

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

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

**BUENA VISTA RANCHERIA OF ME-WUK INDIANS' OPPOSITION TO THE  
MOTIONS TO STAY ISSUANCE OF NOTICE TO PROCEED**

The Buena Vista Rancheria of Me-Wuk Indians (“Buena Vista”) respectfully submits this Opposition to the Motions to Stay EPA’s issuance of a Notice to Proceed filed by Petitioner Amador County, Dkt. No. 22 (July 15, 2011), and by Petitioner Ione Band of Miwok Indians, Dkt. No. 24 (July 20, 2011), respectively.<sup>1</sup> Currently pending before the Board are four petitions, which were filed about a year ago, seeking review of a Clean Water Act (“CWA”) National Pollutant Discharge Elimination System (“NPDES”) permit issued by U.S. EPA Region 9 (“Region”). The NPDES permit authorizes discharge from a wastewater treatment plant to be constructed in connection with Buena Vista’s proposed casino project in Amador County, California. On July 5, 2011, the Region gave the Board notice that it planned to issue a Notice to Proceed authorizing Buena Vista to commence construction of the project facilities, but not to commence any treatment or discharge of wastewater until these appeals are resolved by the Board. *See* Dkt. No. 18. In response, Petitioners have filed Motions asking the Board to stay the

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<sup>1</sup> Petitioners Friends of Amador County and Glen Villa, Jr. have also written letters to the Board asking it to prevent issuance of the Notice to Proceed. *See* Ltr. from J. Cassesi to EAB, Dkt. No. 21 (July 13, 2011); Ltr. from G. Villa to EAB (July 12, 2011) (not docketed) (Exhibit A). To the extent the Board deems these letters to be motions for a stay or other relief, Buena Vista opposes them by this submission.

Region's action. Because Buena Vista is entitled to the Notice to Proceed, and because continuing to withhold it threatens to substantially impair Buena Vista's interests, and the Indian Gaming Regulatory Act's purpose of "promoting tribal economic development, self-sufficiency, and strong tribal government," 25 U.S.C. § 2701, the Buena Vista opposes the Motions to Stay.

## **BACKGROUND**

More than six years ago, Buena Vista proposed to construct a casino on the Buena Vista Rancheria in Amador County, California. In May 2005, Buena Vista applied to the Region for an NPDES permit for discharge into waters of the United States from a wastewater treatment plant that would be associated with the proposed casino. AR 101-12. The Region issued a proposed draft permit in December 2005 and received public comment, which included the statement that the Region needed to conduct a consultation under the National Historic Preservation Act ("NHPA"), 16 U.S.C. 470 *et seq.* AR 75.

The Region initiated NHPA consultation with appropriate parties, including Buena Vista, the California State Historic Preservation Office ("SHPO"), and other Tribes. AR 1301-02. Applying the NHPA regulations, the Region determined that the cultural affiliation between two cultural resources identified as "historic properties" may be adversely affected as a result of visual and audible intrusion from the proposed casino. AR 88-89. After being invited to participate in resolving those adverse effects, the Advisory Council on Historic Preservation ("ACHP") concluded that its participation was not needed. Thereafter, in accordance with 36 C.F.R. § 800.6(c), the Region, the Army Corp of Engineers, the SHPO, and Buena Vista executed a Memorandum of Agreement ("MOA") to resolve the identified potential adverse effects. AR 1347-56. Under the NHPA regulations, the MOA "evidences" the Region's

“compliance” with the NHPA and its regulations, and it “shall govern” the historic preservation issues in the project. *See* 36 C.F.R. § 800.6(c).

In August 2009, the Region re-proposed the NPDES permit and sought additional public comments. AR 514-33; AR 554. The Region made certain changes and issued the final permit on June 22, 2010. AR 1-21. Four petitions to review the permit were submitted to the Board. *See* Dkt. Nos. 1, 2, 3, 6. All four raise various challenges to conditions of the NPDES permit under the CWA. Petitioner Amador County also argues that the Region does not have jurisdiction on the theory that the Buena Vista Rancheria is not in Indian country. *See* Dkt. No. 2. Petitioners Glen Villa and the Ione Band of Miwok Indians contend that the Historic Properties Treatment Plan adopted by the MOA is inadequate. *See* Dkt. Nos. 1, 6.

