

1 NIELSEN, MERKSAMER, PARRINELLO,
2 MUELLER & NAYLOR, LLP
3 CATHY CHRISTIAN (S.B. NO. 83196)
4 KURT R. ONETO (S.B. NO. 248301)
5 1415 L Street, Suite 1200
6 Sacramento, CA 95814
7 Telephone: (916) 446-6752
8 Facsimile: (916) 446-6106

9 e-mail: cchristian@nmgovlaw.com
10 koneto@nmgovlaw.com

11 Attorneys for Petitioner, County of Amador

12 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
13 BEFORE THE
14 ENVIRONMENTAL APPEALS BOARD

15 COUNTY OF AMADOR,) NPDES Permit No. CA 0049675 –
16 Petitioners,) Buena Vista Rancheria (Casino)
17 vs.)
18 UNITED STATES ENVIRONMENTAL) Petition to the Environmental Appeals
19 PROTECTION AGENCY,) Board to Review the Conditions of
20) NPDES Permit No. CA 0049675; and
21) Statement of Reasons Supporting Petition
22 Respondent.) for Review
23)
24)
25)
26)
27)
28)

1 This petition for review of issuance of NPDES Permit No. CA 0049675 to the Buena Vista
2 Rancheria is being brought pursuant to 40 CFR § 124.19(a). The petition is timely pursuant to
3 40 CFR § 124.20(c) and (d). For the reasons set forth below, petitioner AMADOR COUNTY,
4 requests that the Environmental Appeals Board (hereinafter "EAB") review the Environmental
5 Protection Agency's (hereinafter "EPA") permit decision because it is based on both findings of
6 law and fact that are clearly erroneous. In addition, important policy considerations are at stake
7 which warrant exercise of EAB's discretion to review NPDES permit decisions. The issues
8 discussed herein were raised during the public comment period, and are therefore eligible for
9 review by EAB.

10
11 1. The EPA does not have jurisdiction over the proposed Buena Vista Rancheria wastewater
12 treatment plant because the Buena Vista Rancheria is not a reservation, is not allotted lands,
13 and is not Indian country.

14 In the attached letters dated March 17, 2006 and September 4, 2009,¹ the County of
15 Amador objected to the EPA's assertion of jurisdiction under the Clean Water Act ("CWA")
16 over the NPDES permit requested by the tribe for a wastewater treatment facility necessary to
17 deal with the discharge from the tribe's proposed casino. The EPA's response, which is cursory
18 and without significant analysis, is that the land upon which the wastewater discharge facility is
19 proposed to be located is in "Indian country," and that the EPA administers the NPDES program
20 on "Indian lands" (which the EPA deems synonymous with "Indian country"). The definition of
21 Indian country is found in 18 USC section 1151 and includes (1) land within the limits of an
22 Indian reservation; (2) all dependent Indian communities; and (3) all Indian allotments. In its
23 response, the EPA has limited the basis of its jurisdictional claim to an assertion that the land is
24 "within an Indian reservation."² The facts demonstrate that the Buena Vista Rancheria is not a
25 federal Indian reservation as that term is contemplated under the CWA.

26
27
28 ¹ Exhibits 1 and 2.

² *Buena Vista Rancheria NPDES Permit CA0049675, Final Response to Comments Document*, June 2010, Comment and Response #11, page 30.

