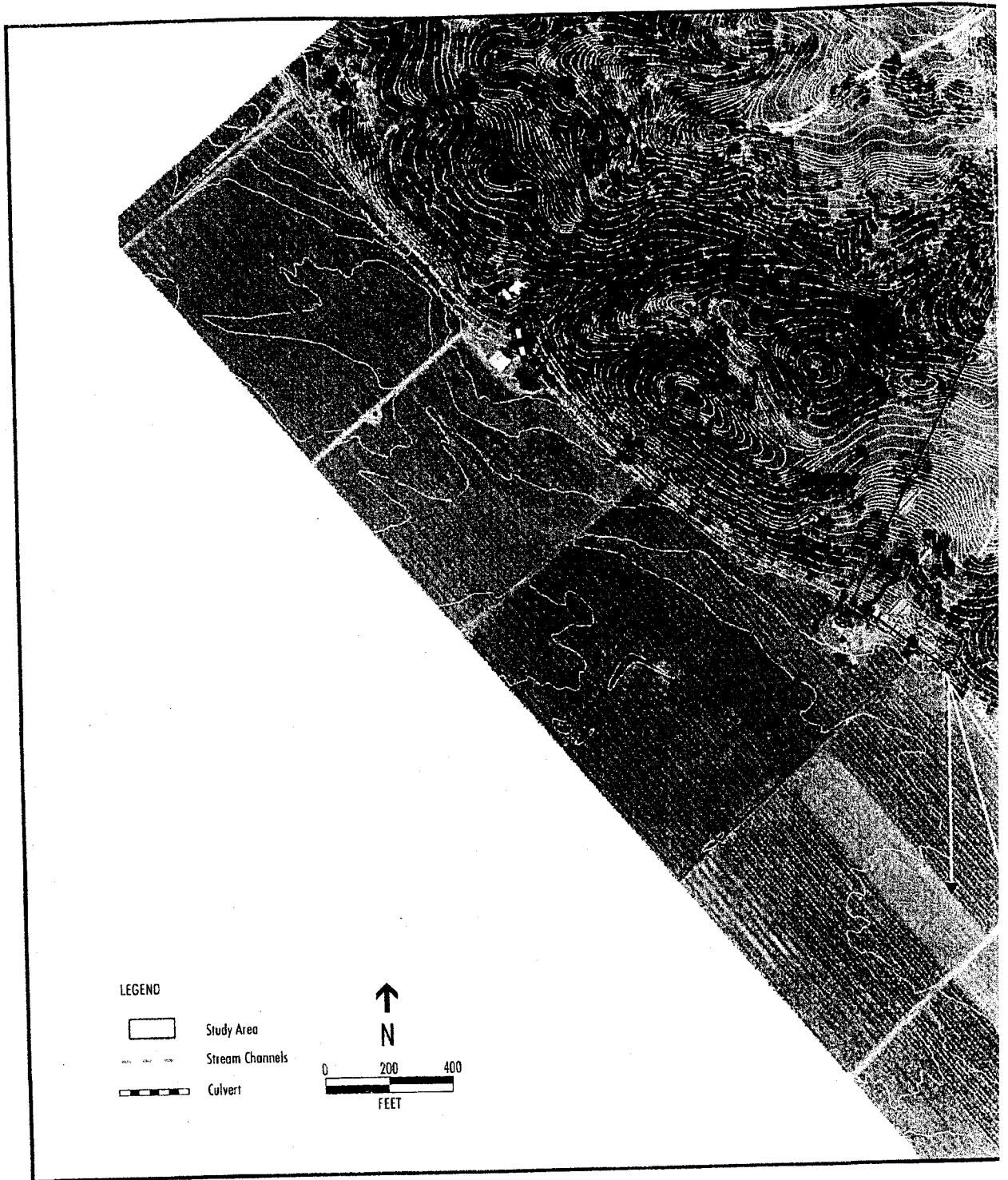
Statement of Basis

Page 15: The statement is made that operators are on-call 24 hours per day. Does this imply that there is no regular attendance at the treatment facility during the normal work week? The permit should require a minimum level of operator attendance at the treatment facility (e.g. 40 hours per week).

Document Requests

At a minimum, the following documents should be requested for review to allow proper evaluation of the proposed NPDES permit in advance of consideration of the permit for adoption.

- a. Complete description of the basis for future flow projections, including a description of any proposed new facilities that would lead to increased wastewater flows.
- b. An engineering analysis of the maximum/ultimate on-site wastewater effluent land disposal capacity.
- c. Effluent data for priority pollutants and hardness.
- d. Reasonable potential analysis and calculations for water quality based effluent limits.
- e. Proposed Adaptive Management Plan for Stream A1 prepared by Hydroscience Engineers in April 2006.
- f. Proposed Surface Water Discharge Operations Plan.
- g. Documentation for US Army Corps of Engineers finding that Stream A1 is not tributary to the Russian River.



SOURCE: Environmental Science Associates, 2004



Dugan Property Wetland Delineation / 202051 004 ■

Figure 4-2
Local Hydrology

William Esselstein

----- Original Message -----

From: Tom Grovhoug

To: William Esselstein ; Bruce Goldstein ; Pete Dayton ; Ralph & Janice Sceales ; Tom Grovhoug ; Candy and Larry Cadd

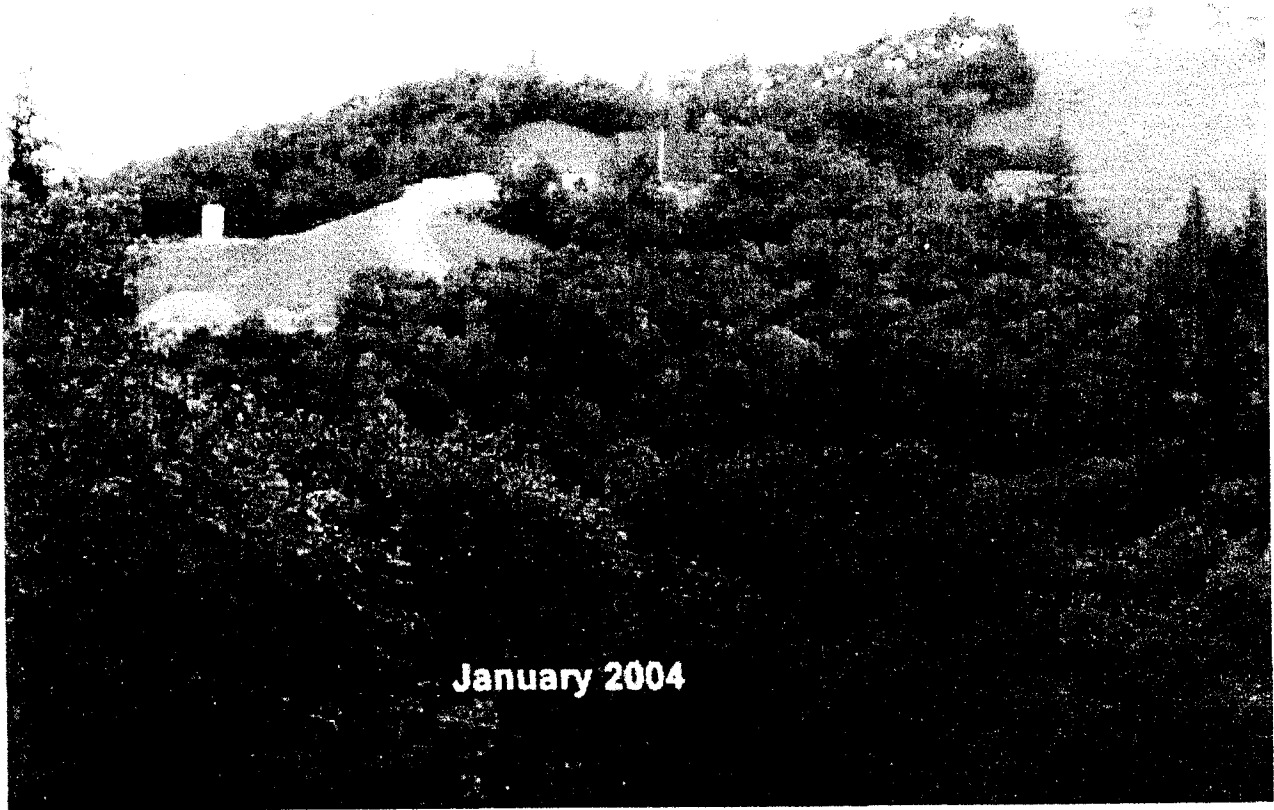
Sent: Friday, September 22, 2006 3:06 PM

Subject: RE: Document request

Bill – I reviewed the Adaptive Management Plan for Discharge to Stream A1 that was prepared in April 2006 by Curtis Lam. The empirical (i.e. trial and error) approach suggested by Mr. Lam suggests increasing discharges to Stream A1 at varying flow rates, starting at 10 gallons per minute, and monitoring over a one year period to observe whether sheet flow occurs from the roadside ditch along Highway 128. Observations, photos and rainfall data would be collected to attempt to determine a discharge rate that will prevent sheet flow from the roadside ditch.