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

for issuance of the [Notice to Proceed].” *Id.* As a result, the only thing preventing Buena Vista from commencing construction is actual issuance of the Notice to Proceed.

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

On July 5, 2011, the Region notified the Board that it “intend[s] to issue a [Notice to Proceed] to the Tribe no sooner than 21 days” from that date. Dkt. No. 18, at 3. The Region explained that Buena Vista is “eligible” for a Notice to Proceed, and that the “potential risks to [Buena Vista’s] financing” led the Region to believe that “it is appropriate to issue the [Notice to Proceed] expeditiously.” *Id.* at 3. Subsequently, Petitioners filed Motions to Stay the Region

from issuing the Notice to Proceed. Buena Vista has sought leave to intervene and oppose the Motions to Stay.

## **ARGUMENT**

### **I. Criteria for Deciding Whether to Issue a Stay**

The Board's regulations provide for an automatic stay of the contested conditions of an NPDES permit during the appeal. 40 C.F.R. § 124.16(a)(1); *see also id.* § 124.60(a)(1) (same). As explained below, however, stay of these permit conditions only restricts Buena Vista's ability to discharge wastewater into waters of the United States and does not restrict Buena Vista's ability to begin construction. Petitioners therefore are requesting that the Board exercise discretionary authority to stay construction. To the extent the Board has such authority to enter a discretionary stay, *see infra* II.A, it is guided by the following factors: "(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 129 S. Ct. 1749, 1756 (2009). "The party requesting a stay bears the burden of showing that circumstances justify an exercise of that discretion." *Id.* (internal quotation marks omitted).

### **II. No Petitioner Has Demonstrated a Likelihood of Success on the Merits**

As a threshold issue, the Board lacks authority under the Clean Water Act to stop Buena Vista from commencing construction. *Natural Resources Defense Council v. EPA*, 822 F.2d 104, 128 (D.C. Cir. 1987). Even if the Board does have such authority, Petitioners have not even attempted to make the requisite "strong showing" that they are likely to succeed on the merits of their claims. For both of those reasons, the Motions should be denied.

**A. The Board Lacks Authority to Halt Construction Pending Review of the NPDES Permit**

Under the Clean Water Act and this Board’s regulations, the pendency of a petition for review does not preclude the permittee from commencing construction. An NPDES permit is required only to “discharge” a pollutant. CWA §§ 301, 402, 33 U.S.C. §§ 1311, 1342; *see Serv. Oil v. EPA*, 590 F.3d 545, 551 (8th Cir. 2009) (“unless there is a ‘discharge of any pollutant,’ there is no violation of the Act”) (quoting *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 504 (2d Cir. 2005)). Accordingly, no permit is required to commence construction of facilities merely because they may eventually lead to discharges. *Natural Resources Defense Council*, 822 F.2d at 128. In *Natural Resources Defense Council*, the D.C. Circuit vacated EPA’s former NPDES permit regulations that banned pre-permit construction activities precisely because that ban was not authorized by the Act. *Id.* The Act “does not prohibit construction of new source without a permit.” *Id.*; *see also* EAB Practice Manual at 52 (2010) (explaining that NPDES and other permits “are treated differently” than Prevention of Significant Deterioration permits, which do bar construction until “a final permit is issued . . . following EAB review”). This long-established construction of the Clean Water Act precludes the Board from staying construction pending the appeal. Furthermore, the Notice to Proceed was voluntarily adopted by signatories to the Memorandum of Agreement, and therefore should not be used against Buena Vista to delay construction.