1 In support of its assertion that the Buena Vista Rancheria ("BVR") is an Indian
2 reservation, EPA cites only the EAB decision in *In re Mille Lacs Wastewater (sic) Treatment*
3 *Facility*, 11 E.A.D. 356, 366 EAB 2004.³ A simple reading of the *Mille Lacs* decision
4 establishes, however, that the land at issue in that case was held in trust for the tribe by the
5 federal government. The *Mille Lacs* opinion expressly noted that ". . . it is uncontested that at
6 the time of the permit decision the land in question had become "trust land," and it is likewise
7 uncontested that the Region based its exercise of permitting jurisdiction primarily on the trust
8 status of the land. . . ." (See, 2004 EPA App. LEXIS 6, at 22, n.8.) The Buena Vista Rancheria,
9 however, is not held in trust, but rather merely held in fee by the tribe. Indeed, the federal
10 government expressly rejected the BVR application to take the subject land in trust several years
11 before the tribe applied for an NPDES permit. (See attached February 22, 2006 correspondence
12 from Amador County Counsel to John Tinger of the EPA, with attachments from the BIA to the
13 tribe and to the Amador County Assessor stating that the BVR land is not in trust.⁴) Thus, the
14 sole basis for EPA's assertion of jurisdiction is that the National Indian Gaming Commission has
15 ruled that the land is deemed "restored lands" and therefore Indian lands under the Indian
16 Gaming Regulatory Act ("IGRA"). (See, 25 U.S.C. sec. 2703(4)(A).) (Comment and Response
17 11a, pp. 30-31.)

18 There is no authority for deeming lands classified as "restored" under IGRA—which
19 allows the lands to be used for gambling activities—to also be deemed a Federal Indian
20 reservation under the Clean Water Act—which is a necessary predicate to EPA jurisdiction. As
21 noted by the EAB only a few weeks ago:

22
23 Section 518, which Congress added to the CWA in 1987, authorizes EPA "to treat an
24 Indian tribe as a state for purposes of numerous CWA provisions, including section 402,
25 where certain criteria are met. CWA § 518(e), 33 U.S.C. § 1377(e); see also *In re Mille*
26 *Lacs Wastewater Treatment Facility*, 11 E.A.D. 356, 364 (EAB 2004). Congress
27 specified that EPA may treat an Indian tribe as a state only if "the functions to be

28 ³ *Id.* at Comment and Response #11a, p. 30-31.

⁴ Exhibit 3.

1 exercised by the Indian tribe pertain to the management and protection of water resources
2 which are held by an Indian tribe, held by the United States in trust for Indians, or
3 otherwise within the borders of an Indian reservation." [] CWA § 518(e)(2), 33 U.S.C. §
4 1377(e)(2); *Mille Lacs*, 11 E.A.D. at 364. Congress instructed EPA to issue regulations
5 implementing this section. CWA § 518(e), 33 U.S.C. § 1377(e)." (See, *In re: Circle T*
6 *Feedlot, Inc., Morgan Feedlot LLC, Sebade Feedyard, & Stanek Brothers*, 2010 EPA
7 App. LEXIS 20, 30-31.)

8 Note 14 of the *Circle T Feedlot* decision states that "[t]he CWA defines 'Federal Indian
9 reservation' to mean 'all land within the limits of any Indian reservation under the jurisdiction of
10 the United States Government, notwithstanding the issuance of any patent, and including rights-
11 of-way running through the reservation.' CWA § 518(h), 33 U.S.C. § 1377(h)."

12 *The Buena Vista Rancheria does not meet any of the criteria of the relevant sections of*
13 *the CWA.* By constructing a wastewater treatment facility for its proposed casino, BVR is not
14 managing and protecting water resources held by the tribe, nor is the land held in trust or within
15 the borders of an Indian reservation. Accordingly, the EPA has no jurisdiction to issue an
16 NPDES permit to the tribe.

17 **2. The Buena Vista Rancheria's proposed wastewater treatment plant is not a Public Owned**
18 **Treatment Works.**

19 As noted in the County's March 17, 2006 letter, the BVR wastewater treatment plant is
20 not a Publicly Owned Treatment Works (POTW) because, although it is proposed to be operated
21 by a tribe, it fails to meet the provision of CWA section 518(f)(2) requiring that the tribe exercise
22 "governmental authority over a *Federal Indian reservation*." The EPA's response to this
23 comment is simply to state that section 502(4) of the CWA "defines 'municipality' and includes
24 'an Indian tribe.'"⁵ Clearly, the CWA does not allow a wastewater facility to be deemed a
25 POTW if it is located in "Indian country," but rather requires that it be located on a Federal
26 Indian reservation, which the BVR facility clearly is not.