The proposed approach is problematic for a number of reasons and would be unlikely to lead to a reliable operational scheme that will guarantee that sheet flows not occur to the vineyards. Problems with the approach include (1) difficulty in correlating discharge rates with acceptable stream flows, especially during rainfall periods, (2) the need to consider soil saturation resulting from antecedent rainfall conditions in the above correlation, (3) practical limitations that operators will encounter, including the need to monitor and predict rainfall and runoff quantities in the establishment of allowable discharge rates, etc. The likelihood that prohibited discharges to the vineyard would occur during the one year testing period has not been considered. The adaptive management plan itself would likely result in immediate permit violations and impacts to the vineyards.

Tom



January 2004



Sant' low casino



new road

EXHIBIT B

COUNTY OF SONOMA
BOARD OF SUPERVISORS

575 ADMINISTRATION DRIVE, RM. 100A
SANTA ROSA, CALIFORNIA 95403

(707) 565-2241
FAX (707) 565-3778

EEVE T. LEWIS
COUNTY CLERK



003

MEMBERS OF THE BOARD

PAUL L. KELLEY
CHAIRMAN

VALERIE BROWN
VICE CHAIRWOMAN

MIKE KERNS

TIM SMITH

MIKE REILLY

September 29, 2006

Mr. John Tinger
Environmental Engineer
Clean Water Act Standards and Permits
United States Environmental Protection Agency
75 Hawthorne St.
San Francisco, CA 94105

Re: County of Sonoma and Sonoma County Water Agency Comments on the
Proposed National Pollutant Discharge Elimination System (NPDES)
Permit No. CA 0005241, and Request for Voluntary National
Environmental Policy Act (NEPA) Compliance

Dear Mr. Tinger:

I am writing to submit the comments of the County of Sonoma and the Sonoma County Water Agency on the above-identified proposed NPDES permit, as well as a formal request that the United States Environmental Protection Agency (USEPA) voluntarily prepare a NEPA document before taking any further action on the same. Copies of both documents are enclosed.

As we expressed in our March 21, 2006 comments on the permit application, at the May 12 meeting with Congressman Mike Thompson's office, and at the September 7 public hearing, the County and Water Agency are deeply concerned about the proposed permit and the environmental impacts caused by the segmentation of the project proposed and implemented by the Dry Creek Band of Pomo Indians ("the Tribe").

The County and Water Agency specifically remain concerned that the record contains insufficient information to permit a meaningful public review of the proposed wastewater discharges and their likely environmental impacts. The enclosed comments identify twelve categories of missing information and analysis that are crucial to

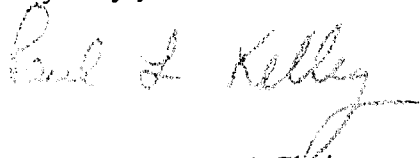
Mr. John Tinger
September 29, 2006
Page 2

informed participation in the permit review process. The County and Water Agency respectfully submit that the USEPA must include this information and analysis in a revised and recirculated proposed permit and proposed statement of basis before taking any further action on the Tribe's application.

The County and Water Agency also respectfully request that before it takes any further action on the application, the USEPA voluntarily prepare a NEPA document under its Policy and Procedures for Voluntary Preparation of NEPA Documents, 63 Fed. Reg. 58045-47 (Oct. 29, 1998). The County and Water Agency note that no NEPA or public review occurred with regard to the Tribe's past development phases, largely because the Tribe did not seek the instant NPDES permit at that time, and that issuance of the proposed permit could allow the Tribe to similarly implement its major expansion plans without any environmental public review. The County and Water Agency respectfully submit that the instant permit review process represents the last best opportunity to comprehensively address the large-scale and cumulative impacts of the Tribe's development, to expand public involvement and address controversial issues, and to meet the USEPA's other criteria for voluntarily preparing a NEPA document.

The County and Water Agency therefore respectfully request that the USEPA revise and recirculate the proposed permit and proposed statement of basis, and voluntarily prepare a NEPA document, before taking any further action on the Tribe's application.

Very truly yours,



PAUL L. KELLEY, Chair
Sonoma County Board of Supervisors
Sonoma County Water Agency Board of Directors

Enclosures

cc: Cheryl Diehm, Office of Congressman Mike Thompson
Bob Van Ness, Esq., Alexander Valley Association

**County of Sonoma and Sonoma County Water Agency
Comments on the Proposed National Pollutant Discharge Elimination System
(NPDES) Permit No. CA 0005241**

Introduction

This document comprises the comments of the County of Sonoma and Sonoma County Water Agency on the NPDES Permit identified above, which the United States Environmental Protection Agency ("USEPA") has proposed to issue to the Dry Creek Band of Pomo Indians ("the Tribe"). The proposed permit would allow the Tribe to approximately triple wastewater output at its Rancheria, from 40,000 to 112,000 gallons per day (gpd), with an average weekend flow of 141,000 gpd and a peak capacity of 200,000 gpd. The Tribe would discharge wastewater via Stream P1 to the Russian River, which is the drinking water supply to approximately 700,000 people in the region. The Tribe also proposes to discharge to Stream A1, a surface fresh water impoundment that terminates on private property and has the potential to impact domestic wells.

Issuance of the proposed permit would remove the last physical and legal restraint on non-gaming development at the Rancheria, and would thus allow the Tribe to approximately triple the size and scope of its operations. Plans for the Tribe's major expansion, which would include a major new hotel and resort, are a matter of public record and have been published in the newspaper. A true and correct copy of the article describing the Tribe's expansion plans, and depicting them in full color, is attached hereto as **Exhibit A**.

The County and Water Agency have taken a very active role throughout this permit process, and have repeatedly expressed to the USEPA their deep concern about the proposed permit. The County Board of Supervisors submitted extensive comments to the USEPA on the permit application on March 21, 2006, County staff entered written objections to the proposed permit at the September 7, 2006 public hearing, and County and Water Agency staff have met and spoken with USEPA staff in an effort to minimize the public health, safety, and environmental impacts of any approved discharge.

The County and Water Agency appreciate the USEPA's willingness to communicate and release some additional information regarding the impacts of the proposed discharge and other issues raised by the proposed permit. The County and Water Agency further appreciate those changes that the USEPA appears to have made as a result of the County's March 2006 comments on the permit application. Many outstanding issues remain, however, and the permit should not be issued on this record. The County and Water Agency respectfully request that the USEPA provide the information and make the changes outlined below, and recirculate a revised proposed permit for additional public review and comment.

The County and Water Agency also respectfully request that the USEPA voluntarily prepare a National Environmental Policy Act ("NEPA") document before taking further action on the proposed permit. The instant permit process represents perhaps the last best chance for resource agencies and the public to review and comment upon the likely significant environmental impacts of the Tribe's tripling of its operations, as well as the cumulative impacts of the Tribe's past, present, and reasonably foreseeable future development. A true and correct copy of the County and Water Agency's formal request that the USEPA prepare a NEPA document is attached hereto as **Exhibit B**.

Discussion

I. The Proposed Permit Should Not Be Issued on this Record.

The public record lacks several categories of information and analysis that are essential to the integrity of the proposed permit and crucial to informed participation in the permit review process. The USEPA should not take further action on the permit until this information and analysis is compiled and/or conducted, a revised proposed statement of basis and proposed permit are recirculated for public review, and additional consultations take place between the USEPA, Tribe, County, and the North Coast Regional Water Quality Control Board.

A. Removal of Stream A1 as a Receiving Water.

Regional Water Quality Control Board staff testified at the September 7 public hearing that discharge to Stream A1 is not permitted under the Water Quality Control Plan for the North Coast Region ("Basin Plan") because Stream A1 is an inland surface water impoundment. The County and Water Agency understand that the USEPA may have already agreed that discharge to Stream A1 would violate the Basin Plan, and intend to remove from the proposed permit Stream A1's designation as a receiving water.