**1. Issuing the Notice to Proceed Does Not Implicate “Contested” Conditions**

Petitioner Ione Tribe contends that its challenges to the National Historic Preservation Act process render issuance of the Notice to Proceed a contested condition that must be stayed under 40 C.F.R. § 124.60(b)(1). Ione Mot. 2-4. That is not correct. Although 40 C.F.R. § 122.49 requires EPA to follow various laws in preparing NPDES permits, including the

NHPA, compliance with those laws does not necessarily create permit conditions. *See Natural Resources Defense Council v. EPA*, 859 F.2d 156, 169 (D.C. Cir. 1988) (holding that, notwithstanding § 122.49’s requirement of compliance with NEPA, EPA cannot create “non-water quality permit conditions”). “[P]articular permit conditions” are included under § 122.49 only if “the applicable law requires” that result. 40 C.F.R. § 122.49. Here, the applicable law—the NHPA—does not require consideration or adoption of particular permit conditions. Instead, the NHPA and its implementing regulations promote historic preservation through the consultation process, which culminates in a Memorandum of Agreement separate from the NPDES permit. *See* 36 C.F.R. § 800.6(c). The MOA provides its own mechanism for enforcement, *see* AR 1352-53 (MOA § IX), and the NHPA regulations provide that the MOA “govern[s] the undertaking and all of its parts.” 36 C.F.R. § 800.6(c). Accordingly, the NHPA MOA does not create permit conditions that may be “contested” within the meaning of 40 C.F.R. § 124.60(b)(1), and as a result, it cannot be stayed.

Petitioner Amador County is also mistaken in claiming that all “construction activities” are “inseverable” from contested conditions and therefore may be stayed. Amador County Mot. 3-4 (40 C.F.R. § 124.60(b)(4), (6)). The regulation provides that certain “[c]onstruction activities” are *uncontested* conditions when they “would partially meet the final permit conditions and could also be used to achieve the discharger’s proposed alternatives.” 40 C.F.R. § 124.60(b)(6). Thus, many construction activities do not implicate contested permit conditions. *Id.* The regulation therefore refutes Petitioner’s argument, since Buena Vista proposes to begin construction that will not implicate contested permit conditions.

More to the point, Petitioners cite no authority by which the Board may prevent an NPDES permit holder from undertaking construction activities on facilities that would not be

affected by changes to the permit's discharge limitations on appeal. This is unsurprising because Petitioner's position runs headlong into the established case law holding that NPDES permit proceedings do *not* preclude construction activities. See *Natural Resources Defense Council*, 822 F.2d at 129-30 ("the Act includes no requirement that permit issuance or permit review proceedings precede construction").

**2. Challenges to the Board's Jurisdiction Does Not Provide Grounds for a Stay of Construction**

Amador County contends that its challenge to the Board's jurisdiction requires staying construction. Amador County Mot. 6. Amador County asks the Board to determine that Buena Vista Rancheria is not Indian Country, such that the State of California, rather than Region 9, has jurisdiction over permitting of wastewater discharges. *Id.* Amador County points to nothing in the Board's regulations or decisions stating that challenges to the Board's jurisdiction should result in a stay of construction activities. Such a rule would, again, conflict with the settled understanding that the NPDES permitting process limits only discharges, and not construction activities. *Natural Resources Defense Council*, 822 F.2d at 129-30. Moreover, such a rule would create a perverse incentive for opponents of projects to allege some jurisdictional claim when challenging an NPDES permit, meritorious or not, in every petition for review in hopes of derailing the project.

**3. Ongoing Federal Court Litigation Does Not Provide a Reason to Delay Issuance of the Notice to Proceed or Review of the NPDES Permit**

Petitioners also argue that a stay is warranted because of two federal law suits that challenge the Department of Interior's position that the Buena Vista Rancheria is "Indian Country." See *Ione Tribe Mot. 6*; see also *Region Ltr. to Board, Dkt. No. 18*, at 3-4 (July 5, 2011) (discussing the litigation). These cases have been pending for years and will continue for



some time. The D.C. Circuit recently remanded one case to the district court after it had granted defendants' motion to dismiss on standing grounds. *Amador County v. Salazar*, No. 10-5240 (D.C. Cir. May 6, 2011). Hence, those parties are just beginning that litigation on the merits. In the other case, *Friends of Amador County v. Salazar*, Case No. 2:10-cv-348-WBS-GGH (E.D. Cal.), discovery only recently closed and dispositive motions have not yet been filed. In both cases, district court litigation and subsequent appeals could extend for years to come. The prospect of this litigation ultimately determining that the Rancheria is not Indian land, notwithstanding the longstanding position of the United States, is both speculative and far into the future. In effect, Petitioners are asking this Board to refrain from exercising its duty to review NPDES permits indefinitely based on the slight chance that a future event may render the review unnecessary. The litigation should not prevent the Board from acting on the petitions before it.

