

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

<hr/>)	
In re: Buena Vista Rancheria)	NPDES Appeal Nos. 10-05 - 10-07 & 10-13
Wastewater Treatment Plant)	
)	EPA Region IX's Response to
NPDES Permit No. CA 0049675)	Petitions for Review
<hr/>)	

As directed, Region IX of the United States Environmental Protection Agency (“EPA” or the “Region”) submits the following response to the Petitions for Review of NPDES Permit No. CA 00049675 (“Final Permit”) filed by the County of Amador, California, Friends of Amador County, Glenn Villa, Jr., and the Ione Band of Miwok Indians (collectively, “Petitioners”). The Final Permit authorizes the Buena Vista Rancheria (“Permittee” or “Tribe” or “Rancheria”) to discharge treated wastewater from the Buena Vista Casino Wastewater Treatment Plant (“WWTP” or “Facility”) to an unnamed tributary to Jackson Creek under the National Pollutant Discharge Elimination System (“NPDES”).

The County of Amador (“County”) argues that the Region committed reviewable error because 1) the Region does not have jurisdiction because the Buena Vista Rancheria is not in Indian country; 2) the proposed wastewater treatment plant is not a publicly-owned treatment works (“POTW”); 3) the Region used inaccurate information to calculate the wastewater flow rate; 4) “EPA erroneously found that an allegedly similarly designed facility at Thunder Valley Casino has been capable of achieving compliance with the California Toxics Rule”; 5) the Region did not address flooding along Coal Mine Road; and 6) the Region’s response to comments regarding groundwater testing are inaccurate.

Friends of Amador County (“FAC”) argues that 1) the permit requirements to monitor upstream and downstream of the discharge and to protect receiving waters from erosion are “unclear and problematic”; 2) the reclaimed water limitations do not protect groundwater; and 3) the proposed permit will exacerbate flooding along Coal Mine Road.

Mr. Villa argues that 1) the Region improperly characterized historic properties located within the geographic area affected by the project; 2) The Historic Properties Treatment Plan (“HPTP”) is inadequate; 3) the Region failed to provide information related to the change in scope of the project in a timely fashion and 4) the Region failed to conduct a proper hydraulic analysis to determine the true impact of increased flows on a downstream archeological site.

The Ione Band of Miwok Indians (“Ione Band” or “Ione Tribe”) argues that the HPTP is inadequate because 1) the entire project site is a single traditional tribal cultural property; 2) the Region failed to conduct and/or require proper archaeological testing of the site; 3) the Region failed to “fully consider off-site impacts and downstream impacts”; and 4) the proposed project would “physically damage the area identified as CA-AMA-411/H”.

For the reasons stated herein, the Environmental Appeals Board (“EAB” or “Board”) should deny the Petitions, because Petitioners have not satisfied the requirements of 40 C.F.R. § 124.19 for obtaining review.

I. STATEMENT OF THE CASE

A. Statutory and regulatory background

1. Clean Water Act

The Clean Water Act (“CWA”), 33 U.S.C. §§ 1251 *et seq.*, generally prohibits the discharge of pollutants to waters of the United States without a National Pollutant Discharge Elimination System (“NDPES”) permit. CWA §§ 301, 402; 33 U.S.C. §§ 1311, 1342. The

CWA provides for two types of effluent limitations to be included in NPDES permits: technology-based limitations and water quality-based limitations. CWA §§ 301, 303, 304(b); 33 U.S.C. §§ 1311, 1313, 1314(b); 40 C.F.R. Parts 122, 125, 131. For POTWs, technology-based limitations are numeric limitations based on the application of secondary treatment or its equivalent. CWA §§ 301 (b)(1)(B), 304(d)(1),(4); 33 U.S.C. §§ 1311(b)(1)(B), 1314(d)(1), (4); 40 C.F.R. Part 133.

In the event that technology-based effluent limitations are not sufficiently stringent, water quality-based effluent limitations are designed to ensure that the permitted discharge is controlled as necessary to meet water quality standards established by the State or Tribe. CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1). When a State or authorized Tribe adopts water quality standards, it first designates uses for the waterbody, such as use and value for public water supplies, propagation of fish and wildlife, recreation, and/or agricultural and industrial uses. Then it establishes water quality criteria that protect those designated uses. CWA § 303(c)(2), 33 U.S.C. § 1313(c)(2).