The County and Water Agency concur in the Regional Water Quality Control Board's determination, and request that the USEPA delete Stream A1 from the proposed permit. The County and Water Agency further submit that this change would constitute a substantial revision to the proposed statement of basis and proposed permit, and that both documents should be recirculated and subjected to additional public review and comment.

B. Monitoring Requirements for Receiving Water Limitations.

The proposed permit includes monitoring requirements for some pollutants and discharge characteristics at Outfalls 001, 002, and 003, where the treatment plant would discharge to Streams P1 and A1. (Permit at 2-5.) It would also require weekly

monitoring for pH, dissolved oxygen, turbidity, and temperature both 100 feet upstream of the outfalls, and at the Rancheria boundary. (Permit at 6.)

The proposed permit then identifies fifteen separate limitations on the Russian River and other receiving waters. (Permit at 6-7.) These include important limits on temperature, turbidity, dissolved oxygen, pH, and others necessary to protect human and aquatic health and safety. (Permit at 6-7.) The proposed permit does not appear to require any testing or monitoring to ensure compliance with these limitations, however.

The USEPA should revise the permit to require frequent and independent monitoring and testing of the Russian River to ensure compliance with these limitations. The USEPA should further require the Tribe to submit monitoring and testing results to the Regional Water Quality Control Board and all other agencies having jurisdiction over the Russian River and its resources.

The absence of monitoring and testing requirements is especially problematic with regard to temperature, as the County commented in March 2006. The proposed statement of basis correctly states that the Russian River is listed as an impaired waterbody for sedimentation/siltation and temperature pursuant to Section 303(d) of the Clean Water Act (SOB at 8), and the proposed permit therefore imposes a detailed, three-part temperature limit on discharges to receiving waters. (Permit at 7, ¶ 10.) Yet the proposed permit does not appear to require any downstream testing or monitoring to ensure that these limits are met, and that discharges do not further degrade the Russian River and the listed fish species within it.

Similarly, the proposed permit does not appear to require the Tribe to actually test and verify that its discharges would not unduly increase turbidity (Permit at 6, ¶ 2), create undesirable water discoloration, taste, or odors (*id.* at 7, ¶¶ 5-6), cause pesticide bioaccumulation in aquatic life (*id.*, ¶ 11), or violate any of the other receiving water limitations. The proposed permit should be revised to require impose frequent and independent monitoring and testing requirements, and should be recirculated for public review and comment of the same.

C. Water Balance.

The County has repeatedly commented on the pressing need for some evidence that the Tribe's proposed disposal and storage scheme is actually feasible as a matter of fact. Neither the proposed statement of basis nor the proposed permit include a water balance or other information demonstrating that the Tribe's surface discharges, storage areas, and spray fields could actually accommodate the proposed 300 percent increase in treated wastewater.

This information is crucial, given the Basin Plan's significant restrictions on discharges to A1 and the Russian River, the Tribe's limited reuse opportunities, and the USEPA's reduced enforcement leverage against the Tribe (as opposed to municipal agencies). The USEPA should disclose all information provided by the Tribe regarding the feasibility of its proposed discharge scheme during both typical and extreme weather years. The USEPA should also conduct an independent investigation and analysis of this question, revise the proposed statement of basis and proposed permit accordingly, and recirculate both for additional public review and comment.

D. Effluent Limits for Priority Pollutants.

The proposed statement of basis states that "[n]o data on priority pollutants is available at this time because the WWTP was not required to conduct monitoring of toxic pollutants." (SOB at 7.) This sentence should be rewritten from the passive to the active tense, to disclose that no data is available only because the USEPA has not asked for it, and the Tribe has not provided it.

The USEPA should require the Tribe to submit information identifying the priority pollutant levels in its existing effluent, including but not limited to three priority pollutant analyses, a "reasonable potential" analysis, and a laboratory analysis of hardness. This information is readily available, given that the Tribe has been operating its treatment plant for the last several years. Indeed, resource agencies routinely require this information when evaluating permit applications to discharge even tertiary treated wastewater.

The USEPA should thereafter derive appropriate priority pollutant effluent limitations, and include them in a revised and recirculated permit. The County understands that the USEPA expects that the proposed discharge may not contain priority pollutants sufficient to trip water quality standards. (SOB at 7.) It would be arbitrary and capricious to issue an NPDES permit on expectation alone, however, especially when the USEPA's hypothesis can be easily tested and verified by requesting data from the existing treatment plant.

E. Biochemical Oxygen Demand (BOD) and Total Suspended Solids (TSS).

The County similarly commented in March 2006 that the USEPA should require the Tribe to disclose BOS and TSS levels in its existing influent water, rather than assuming them to be the same as "typical gaming facility" wastewater. The USEPA does not appear to have done so, even though these values are readily available and easily determined. The County appreciates the USEPA's willingness to impose BOS and TSS standards more stringent than technology-based standards. (SOB at 9, 11.) The USEPA nevertheless appears to have repeatedly refused to ask for readily available and

potentially valuable information. The USEPA's repeated refusals, and its potential issuance of an NPDES permit without this information, appear unreasonable.

F. Physical Capacity of Stream P1.

Mr. Dennis Murphy testified persuasively at the September 7 public hearing that Stream P1 can not physically accommodate the anticipated discharge, and that using Stream P1 as a receiving water would result in significant streambank erosion and other environmental impacts. These concerns will be magnified if Stream A1 is removed as a receiving water, and the Tribe increases discharges to Stream P1.

As Mr. Murphy correctly pointed out on September 7, neither the proposed permit nor the proposed statement of basis provides any information or analysis of Stream P1's capacity to accommodate the anticipated discharge. The proposed permit and proposed statement of basis similarly include no information regarding erosion impacts, except for one sentence requiring the Tribe to "design and install erosion protection measures to prevent erosion from the discharge point to receiving water." (Permit at 9.)

These measures should be designed and submitted for USEPA and public review before any further action is taken on the proposed permit. In addition, the USEPA should analyze whether the proposed measures would be effective, disclose whether the Tribe has the legal authority to enter private property along Stream P1 to implement them, and impose a condition requiring that they be replaced with equal or more effective measures should they fail or prove ineffective. A revised statement of basis and proposed permit including this information and analysis then should be recirculated for additional public review and comment before any action is taken on the permit.

G. Stream A1's Percolation and Evapotranspiration Capacity.

The proposed statement of basis discloses that the Tribe has already "conducted a study to estimate the percolation and evapotranspiration capacity of [Stream A1]." (SOB at 17.) The County specifically requested a copy of this study at the September 7 public hearing, but did not receive it. Indeed, it does not appear that any interested individual or organization has had an opportunity to review this study. If the USEPA decides to retain Stream A1 as a receiving water, it should release this study to the public, and allow an additional round of public review and comment.

Releasing the study is particularly important because, as the USEPA concedes, the study appears to have failed "to predict within a level of accuracy sufficient to demonstrate the permit requirement that no discharge contribute to sheetflow." (SOB at 17.) Moreover, as the County has previously commented, the Tribe has consistently overestimated the percolation characteristics of soils intended for discharge.

Similarly, the Tribe's proposed Adaptive Management Plan appears insufficient to ensure that the proposed discharge would function as intended and not cause sheet flow onto the existing vineyard located near the terminus of Stream A1. This sheet flow would constitute a trespass onto private land, and could adversely impact the viability of downstream lands for agriculture and residential development. The County and Water Agency thus again request that this study be included in the public record, and that the public have a chance to review and comment on it.

H. Analysis of Temperature Limitations.

As noted above, the Russian River is listed as an impaired waterbody for temperature and sedimentation/siltation pursuant to Section 303(d) of the Clean Water Act. With regard to sedimentation/siltation, the proposed statement of basis includes one paragraph attempting to explain why the proposed discharge would not contain materials sufficient to increase sediment levels in the Russian River. (SOB at 11.) Although the County and Water Agency disagree with the USEPA's decision to analyze estimated rather than actual TSS levels, the proposed statement of basis at least provides some analysis of potential sedimentation and siltation impacts on the Russian River.