27 The consequence of the wastewater facility not qualifying as a POTW is that the facility
28 must be considered as a new source of waste discharge and therefore issuance of the NPDES

⁵ *Buena Vista Rancheria NPDES Permit CA0049675, Final Response to Comments Document*, June 2010, Comment and Response #11b, page 31.

1 permit is required to comply with the National Environmental Policy Act (NEPA). No NEPA
2 analysis was conducted with respect to the BVR wastewater facility, and thus the EPA is without
3 authority to issue an NPDES permit.
4

5 3. EPA calculated wastewater flow rates on the basis of inaccurate information.

6
7 In EPA's Final Response to Comments, Comment #2b asked "*on what basis are*
8 *wastewater flow rates determined without TEIR?*"⁶ EPA responded that:

9 The permit limitations are based on flow rates identified by the applicant in its NPDES
10 Form 1 and Form 2A applications and in subsequent communications. *The size of the*
11 *facility was decreased as a result of negotiations between the County of Amador and the*
12 *Tribe under the Intergovernmental Services Agreement (ISA).* EPA has incorporated
13 these changes into the final permit and therefore the allowed flow rates were decreased in
14 the final permit. The permit establishes mass based limitations based on the design flow
15 of the wastewater treatment system.⁷ (Emphasis added.)

16 Similarly, Comment #5flow c stated that "*It is unclear how the design peak weekend flow of*
17 *350,000 gpd was calculated.*" EPA responded that, "As noted in Response 2b, *the size of the*
18 *facility was reduced* during negotiations with the County of Amador; therefore, the projected
19 flows...have also been reduced for the final permit."⁸ (Emphasis added.)

20 The problem with these findings is that the size of the Buena Vista Rancheria gaming
21 facility has in fact not been reduced. The "reduction" in the size of the project cited by EPA can
22 be found in Paragraph (1)(a)(i) of the ISA between Amador County and the Tribe. It states that
23 "The Gaming Facility" and Project shall have no more than 950 slot machines and no more than
24 20 gaming tables." However, Paragraph (6)(a) of the ISA, entitled "Future Negotiations for
25 Project Expansion," states that *notwithstanding any other provision of the ISA*, "the Tribe shall
26 have a one-time right, at any time after the first year of operations, to negotiate a new
27 Intergovernmental Services Agreement...for the expansion of the Project...provided, however,

28 ⁶ Buena Vista Rancheria NPDES Permit CA0049675, Final Response to Comments Document, June 2010,
page 4.

⁷ *Id.*

⁸ *Id.* at 7.

1 that in no event shall any expansion of the Gaming Facility result in more than 1,650 slot
2 machines and 60 gaming tables.”

3 As stated in the Declaration of Theresa R. Daly,⁹ the Tribe apparently has no intention of
4 utilizing the smaller, reduced-size version of the Gaming Facility, but instead intends to
5 immediately exercise its one-time right to expand the Project to the full 1,650 slot machines and
6 60 gaming tables despite the fact that construction on the smaller version of the casino has not
7 yet commenced. The decreased, reduced version of the facility that EPA based its calculations
8 for issuance of the NPDES permit upon only exists on paper. It does not, and most likely never
9 will, exist in reality. EPA has essentially issued a NPDES permit for an imaginary facility. This
10 it cannot do. The permit must be based on the actual size of scope of the facility that will be
11 constructed.

12
13 4. EPA erroneously found that an allegedly similarly designed facility at Thunder Valley
14 Casino has been capable of achieving compliance with the California Toxics Rule.

15 In EPA’s Final Response to Comments, Comment #5 treatment b stated that

16
17 The very similar designed facility at Thunder Valley has been shown to be incapable of
18 achieving compliance with the California Toxics Rule (CTR) constituent limitation even
19 using a finer membrane. A treatability analysis should be required before proceeding
20 with a “new” system which may be immediately shown to be incapable of meeting CTR-
21 based limitations. The Thunder Valley WWTP utilizes a 0.1-micron membrane and the
22 proposed WWTP at the Buena Vista Casino has been designed to use a 0.3-micron flat
23 plane membrane.”