In sum, Petitioners cannot overcome the baseline rule that review of an NPDES permit does not operate as a stay of construction. The fact that Buena Vista voluntarily assented to the Notice to Proceed mechanism in the NHPA MOA as an extra step of historic protection should not be used against Buena Vista. Put another way, if the MOA signatories had chosen not to include the Notice to Proceed—which is not required by any statute or regulation—Buena Vista could have commenced construction months ago. Petitioners effectively ask the Board to exercise authority to stop construction that Congress did not grant EPA under the Clean Water Act. *See Natural Resources Defense Council*, 822 F.2d at 128.

**B. Petitioners Have Not Shown a Likelihood of Success on the Merits**

Even if the Board retained discretionary authority to stay issuance of the Notice to Proceed, Petitioners have not shown that any of their claims are likely to succeed on the merits.

## 1. Amador County's Jurisdictional Claims

As noted, Amador County claims that the Board lacks jurisdiction to issue the NPDES permit on the ground that the Rancheria is not Indian lands. Dkt. No. 2. Amador County makes no effort, however, to show why this claim is likely to succeed. *See id.* Moreover, as the Region explained in its Response to the petition, it has been the governing position of the United States for decades that the Rancheria is “Indian land.” *See* Region’s Corrected Response, Dkt. No. 15, at 16-17; AR 1293-1300. This position is unlikely to be set aside by this Board.

Indeed, it should be impossible for the County’s claim to prevail because this Board has no power to rule on it. The determination of whether Buena Vista Rancheria is “Indian land” lies wholly within the authority and expertise of the Department of Interior and the federal courts in judicial review of Interior’s decision. Neither the Region nor the Board has authority to reconsider the position of the federal agency with jurisdiction to decide that issue. *Cf. In re Sutter Power Plant*, 8 E.A.D. 680, 688, 690 (EAB 1999) (explaining that that the Board only “has jurisdiction to review issues directly related to permit conditions that implement the federal PSD program” and not issues related to state or local initiatives).<sup>2</sup> Here, the County is already pursuing its arguments about the Rancheria’s status as Indian land in its suit against Interior in the district court, as explained by in the Region’s letter to the Board of July 5, 2011. Dkt. 18. The Board should not allow the County yet another forum to challenge Interior’s decision with the matter already pending before a federal Article III court.

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<sup>2</sup> The County’s other attack on the Board’s jurisdiction—alleging that the discharge point source is located outside the Rancheria and, therefore, should be subject to the State’s jurisdiction—was not raised in the County’s petition for review, Dkt. No. 2 (July 23, 2010), nor in its proposed reply brief, Dkt. No. 13 (Oct. 7, 2010), nor in its Motion for Leave to File Clarification Response, Dkt. No. 16 (Oct. 25, 2010). The argument is therefore waived. *See, e.g., In re Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-20, at 20 (EAB Mar. 19, 2008) (arguments raised in a reply “constitute, in essence, ‘late-filed appeals’”).

## **2. National Historic Preservation Act Claims**

The Ione Band likewise makes little effort to carry its burden of showing that its NHPA claims are likely to succeed. *See* Ione Mot. 2-3. The record strongly suggests the claims will fail. As noted, the Region engaged in an extensive consultation process with the SHPO, the Army Corp of Engineers, and other Tribes. AR 1301-45. The ACHP also was engaged and “concluded that its participation was not necessary.” AR 1348. Through this process, a formalized Historic Property Treatment Plan was adopted, and the parties executed a Memorandum of Agreement (“MOA”) to resolve the identified potential adverse effects. AR 1347-56. There is no reason to think that these efforts did not amply satisfy the NHPA’s requirements.