No similar analysis appears to exist with regard to temperature. The Tribe does not appear to have provided any data suggesting that its proposed discharges would comply with temperature limitations, and neither the proposed statement of basis nor proposed permit offer any evaluation of this issue. Given the importance of water temperature to the Russian River and the protected species within it, the USEPA should not issue any NPDES permit without analyzing the proposed discharge's likely temperature impacts.

I. Adaptive Management Plan.

The proposed statement of basis and proposed permit rely heavily on a proposed Adaptive Management Plan to assuage rampant public concerns that Stream A1 can not accommodate proposed Tribal discharges without causing significant environmental impacts on neighboring, private vineyards. (SOB at 17; Permit at 9.)

The proposed Adaptive Management Plan can not carry this weight. The proposed plan is just three pages long, and does not identify how much water Stream A1 can accommodate without causing discharges onto private property. The plan instead proposes a trial and error approach that essentially guarantees that at least some overflow will occur on private property. This approach is wholly inappropriate for this proposed discharge. The USEPA should delete Stream A1 as a receiving water, or require significant modifications to the proposed Adaptive Management Plan, disclose those changes to the public, and decide on and circulate a final plan *before* issuance of any NPDES permit.

J. Quality Assurance (QA) Manual or Plan.

The proposed permit would require the Tribe to develop a QA Manual or Plan that would, among other things, identify the roles and responsibilities of the participants, explain the Tribe's intended sample collection procedures and similar information, identify the laboratory that would analyze the samples, and discuss how the Tribe would perform data review and meet the USEPA's reporting and laboratory certification requirements. (Permit at 13-14.)

None of this information depends on issuance of the proposed permit, and the Tribe could prepare the require manual or plan now, and allow public review of its contents. The USEPA should require the Tribe to do so, and circulate the draft QA Manual or Plan for public review and comment before taking any action on the permit

K. Operation, Maintenance, and Emergency Response.

The County has repeatedly requested that the USEPA require the Tribe to designate and identify independent persons or entities to operate and maintain the wastewater treatment plant and disposal facilities. The proposed statement of basis and proposed permit again do not identify any such persons or entities, nor provide any assurance that they will be independent, and on site or available to respond to emergency conditions.

The only information in this regard in the September 7 public hearing, when one of the Tribe's consultants obliquely referred to an alarm system, remote viewing of the plant, and a protocol for notifying concerned parties when violations occur. The proposed permit and proposed statement of basis should be revised to disclose this information in far greater detail, and to provide an analysis by USEPA staff regarding the feasibility and efficacy of the Tribe's operation, maintenance, and emergency response plans. The USEPA should specifically require that the Tribe immediately report all water quality violations to the Regional Water Quality Control Board, the County, and all other interested State and local entities.

The USEPA may object that this information (or other information identified above) is beyond the usual purview of an NPDES permit. The County and Water respectfully refer the USEPA to page 19 of its proposed statement of basis, which reveals that although the Tribe is not required to comply with State criteria for wastewater reuse on Tribal lands, USEPA staff successfully negotiated with the Tribe on this point, and inserted permit terms requiring compliance. The County and Water Agency respectfully request the USEPA to do the same with regard to the information identified above, and include permit terms establishing standards for the same.

L. Navigability of Stream A1.

The Statement of Basis states that the U.S. Army Corps of Engineers has determined that Stream A1 is hydrologically isolated from all navigable waters of the United States. (SOB at 3.) The USEPA should provide some citation or documentation of that statement.

M. Conclusion.

The missing information and analysis identified above demonstrates that it is premature to issue a discharge permit at this time. The health and water contamination risks to neighboring wells, as well as water sources upon which the community depends, obligate the USEPA to require the collection of additional data, conduct additional analysis of the Tribe's proposed discharge plans, and initiate a consultation process of stakeholders before it takes any further action on the proposed permit. The County and Water Agency therefore respectfully request that at a minimum the proposed permit and proposed statement of basis be revised as set forth above, and subjected to additional public review and comment, before any further action is taken on the proposed permit.

II. The Proposed Permit and Proposed Statement of Basis Should Be Revised.

The County and Water Agency further suggest that the proposed permit and proposed statement of basis be modified as set forth below, to better fulfill the requirements of the Clean Water Act and ensure the safety, feasibility, and efficacy of the proposed discharges.

A. Removal of Stream A1 as a Receiving Water.

The permit should excise Stream A1 as a receiving water, for the reasons stated by the Regional Water Quality Control Board, and as outlined above.

B. Operator Qualifications.

The County and Water Agency have repeatedly commented that the USEPA should require a minimum level of independence and competence (for example, a particular level of wastewater operator license) for personnel operating the facilities. To its credit, the proposed permit would require operators to have "training and/or certification equivalent to the requirements of the State of California, at the level appropriate to the facility and/or system." (Permit at 15.) To obtain a license from the State of California, one must have past experience operating and maintaining wastewater treatment facilities, and not just training to do so. The County and Water Agency respectfully request that the USEPA similarly require all future operators of the instant facilities to have past experience. The County and Water Agency also respectfully

request that the USEPA require all future operators to be independent third parties, rather than Tribal employees themselves.

C. Flow Limitations.

The proposed Statement of Basis improperly includes several pages that improperly and incorrectly suggest that the proposed discharge might qualify for an exception to the Basin Plan's prohibition against discharge to the Russian River between May 15 and September 30 when the discharge flow is greater than one percent of the receiving stream's flow. (SOB at 12-18.) The proposed permit properly does not rely on these suggestions, and limits flows to no greater than one percent of the River as measured at the Cloverdale USGS Gaging Station. (Permit at 3.) These suggestions in the proposed statement of basis thus appear to be superfluous at best. They should be excised from any future statement of basis.

D. Acute Bioassay Monitoring.

The proposed permit would require chronic bioassay monitoring in the first, third, and fifth years of the permit (Permit at 2, 4), but does not appear to require acute bioassay testing at all. The North Coast Regional Water Quality Control Board typically requires discharges to the Russian River to conduct 96-hour static, non-renewal acute bioassay monitoring on a monthly basis during discharge. The species is usually rainbow trout with the following conditions: (1) Single sample bioassay result less than 70 percent survival; (2) Median for any three or more consecutive bioassays less than 90 percent survival. The proposed permit should be revised to require acute bioassay testing in addition to chronic bioassay monitoring.

E. Composite Sampling.

Table 1 and Table 2 of the proposed permit use the word "Composite" with regard to seven separate effluent limitations and monitoring requirements, but do not define the type of composite sample being referred to. This confusion is complicated by the fact that Appendix A of the proposed permit ("Standard Definitions") references both an 8-hour "composite sample" and a "24-hour composite sample." The USEPA should revise the proposed permit to clarify the type of composite sample required for each effluent limitation.

Because the Tribe's casino is a 24-hour operation, the USEPA should specifically require that the Tribe take 24-hour flow proportional samples, and take weekly samples on different days (not always on a Monday, for example). The USEPA should also require sampling during at least one weekend per month, since the Rancheria will experience significantly higher flows and pollutant concentrations on weekend days.

F. Chlorine Limitations.

The proposed statement of basis states the USEPA "believes there is a reasonable potential for chlorine residual to be present due to the use of chlorine at the WWTP and its use for reclaimed water applications. Therefore, effluent limits for residual chlorine have been included in the permit to verify compliance." (SOB at 12.)

This does not appear to be accurate. The proposed permit includes chlorine testing in Tables 1 and 2, but states via footnote 3 that there is "[n]o limit set at this time." (Permit at 2-5.) The USEPA should revise the proposed permit to require daily testing of total residual chlorine, and to require that wastewater discharged shall not contain detectable levels of total chlorine using an analytical method or chlorine analyzer with a minimum detection level of 0.1 mg/L.

Conclusion

For the foregoing reasons, the County and Water Agency respectfully request that the USEPA revise the proposed permit as outlined above, and subject it to additional public review and comment.

**County of Sonoma and Sonoma County Water Agency
Request that the United States Environmental Protection Agency voluntarily
prepare a National Environmental Policy Act ("NEPA") document regarding
National Pollutant Discharge Elimination System ("NPDES") Permit No. CA
0005241**

Introduction

The County of Sonoma and Sonoma County Water Agency hereby request that the United States Environmental Protection Agency ("USEPA") voluntarily prepare a NEPA document before taking further action on NPDES Permit No. CA 0005241. The County and Water Agency make this request pursuant to the USEPA's Policy and Procedures for Voluntary Preparation of NEPA Documents, 63 Fed. Reg. 58045-47 (Oct. 29, 1998).