24 Reliability of the proposed waste water treatment plant is of great concern. In addition to
25 the example cited above, many other instances of plant upset or other system failures
26 have been documented, most notably in a virtually identical plant designed for Thunder
27 Valley Casino. It is unclear whether any provision for storage or removal of wastewater
28 that cannot be treated to comply with discharge requirements is to be required. If
inadequate storage is provided; ongoing generation of wastewater must be hauled to
another waste water treatment plant or it will be discharged in violation of the Proposed
Permit. Hauling would create additional environmental impacts, and feasible destinations
for hauled waste water have often been difficult or impossible to locate in the past. The

⁹ Exhibit 4.

1 Proposed Permit should include a requirement for adequate contingency planning in
2 recognition of the potential for plant upset.¹⁰

3 EPA somewhat dodged the comment by responding to Comment #5 treatment b that, although
4 “EPA agrees that the design of the wastewater treatment plant serving Thunder Valley Casino is
5 very similar to the proposed design for the WWTP for the Buena Vista Casino, *however EPA*
6 *does not agree that the Thunder Valley (sic) has been shown to be incapable of achieving*
7 *compliance with the California Toxic Rule (CTR).”¹¹ (Emphasis added.)*

8 EPA’s conclusion is not supported by recent evidence. The California Regional Water
9 Quality Control Board has found that Thunder Valley is unable to consistently comply with its
10 effluent limitations for cadmium, lead, and zinc.¹² The state Regional Water Quality Control
11 Board has also been forced to issue cease and desist orders to Thunder Valley requiring it to
12 discontinue exceeding discharge effluent limitations for aluminum, atrazine, boron, fluoride,
13 methylene blue active substances (MBAS), nitrate, electrical conductivity, sulfate, arsenic, total
14 trihalomethanes, persistent chlorinated hydrocarbon pesticides, and ammonia because the Board
15 found that Thunder Valley was discharging those substances in violation the applicable Effluent
16 Limitations.¹³ Moreover, the California Regional Water Quality Control Board has even filed an
17 administrative civil liability complaint against Thunder Valley, seeking penalties of \$435,000 for
18 effluent limitation violations.¹⁴ For EPA to dismiss out-of-hand the history of repeated
19 violations at the Thunder Valley WWTP—a facility that is nearly identical in design to the
20 WWTP proposed by Buena Vista—and find that EPA does not agree that “Thunder Valley has
21 been shown to be incapable of achieving compliance with California Toxic Rule” criteria is
22 unsupported by fact an cannot be sustained.

23
24 ¹⁰ Buena Vista Rancheria NPDES Permit CA0049675, Final Response to Comments Document, June 2010,
page 8.

25 ¹¹ *Id.*

26 ¹² Calif. Water Resources Control Bd., Central Valley Region, Time Schedule Order No. R5-2010-0006.
http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/index.shtml#placer. Exhibit 5.

27 ¹³ Calif. Water Resources Control Bd., Central Valley Region, Time Schedule Order No. R5-2005-0033,
Requiring the United Auburn Rancheria Casino Wastewater Treatment Plant to Cease and Desist.
http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/index.shtml#placer. Exhibit 6.

28 ¹⁴ Calif. Water Resources Control Bd., Central Valley Region, Administrative Civil Liability Complaint
No. R5-2006-0502; Auburn Rancheria Casino Wastewater Quality Control Facility, Placer County.
http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/index.shtml#placer. Exhibit 7.

1 The NPDES permit sought to be issued to Buena Vista Rancheria likewise contains
2 Maximum Allowable Discharge Limitations for ammonia, electrical conductivity, nitrate, and
3 other toxic substances. Without adequately addressing the concerns raised by the facts present at
4 the nearly identical Thunder Valley WWTP, EPA should not be permitted to issue an NPDES to
5 Buena Vista. To do otherwise essentially authorizes EPA to issue an NPDES permit for a
6 WWTP facility that, based the experiences at Thunder Valley, is almost guaranteed to fail.
7

8 5. EPA ignored the flooding problems that issuance of the NPDES permit will cause on Coal
9 Mine Road.