## **3. Effluent Limitation Claims**

Petitioner Friends of Amador submitted a letter complaining that the NPDES permit will allow discharge of water into a tributary that runs four miles from the Rancheria’s border to the Jackson Creek waterway. Dkt. No. 21. The letter expresses concern that the water may cross into private property, but it does not allege any particular CWA violation, let alone make a strong showing of likely success on its claims. Furthermore, the discharges complained of cannot possibly necessitate a stay because they relate to the ultimate facility rather than the construction that will take place under the Notice to Proceed. In any event, the record amply supports the Region’s approval of the plan for wastewater discharges. *See* Dkt. 12.01-06.

## **II. Petitioners Have Not Demonstrated That They Will Suffer Irreparable Harm**

Apart from bald allegations, no Petitioner demonstrates why allowing the Notice to Proceed to issue will cause irreparable harm. This does not suffice. *Nken*, 129 S. Ct. at 1761 (factor requires more than “simply showing some ‘possibility of irreparable injury’”). To the

extent the Board is concerned that Buena Vista's construction activities may threaten any Petitioner's interests, Buena Vista respectfully requests that the Board expedite review. It will take some time following issuance of the Notice to Proceed for Buena Vista to pursue financing and begin construction activities. During that time, the Board could proceed to review and dispose of the petitions.

### **III. A Stay of the Notice to Proceed Would Substantially Injure Buena Vista**

Another reason to deny the Motions to Stay is that continuing to withhold the Notice to Proceed would cause substantial injury to Buena Vista. The Tribe has worked diligently with the Region and other consulting agencies for the past six years during the permitting process to pursue this project. During this time, Buena Vista has taken on millions in loans that depend upon the project's completion for repayment. Further delay costs Buena Vista real money in interest on that financing.

More importantly, further delay may threaten the viability of the project. As Buena Vista demonstrated to the Region by its May 26, 2011 letter, the project requires financing that will be raised from the high-yield bond market. Dkt. No. 19. Issuance of the Notice to Proceed is a critical step that would make it possible for Buena Vista to attract funding from that market. *See id.* At this time, the market is functioning well and interest rates are at levels that would make the project viable. *Id.* That market is extremely volatile, however, and it could close or become prohibitively expensive at any time—as it has done for various periods since 2008. *Id.* It is therefore imperative to the project's success that the Notice to Proceed issue as soon as possible so that Buena Vista can pursue financing now. If Petitioners' Motions were granted, further

delay would be ensured, and the opportunity to secure financing could close, harming Buena Vista and undermining the Indian Gaming Regulatory Act's goals.<sup>3</sup>

#### **IV. The Public Interest Favors Denying the Motions for a Stay**

The public interest does not favor entering a stay of the Notice to Proceed, which would delay, if not entirely derail, the casino project. The casino project will generate substantial economic opportunity in a region that has long been economically depressed. *See* Dkt. No. 19, at 1-2. The casino construction is projected to employ approximately 350 people. *Id.* Once the casino is operating, it will employ approximately 800 people, generating substantial revenue. *Id.* Each day that the project is delayed, these jobs and revenue are foregone. This factor, too, weighs against entering a stay of the issuance of the Notice to Proceed.

#### **CONCLUSION**

For the foregoing reasons, Buena Vista respectfully requests that the Board deny the Motions to Stay issuance of the Notice to Proceed.

Respectfully submitted,

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<sup>3</sup> Petitioner Ione Tribe is mistaken in disputing EPA's reliance on letters from Buena Vista and its bank Credit Suisse Securities, *see* Dkt. 19. *See* Ione Tribe Mot. 4-5. Because one of the NHPA MOA conditions for issuing the Notice to Proceed has been fulfilled, EPA had full discretion to issue it without regard to the letters. *See supra* II.A. In any event, there is no legal requirement that prevents EPA from relying on these letters.

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