The requested NPDES permit would allow the Dry Creek Band of Pomo Indians ("the Tribe") to approximately triple wastewater output at its Rancheria, from 40,000 to 112,000 gallons per day (gpd), with an average weekend flow of 141,000 gpd and a peak capacity of 200,000 gpd. The Tribe's inability to discharge additional wastewater is the limiting factor on its expansion plans, which include construction of a major new hotel and resort. A true and correct copy of an article describing the Tribe's expansion plans, and depicting them in full color, is attached hereto as **Exhibit A**.

The instant permit review process represents the last best chance to subject the Tribe's past and reasonably foreseeable future development plans to environmental review. The instant permit appears to be the only federal approval the Tribe needs to implement its major expansion plans, and is thus the only opportunity to conduct a NEPA review of those plans. Similarly, because the Rancheria is located on trust land, the Tribe likely could implement its proposed major expansion without complying with any state or local environmental review laws. The instant permit process thus may represent the only opportunity for resource agencies and the public to review and comment upon the likely significant environmental impacts of the Tribe's tripling of its operations.

Failure to conduct a NEPA review likely would lead to the segmentation or piecemealing of environmental impacts, contrary to NEPA's statutory goals and legislative intent. By its own terms, the proposed permit would remove a significant legal and physical impediment to future development, and thus should not be viewed in isolation. The proposed permit is an integral part of the Tribe's major expansion project, which has the potential to cause significant environmental impacts. The whole of this action should be subject to a comprehensive NEPA review before any part of it is approved.

Voluntary NEPA review is particularly necessary given the absence of any meaningful environmental review of the Rancheria's development projects to date. The

Tribe developed its casino gaming facilities, including massive grading and earth movement, via a grossly inadequate "Environmental Study" that did not comply with NEPA or state or local environmental law. For example, it was lack of proper analysis of soil permeability and stability as well as water balance that has forced the Tribe to pursue the instant NPDES permit, although no such impact or need was previously identified in its prior environmental work. The segmentation of the casino, parking, and other projects has prevented any comprehensive environmental analysis of the cumulative impacts of the Tribe's Rancheria development. The instant permit thus affords resource agencies and the public their first real opportunity to identify and analyze the cumulative impacts of the Tribe's past, present, and reasonably foreseeable future developments.

Staff from the Regional Water Quality Control Board testified at the September 7, 2006 public hearing on the proposed NPDES permit that they were "stunned" that no NEPA review had yet been conducted for this proposed permit. The County and Water Agency respectfully submit that it is not too late to conduct this review, and that such an analysis is imperative to fulfill NEPA's statutory goals and legislative intent.

Discussion

USEPA policy states that the agency will voluntarily prepare a NEPA document "where the Agency determines that such an analysis would be beneficial." (63 Fed. Reg. at 58046.) The USEPA may consider the following criteria in making such a determination:

- (a) the potential for improved coordination with other federal agencies taking related actions;
- (b) the potential for using an EA or EIS to comprehensively address large-scale ecological impacts, particularly cumulative impacts;
- (c) the potential for using an EA or an EIS to facilitate analysis of environmental justice issues;
- (d) the potential for using an EA or EIS to expand public involvement and to address controversial issues; and
- (e) the potential of using an EA or EIS to address impacts on special resources and public health.

(*Id.*)

An environmental analysis would be "beneficial" here, and the cited factors militate in favor of NEPA review before further action is taken on the proposed permit. The USEPA's policy specifically recognizes NEPA's value in comprehensively addressing large-scale projects, and particularly the cumulative impacts of the same. The instant project is already large-scale, and is slated to triple in size if the proposed permit is issued. The Tribe's existing development has created significant adverse visual impacts by placing massive buildings and new nighttime light sources on a completely undeveloped hillside. It has caused significant adverse traffic and traffic safety impacts

that will be complicated if the Tribe succeeds in its request to serve alcohol. And it has caused significant adverse geologic, land use, noise, and other environmental impacts, all without any NEPA review.

The instant permit would allow the Tribe to triple its wastewater discharges, and thus triple its development, as outlined above. This expansion would cause significant adverse impacts to a wide variety of resource categories, including but not limited to aesthetics (as Exhibit A makes clear), traffic and circulation, land use compatibility, and many others. It would also cause significant adverse cumulative impacts in a similarly wide range of resource categories. As noted above, the significant cumulative impacts of the Tribe's Rancheria development have never been properly addressed under NEPA.

Preparation of a NEPA document would thus allow resource agencies and the public to comprehensively address the ecological impacts of the Tribe's its major expansion project, and the cumulative ecological impacts of its past, present, and reasonably foreseeable future development.

Preparation of a NEPA document would also expand public involvement and allow resource agencies to address the impacts caused by the Tribe's development, which has already created serious environmental problems both on and off the Rancheria. As noted above, very little public involvement accompanied the Tribe's past development projects, and little is likely to accompany implementation of its major expansion plans. Indeed, if the USEPA issues the proposed permit, the Tribe likely could implement its expansion plans without any further significant environmental or public review. NEPA review is therefore necessary at this stage, to ensure the public an opportunity to review and comment on the environmental impacts of the proposed wastewater discharges and likely expansion of the Tribe's operations.

The remaining criteria similarly support preparation of a NEPA document here. Preparation of an EA or EIA would allow for improved coordination between the agencies with jurisdiction over the resources impacted by the proposed permit, including the Regional Water Quality Control Board, NOAA National Marine Fisheries Service, California Department of Fish and Game, and the County. A NEPA document would also facilitate analysis of environmental justice issues, and the proposed project's likely significant impacts on the public health and the Russian River, groundwater basin, scenic hillside, and other special resources.

The County and Water Agency therefore respectfully request that the USEPA voluntarily prepare a NEPA document before taking further action on the proposed permit.

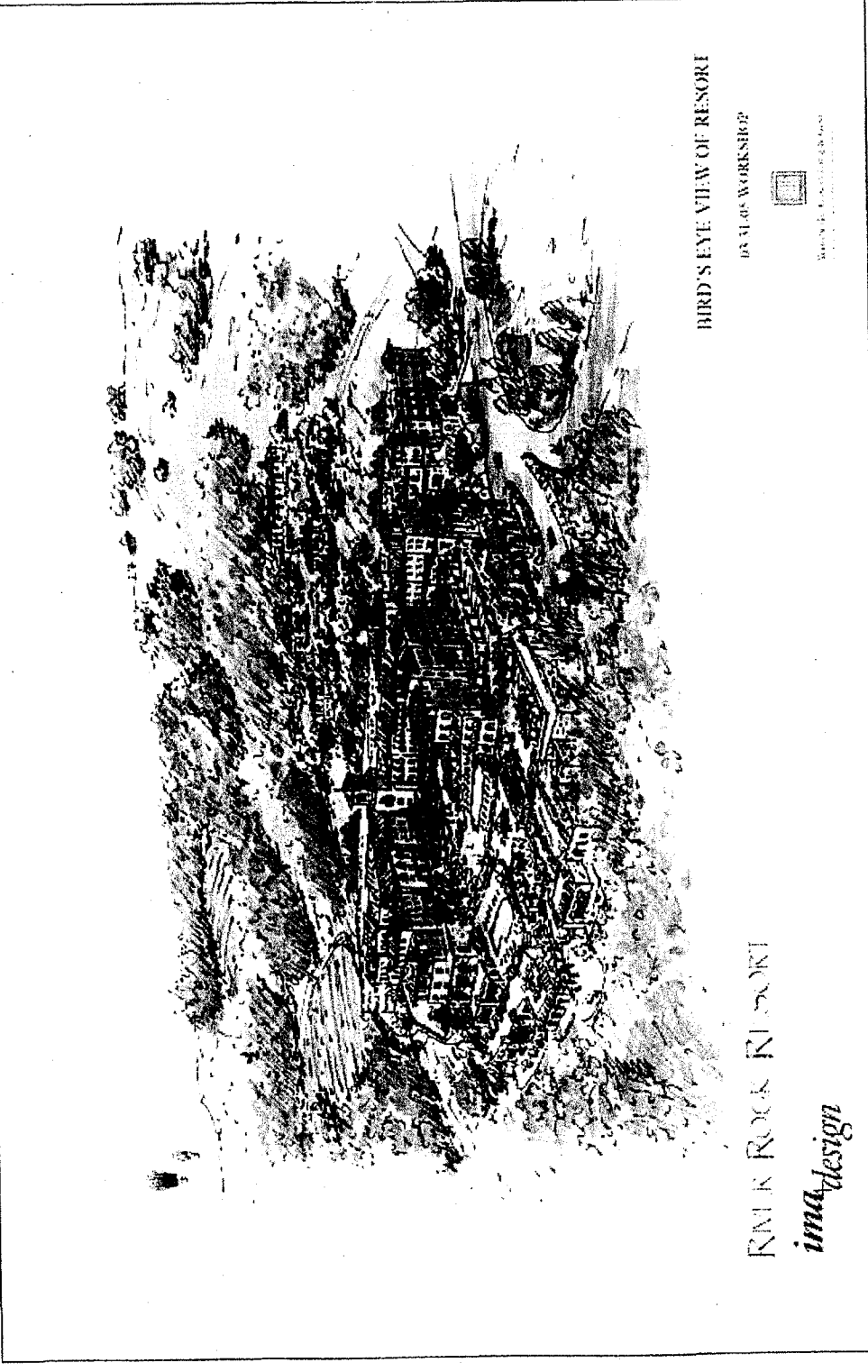
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Article published - Aug 13, 2006