10 In EPA's Final Response to Comments, Comment #8h stated that "*the proposed*
11 *wastewater discharge will significantly exacerbate existing flooding problems, as shown by*
12 *enclosed pictures.*"¹⁵ EPA responded by stating "EPA recognizes there are existing flooding
13 problems. EPA has determined that the proposed discharge will not significantly exacerbate
14 existing flooding. See response to 8a."¹⁶

15 More precisely, the comments referenced in #8h dealt with severe flooding on Coal Mine
16 Road, which was documented with photographs in a letter submitted to EPA on April 3, 2006.¹⁷
17 Even without a gaming facility, be it the smaller or larger design, Coal Mine Road experiences
18 extreme winter flooding. A gaming facility of *any* size will exacerbate flooding because existing
19 flooding on Coal Mine Road is already severe. The Buena Vista Rancheria proposed to
20 discharge its wastewater into a county ditch which runs adjacent to Coal Mine Road, so the
21 increased water flow invariably will exacerbate the flooding.

22 Nonetheless, EPA ignored this fact and merely referred to its response to Comment #8a.
23 However, as can plainly be seen in EPA's response to Comment #8a, it utterly failed to consider
24 or address flooding on Coal Mine Road. Rather, EPA only addressed potential flooding of
25 Jackson Creek, which EPA response to Comment #8a admits is "*approximately 5 miles from the*
26

27 ¹⁵ Buena Vista Rancheria NPDES Permit CA0049675, Final Response to Comments Document, June 2010,
28 page 29.

¹⁶ *Id.*

¹⁷ See letter to John Tinger from Cathy Christian, Apr. 3, 2006. Exhibit 8.

1 *project site.*¹⁸ (Emphasis added.) Instead of addressing the flooding issue on Coal Mine Road,
2 EPA ignored the real issue and erroneously pointed to information that is only relevant to an area
3 *several miles removed* from the actual area of gravest flooding concern. Unless and until EPA
4 appropriately addresses the flooding issue on Coal Mine Road with facts pertaining to Coal Mine
5 Road, instead of using information from the far-removed Jackson Creek, the NPDES permit will
6 be based on impermissible factually inaccurate information.
7

8 6. EPA's conclusions regarding groundwater testing are inaccurate.

9
10 The response to Comment #8i states that "EPA is aware of no monitoring wells used to
11 evaluate groundwater chemistry. EPA did not require the applicant to install such wells."¹⁹ This
12 is contrary to obvious fact at the project site that the Tribe has undertaken monitoring of a
13 significant number of wells to establish baseline groundwater conditions in advance of
14 groundwater extraction. There is no valid reason why EPA should have been unaware of this
15 fact. Furthermore, EPA's response to Comment #8i is inconsistent with EPA's response to
16 Comment #17b, that "EPA does not expect that the drinking water used at the casino [which will
17 be derived from groundwater] will contain high levels of arsenic, metals, or radiological
18 constituents that will need to be reduced prior to domestic use. EPA does not believe that the
19 casino will be utilizing contaminated drinking water."²⁰

20 If no groundwater quality information is available, as EPA states in response to Comment
21 #8i, EPA has provided no factual basis for its apparently unsupported conclusion that the
22 drinking water used by the casino will not be contaminated.
23
24
25
26

27 ¹⁸ Buena Vista Rancheria NPDES Permit CA0049675, Final Response to Comments Document, June 2010,
28 page 26.

¹⁹ *Id.* at 29.


²⁰ *Id.* at 36.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

For the reasons stated above, petitioner AMADOR COUNTY requests that EAB grant its petition for review.

Dated: July 13, 2010

Respectfully submitted,
NIELSEN, MERKSAMER, PARRINELLO,
MUELLER & NAYLOR, LLP

By 
Cathy Christian
Attorneys for Petitioner