River Rock expansion a step closer Casino seeks approval to discharge more wastewater



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 RIVER ROCK RESORT
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BIRD'S EYE VIEW OF RESORT

US AG'S WORKSHOP



WASHINGTON, D.C.

By Clark Mason THE PRESS DEMOCRAT

The Indian tribe that operates River Rock casino is seeking federal approval to expand its wastewater treatment system, a first step for building its long-planned destination hotel and resort.

The Dry Creek Rancheria Band of Pomo Indians submitted plans to nearly triple the amount of wastewater processed at its casino site in Alexander Valley, indicating it intends to go ahead with a major expansion.

But the timing remains a mystery. Casino and tribal officials declined last week to say when a hotel-resort might be built, or to discuss any expansion plans. They also downplayed drawings by an architectural and design company working with the tribe that show a multistory luxury hotel, swimming pools and a permanent casino replacing the current tentlike structure.

"The tribe has always planned to convert the facility to something more," tribal spokesman David Hyams said. "They have always considered this facility interim and always wanted to do more on the rancheria. They said that at the time they opened."

"The hotel is still in a conceptual stage. Nothing's in concrete. There is no project per se," said casino manager Norm Runyan. But the wastewater expansion

rosale Wimberly, Allison, Tong & Goo

plans have alarmed Sonoma County officials and Alexander Valley residents who have fought the casino since it opened in the picturesque vine-growing region in 2002. Rep. Mike Thompson, D-St. Helena, met this week with officials from the Environmental Protection Agency to discuss concerns raised by Alexander Valley residents about the impact of the

wastewater on streams, vineyards and wells. The tribe wants to discharge the effluent into an unnamed creek that flows into the Russian River, as well as another channel where it would evaporate or soak into the ground. The EPA has a hearing scheduled for Sept. 7 - tentatively in Healdsburg - at which the public can comment on the tribe's application. But the agency has already announced its intent to issue the permit, subject to close monitoring of the wastewater quality.

Thompson was not available for comment. "It's one more impact coming in our direction," said Candy Cadd, whose property is next to River Rock and contains a small stream into which the tribe would discharge highly treated wastewater.

She said the permit sought by the tribe means "they are preparing for a project, either as soon as they get their permit, or sometime in the near future." The tribe has been criticized for lack of candor dating back to statements in May 2002 that the initial grading on the rancheria was for homes, roads, water and sewage treatment systems, not a casino.

County officials said they also have had trouble getting information about the Dry Creek Rancheria's latest plans, and how they tie into the wastewater discharge permit application. "We have concerns about the growth implications for the casino and what the tribe's expansion plans are," said Deputy County Counsel Bruce Goldstein.

He said that under the tribe's state gaming compact, it is supposed to consult with the county on any expansion plans, but has not done so. Casino manager Runyan said the plans are "just conceptual." He said that any formal expansion plans will be subject to an environmental review separate from the wastewater permit.

Some conceptual drawings of the hotel-resort were done by Wimberly, Allison, Tong & Goo, a leading architectural and design firm that has done work around the world on a number of luxury hotels and casinos. Some of the firm's clients include the Venetian Resort and Caesars Palace in Las Vegas.

But tribal spokesman Hyams downplayed the drawings, saying they were among a number of designs and ideas floated over the past several years for River Rock. Runyan said the delay in getting a liquor license for the casino has also injected uncertainty into the timing of an expansion.

"We're still waiting for a liquor license. It's hard to make any plans. It's a big issue for us," he said. Both the county and casino opponents have challenged the issuance of a liquor license, saying it would lead to disaster on the narrow roads to and from the casino. County officials claim it would also increase evacuation problems in the event of a fire at the casino.

Currently, the casino averages about 2,000 patrons a day, according to Runyon, who said that increases by about 30 percent on weekends. According to the tribe's application, its wastewater treatment plant generated a flow of 40,000 gallons per day in 2005.

The wastewater is spray-irrigated on-site, or recycled through toilet flushing. But the tribe said it anticipates an average flow of 112,000 gallons per day, almost three times the amount it now produces. It said that could spike as high as 141,000 gallons a day on weekends.

The tribe's inability to get rid of all the extra wastewater triggered the application to the EPA, which is required to issue a permit for any stream and river discharges. The wastewater would be released primarily in winter, in a similar fashion to how cities in Sonoma County discharge directly or indirectly into the Russian River.

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EXHIBIT C

-+BIOLOGICAL EVALUATION
4/06 DRAFT

**New NPDES Permit for the Dry Creek Rancheria Waste Water Treatment Plant
(NPDES Permit CA 0005241)**

Project Description

The proposed Federal action that is subject to the requirements of Section 7 of the Endangered Species Act (ESA) and the Magnuson-Stevens Fishery and Conservation Management Act (MSA), is the issuance of the National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to Section 402 of the Clean Water Act for discharge of treated wastewaters to waters of the United States from the Dry Creek Rancheria Waste Water Treatment Plant (WWTP).

The WWTP will provide treatment for sewage from the River Rock Casino located on the Dry Creek Rancheria (DCR), in the northeastern portion of Sonoma County, approximately two miles southeast of Geyserville in the Alexander Valley. The wastewater treatment plant is a sequencing batch reactor with parallel trains. Wastewater will be treated to tertiary levels and be of equal or better quality than California Title 22 water quality which allows for unlimited reuse. The discharge will occur in two locations, P-1 and A-1, shown on Attachment 1 (MAP). The stream called P-1 has also been referred to as "Indian Creek" (ESA 2005) and "Rancheria Creek", (NMFS, email from B. Hearn). The discharge at P-1 will occur in the winter season, and will not exceed 1% of the flow of the Russian River, from October 1st through May 14th. Discharges are prohibited in the Russian River and its tributaries from May 15th through September 30. The discharge at A-1, which is not tributary to the Russian River, will occur primarily in the dry months, from May 15th to September 30th.

More information regarding this discharge and the NPDES permit can be found in the draft permit and fact sheet Attachment 2 (DRAFT NPDES+FACT SHEET).

Description of Proposed Receiving Waters

Channel P-1 is an intermittent to perennial stream, the origin of which is a half mile east of the DCR boundary and flows to its terminus at the Russian River. The reach of the stream above the DCR and for the large part on the Rancheria, is dry during the late spring and summer months and riparian vegetation is sparse. In the lower reaches, riparian vegetation increases to over 60% (ESA 2005). Channel P-1 flows through three culverts prior to the HWY 93 before reaching a large culvert that runs under HWY 128. For approximately 1,500 feet beyond the DCR boundary, and before HWY 128, what appear to be in-channel springs maintain that reach of the stream as perennial (ESA 2005). Beyond the culvert that runs under HWY 128, the channel is highly altered, with no riparian vegetation, until its terminus at the Russian River. That "reach" of the stream is dry even when the reach of P-1 above it has water. Pg 14

Channel A-1 is an intermittent channel on the southwest boundary of the DCR and flows west for approximately 400 feet before flowing into a larger intermittent channel (I-2), then 1,600 feet before flowing under HWY 128 and into a roadside ditch. This channel is not tributary to the Russian River, has poor to no aquatic habitat, and will not be considered further in this Biological Evaluation, as the discharge here it will have no effect on ESA species.

Potentially Effected Species

Table 1 contains the Federally-listed species under the jurisdiction of the National Marine Fisheries Service (NMFS) applicable to this ESA Section 7 consultation, as described in NMFS response (2/14/06) to a species request from EPA (07/05/05). Table 2 contains species under the jurisdiction of NMFS for the purpose of protection of Essential Fish Habitat (EFH) under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1855(b)). Table 3 contains Federally-listed species under the jurisdiction of the Fish and Wildlife Service (FWS) applicable to this ESA Section 7 consultation.

TABLE 1: NMFS ESA SPECIES

Type	Common Name	Scientific Name	Status
Fishes			
	Central California Coast coho*	<i>Oncorhynchus kisutch</i>	Endangered
	California coastal chinook*	<i>Oncorhynchus tshawytscha</i>	Threatened
	Central California Coast steelhead	<i>Oncorhynchus mykiss</i>	Threatened

* Species for which critical habitat has been designated.

TABLE 2: NMFS EFH SPECIES

California coastal chinook	<i>Oncorhynchus tshawytscha</i>
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TABLE 3: FWS ESA SPECIES

Type	Common Name	Scientific Name	Status
Invertebrates			
	California freshwater shrimp	<i>Syncaris pacifica</i>	Endangered
Birds			
	Bald eagle	<i>Haliaeetus leucocephalus</i>	Threatened
	Northern spotted owl	<i>Strix occidentalis caurina</i>	Threatened

Plants

Burke's goldfields

Lasthenia burkei

Endangered

Species Descriptions and Summary Effects of Proposed Action on ESA Species

Invertebrates

Syncaris pacifica - California freshwater shrimp (Endangered)

The California freshwater shrimp (CFWS) general habitat is the Klamath-North Coast Province, in permanent streams with fishes. Its favored habitat is low-gradient stream pools, areas of low elevation, and they live among exposed live tree roots. The nearest documented occurrence of CFWS to DCR is in Franz Creek, a tributary to the Russian River, east of Healdsburg (CNDD 2006) and downstream of the DCR. USEPA finds that there will be no effect by the project on the CFWS, as it is not known to occur within the project area.

Fishes

Oncorhynchus kisutch - coho salmon - Central CA Coast (Endangered)

Central California Coast Coho salmon (CCCCS) are found in Northern California coastal streams where suitable spawning and rearing habitat are present. This type of habitat is found from Punta Gorda south to the San Lorenzo River. While CCCCCS have not been sited in the project area, there are potential downstream water quality effects during the spawning and incubation periods.

Oncorhynchus mykiss - Central California coastal steelhead (Threatened)

The Central California coastal steelhead (CCCSH) are found in Northern California coastal streams where suitable spawning and rearing habitat occur. There are known occurrences of this species in the project area (ESA 2005), the project may affect, but is not likely to adversely affect the CCCSH.

Oncorhynchus tshawytscha - California coastal chinook salmon (Threatened)

The California coastal chinook salmon (CCCS) are found in Northern California Coastal streams where suitable spawning and rearing habitat are found. CCCS fry have been observed stranded below the 128 culvert near the confluence with the Russian River after heavy flows in the Russian River recede (Bob Coey DFG, pers. comm., see email from William Hearn). The project may affect, but is not likely to adversely affect the CCCS.

Birds

Haliaeetus leucocephalus - bald eagle (Threatened)

The bald eagle nests in large trees with open branches along lake and river margins, generally within a mile of the water body. There is little suitable nesting habitat within the project area, and the level of disturbance and human activity in the small area make it unlikely that bald eagles would over winter in the area. There have been no reported sightings of bald eagles in the project area. The project will have no effect on the bald eagle.

Strix occidentalis caurina - northern spotted owl (Threatened)

The Northern spotted owl is found in dense, old growth and multilayered mixed conifer habitats in Northern California. While some suitable roosting habitat exists in the project area, no trees will be disturbed. The discharge will have no effect on the Northern spotted owl.

Plants

Lasthenia burkei - Burke's goldfields (Endangered)

This vernal pool species is known only from southern portions of Lake and Mendocino counties and from northeastern Sonoma County (FWS website). No suitable habitat exists in the project area. The discharge will have no effect on Burke's goldfields.

Requirements of Salmonids

Coho salmon (*Oncorhynchus kisutch*)

Coho salmon are typically associated with small to moderately-sized coastal streams characterized by heavily forested watersheds, perennially-flowing reaches of cool, high-quality water, dense riparian canopy, deep pools with abundant overhead cover, in-stream cover consisting of large, stable woody debris, undercut banks and gravel or cobble substrates (NMFS 2001). The project will not disturb structural habitat or dissolved oxygen levels, but may affect in-stream temperatures at P1, tributary to the Russian River, which is where coho salmon are expected to occur.

Migration, spawning and incubation temperature requirements: Freshwater migration of adult coho from the ocean to their natal streams begin after late fall or early winter rains and continue to March, peaking in December and January. Optimal migration, spawning and incubation temperatures for coho are between 4 and 10⁰ C (NMFS 2001). The eggs generally hatch in one to two months, depending on water temperature.

Juvenile rearing temperature requirements: Juvenile coho salmon prefer well shaded pools at least one meter deep at water temperatures of 12 - 15⁰ C. Water temperatures for optimal survival and growth of juvenile coho salmon range from 10 to 15⁰ C. Growth is slowed considerably at 18⁰ C and ceases at 20⁰ C (NMFS 2001).

Chinook salmon (*Oncorhynchus tshawytscha*)

Upstream migration of fall-run chinook salmon occurs from June through December, peaking in late October. Spawning occurs from late September through December with a peak in late October. These fish typically enter freshwater at an advanced stage of maturity, move rapidly to their spawning areas on the mainstem or lower tributaries of rivers, and spawn within a few weeks of freshwater entry. Optimal spawning temperatures range from 5.6 to 13.9⁰ C (NMFS 2001).

Egg deposition is timed to ensure that fry emerge during the following spring at a time when the river is sufficiently productive for juvenile survival and growth. Successful incubation depends on several factors including dissolved oxygen levels, temperature, substrate size, amount of fine sediment and water velocity. Maximum survival of incubating eggs and pre-emergent fry occurs at water temperatures between 5.6 and 13.3 °C, with an optimal temperature of 11.1 °C (NMFS 2001).

Optimal temperatures for both fry and fingerlings of chinook salmon range from 12 to 14 °C, with maximum growth rates at 12.8 °C (NMFS 2001).

Steelhead (*Oncorhynchus mykiss*)

The timing of upstream migration of steelhead is correlated with high flow events and associated with lower water temperatures. There are two types of steelhead, summer steelhead and winter steelhead. Summer steelhead return to fresh water from June through September, migrate inland towards spawning areas, overwinter in the larger rivers, and then resume migration to natal streams and spawn. Winter steelhead return to fresh water in autumn or winter, migrate to spawning areas and then spawn in late winter or spring. Upstream migration of winter steelhead occurs from September through May with the peak run occurring in February (NMFS 2001).

Spawning, for the large part, takes place from January through April. The number of days it takes for steelhead to hatch is inversely proportional to water temperature and varies from about 19 days at 15.6 °C, to about 80 days at 5.6 °C (NMFS 2001).

Rearing juvenile steelhead reside in freshwater all year, making adequate flow and temperature important to the population at all times. Water temperature influences the growth rate, population density, swimming ability, ability to capture and metabolize food, and ability to withstand disease of these rearing juveniles. Rearing steelhead juveniles prefer water temperatures of 7.2 to 14.4 °C (NMFS 2001).

Conclusions

Discharge to P1, which is tributary of the Russian River, will only be allowed to take place in the cooler months (October 1 to May 14th). Recycle and reuse of treated wastewater will be maximized on-site, reducing the average annual daily volume of discharge to the Russian River to under 112,000 gallons per day average. The discharge will be advanced treated wastewater, and we expect no effects due to chemical pollutants. The discharger will be required to treat wastewater to control toxics in accordance with water quality standards based on the Water Quality Control Plan for the North Coast Region ("Basin Plan") for the Russian River, Geyserville Hydrologic Subarea to the discharge. The discharger will be required to meet all water quality standards without allowances for dilution in the receiving stream (applying water quality standards "end of pipe"), the most conservative assumption available for the control of toxics.

Because the temperature of the discharge is expected to be higher than the ambient water

temperature in P1, and salmonids are sensitive to water temperature, we find that the discharge may affect salmonids. This potential effect is mitigated by the fact that the water is likely to cool sufficiently before reaching the perennial areas of P1 that support aquatic habitat, so we find that the project may affect, but is not likely to adversely affect salmonids in the project area.

The discharger will be required to monitoring temperature of the discharge and monitor upstream and downstream of the discharge point to ensure that the following conditions are met:

- a. When the receiving water is below 58 ° F, the discharge shall cause an increase of no more than 4° F in the receiving water, and shall not increase the temperature of the receiving water beyond 59 ° F. No instantaneous increase in receiving water temperature shall exceed 4 ° F at any time.
- b. When the receiving water is between 59 °F and 67 °F, the discharge shall cause an increase of no more than 1 ° F in the receiving water. No instantaneous increase in receiving water temperature shall exceed 1 ° F at any time.
- c. When the receiving water is above 68 ° F, the discharge shall not cause an increase in temperature of the receiving water

Based on the temperature requirements contained in the permit for discharge, we conclude that any potential effects will be adequately controlled and monitored to prevent detrimental affects to aquatic habitat, and is therefore not likely to adversely impact Salmonids.

Critical Habitat

In an email dated 02/14/06, from NOAA Fisheries, we were informed that: "If the creek...is neither Sausal creek nor Gird Creek, then it is not listed as critical habitat for steelhead, nor is it critical habitat for chinook salmon." The Russian River mainstem, however, is listed as critical habitat for coho and chinook salmon. EPA finds that there will be no effect on critical habitat by the project.

Magnuson-Stevens Fishery Conservation and Management Act - Essential Fish Habitat

The project site is located in an area identified as Essential fish Habitat (EFH) for all life stages of California coastal chinook salmon under the Magnuson-Stevens fishery Conservation and Management Act (MSA) and the Department of Commerce's EFH consultation regulations (50 CFR 600.905-930). The statute includes a mandate that Federal agencies must consult with the secretary of Commerce on all activities, or proposed activities, authorized, funded or undertaken by the agency, that may adversely affect EFH (NMFS 1999). EPA finds that there will be no adverse effect on EFH from the project, and therefore will not initiate consultation.

References

California Department of Fish and Game 2004. California Natural Diversity Data Base. Sacramento, CA.

ESA 2005. Dry Creek Rancheria treated wastewater discharge project Biological Evaluation, Environmental Science Associates, January, 2005.

NMFS 1999. Essential Fish Habitat Consultation Guidance. Office of Habitat Conservation, National Marine Fisheries Service, November, 1999.

NMFS 2001. The effects of summer dams on salmon and steelhead in California Coastal watersheds and recommendations for mitigating their impacts. Appendix A. Descriptions of the life history and status of coho salmon, chinook salmon, and steelhead in California. National Marine Fisheries Service, Southwest Region - Santa Rosa Field Office, 777 Sonoma Ave. Rm 325, Santa Rosa, CA 95404. July 23, 2001.

EXHIBIT D



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

Southwest Region
501 West Ocean Boulevard, Suite 4200
Long Beach, California 90802-4213

July 25, 2006

In response refer to:
151422SWR2006SR00353:JPM

Mr. Doug Eberhardt, Chief
CWA Standards and Permits Office
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105-3901

Dear Mr. Eberhardt:

This letter is in response to your April 18, 2006, request for concurrence from NOAA's National Marine Fisheries Service (NMFS), in accordance with 50 CFR 402.13, that issuance of a National Pollution Discharge and Elimination System (NPDES) Permit for the operation of an expanded Waste Water Treatment Plant (WWTP) by the Dry Creek Rancheria (DCR) near the Russian River near Geyserville, California, is not likely to adversely affect species and critical habitats listed or designated under the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 *et seq.*).

The WWTP will provide treatment for sewage from the River Rock Casino located on the DCR in the northeastern portion of Sonoma County in the Alexander Valley, approximately two miles southeast of Geyserville, California. Waste water will be treated to tertiary levels and be of equal or better quality than California Title 22 water quality which allows for unlimited reuse. Reuse will include irrigation and recycling. The discharge will occur in two locations, known as P-1 and A-1. A-1 is an ephemeral drainage unconnected to the Russian River by surface flows. P-1 is a tributary to the Russian River and is an intermittent stream with a perennial section on the DCR. Although not named on U.S. Geological Survey maps, the tributary is commonly referred to as "Rancheria Creek". Discharge at the P-1 site, into Rancheria Creek, a Russian River tributary, will be restricted to between September 30 through May 15th, and will not exceed 1 percent of the flow of the Russian River. The discharge to the ephemeral drainage at A-1, which is not a tributary to the Russian River, will occur primarily in the dry season from May 15th through September 30th.

Endangered Species Act

Available information indicates that the following listed species may occur at the project site:



Central California Coast steelhead (*Oncorhynchus mykiss*)
threatened (71 FR 854)

Coastal California Chinook salmon (*O. tshawytscha*)
threatened (70 FR 37160)

Although Rancheria Creek was not designated as critical habitat (70 FR 52488 and 70 FR 54287), the salmonid species listed are reported by California Department of Fish and Game (CDFG) to occur in the watershed of Rancheria Creek (Bill Cox, personal communication, CDFG). Of particular concern is water quality for rearing steelhead during the summer months in the perennial section of the creek located within the DCR boundaries. In smaller California streams, the water levels may drop so low during the summer that pools are the only viable rearing habitat. No passage between pools can occur until stream levels rise with the onset of the rainy season. Therefore, juvenile steelhead rearing in isolated summer pools are extremely vulnerable to disturbance or water quality impacts. Daytime temperatures in summer rearing pools may also be near lethal levels; riparian shading and the presence of sub-surface, cold water seeps is often essential to maintain pool temperatures below lethal levels. Juvenile Chinook salmon migrate to the estuary or ocean in the spring, and thus would not be affected by any changes in summer water quality.

The draft NPDES Permit for the Dry Creek Rancheria WWTP, submitted by the U.S. Environmental Protection Agency (EPA) to NMFS includes changes requested by NMFS (daily timing of water quality monitoring) and addresses both the timing of discharges to Rancheria Creek and all known potential water quality impacts that may adversely affect listed species including impacts to water temperature, dissolved oxygen, ammonia (total nitrates) and turbidity. No discharges are permitted to Rancheria Creek during the dry season from May 15th through September 30th. The draft NPDES effluent limit standards and/or receiving water quality standards are within EPA ambient water quality criteria for chronic exposure of salmonids. Required monitoring protocols, reporting requirements, and development of management plans are sufficient to protect water quality from being adversely affected by changes in temperature, dissolved oxygen, total nitrates and turbidity. Additionally, the permit requires yearly 24-hour composite "Whole Effluent Toxicity Testing", which includes static-renewal toxicity testing with fathead minnows (*Pimephales promelas*), daphnid (*Cerodaphnia dubia*), and green alga (*Selenastrum capricornicum*) according to EPA mandated procedures (EPA-821-R-02-013, October 2002; Table IA, 40 CFR part 136). Additional quality assurance measures, instructions, recommendations and reporting requirements are specified in the draft permit, thereby insuring that any changes in water quality that have the potential to adversely affect salmonids will be quickly detected and remediated.

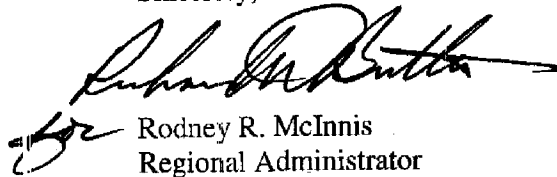
Based on the best available scientific information, NMFS has determined that no listed anadromous salmonids or their designated critical habitats are likely to be adversely affected by this project. This concludes consultation in accordance with 50 CFR §402.13 for the proposed issuance of a NPDES Permit for the operation of an expanded WWTP by the DCR. However, further consultation may be required if: (1) new information becomes available indicating that listed species or critical habitat may be adversely affected by the project in a manner not previously considered, (2) current project

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plans change that affects listed species or critical habitat in a manner not previously considered, or
(3) a new species is listed or critical habitat designated that may be affected by the action.

If you have any questions, please contact Mr. John McKeon at (707) 575-6069.

Sincerely,



for Rodney R. McInnis
Regional Administrator

cc: Russ Strach, NMFS
Suesan Saucerman, EPA
John Tinger, EPA