Further, where a discharge originating in one jurisdiction may affect the quality of waters in another jurisdiction, the permitting agency “shall condition [the NPDES permit] in such manner as may be necessary to insure compliance with applicable water quality requirements” [“WQR”]. CWA § 401(a)(2), 33 U.S.C. § 1341; *see also* 40 C.F.R. § 122.44(d), 40 C.F.R. § 122.44(i). Applicable WQR include limitations necessary to achieve water quality standards (“WQS”) established by States or Tribes and approved by EPA pursuant to CWA § 303, 33 U.S.C. § 1313, including narrative and numeric water quality criteria. *See* 40 C.F.R. § 122.44(d)(1).

EPA administers the NPDES program, by reviewing and issuing permits, on “Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands.”¹ CWA § 518, 33 U.S.C. § 1377; 40 C.F.R. § 123.1(h).

2. National Historic Preservation Act

The National Historic Preservation Act (“NHPA”), 16 U.S.C. §§ 470 *et seq.*, establishes certain procedural obligations on federal agencies with respect to “historic properties.” Specifically, Section 106 of NHPA requires that prior to the issuance of any license (in this case a federal NPDES permit), a federal agency must “take into account the effect of the undertaking on any district, site, building, structure, or object that is included or eligible for inclusion in the National Register.” 16 U.S.C. § 470f. In addition, the agency must “afford the Advisory Council on Historic Preservation ... a reasonable opportunity to comment with regard to such undertaking.” *Id.* Federal agencies “take into account” the potential effects of their actions, i.e., undertakings, by engaging in a consultation process primarily with the appropriate State Historic Preservation Officer (“SHPO”),² equivalent tribal officials, and other consulting parties, including local governments. These obligations which are often referred to as “the Section 106 process” are set forth in the implementing regulations found at 36 C.F.R. Part 800. Importantly, Section 106 establishes procedural obligations for federal agencies to consider the effects of their undertakings on historic properties. It does not mandate a particular substantive outcome.

¹ See AR at 76-77 (Buena Vista Rancheria, NPDES Permit CA 0049675, Final Response to Comments (“Response to Comments” or “RTC”) at 30-31 (June 2010)). The State of California has not demonstrated that it has authority to regulate NPDES activity on the Buena Vista Rancheria, and EPA has not approved the Tribe for “Treatment as a State” pursuant to CWA Section 518(e), 33 U.S.C. § 1377(e), to implement the NPDES program.

² Designated by the governor of their respective State or territory, State Historic Preservation Officers carry out the national historic preservation program as delegates of the U.S. Secretary of the Interior pursuant to the NHPA. See Section 101(b) of the NHPA, 16 U.S.C. §470a(b).

Where a federal agency fulfills the procedural obligations, as the Region did in this case, the NHPA is satisfied.

B. Factual and procedural background

1. Background

The Buena Vista Rancheria is located in Amador County, California, approximately 4 miles south of the town of Ione. The 67-acre Rancheria is relatively flat at the northern end with elevations rising several hundred feet towards the middle of the property.³ The Tribe has proposed to build a new casino with approximately 56,000 square feet of gaming (“casino” or “project”) and an associated wastewater treatment plant (“WWTP”) on the Rancheria.⁴ The wastewater generated from the project includes sewage, restaurant washwaters, and miscellaneous wastewater from guest support services.⁵ The project is anticipated to generate flows of 50,000 gallons per day (“gpd”) on weekdays and 100,000 gpd on weekends, with an average of 60,000 gpd annually.⁶ The WWTP will have a design capacity of 200,000 gpd. The permit has been issued based on the design capacity of the WWTP and limits the amount of discharge to no more than 100,000 gpd average monthly and 200,000 gpd daily maximum.⁷

The treated effluent will discharge from the WWTP to a constructed, vegetated swale south of the parking garage and casino and will flow on-site for approximately one-half (½) mile.⁸ At the northwest corner of the Rancheria (at Coal Mine Road), the effluent will flow through a reverse siphon into a drain under Coal Mine Road to the receiving water, an unnamed

³ AR at 118-122, (Buena Vista Rancheria Wastewater Engineering Report (“Engineering Report”) (Hydroscience Engineers May 2005), at 1).

⁴ AR at 122 (Engineering Report at 5).

⁵ *Id.*

⁶ AR at 125 (Engineering Report at 8).

⁷ AR at 5 (Authorization to Discharge under the National Pollutant Discharge Elimination System, NPDES Permit No. CA 0049675 (August 1, 2010) (“Final Permit”) at 3).

⁸ AR at 27 (Fact Sheet, NPDES Permit No. CA 0049675 (June 2010) (“Fact Sheet”) at 3). *See also*, AR at 121 (Engineering Report at Figure 1-22).

tributary/drainage channel, which flows east for several miles before entering Jackson Creek.⁹ Jackson Creek subsequently flows into Dry Creek and to the lower Mokelumne River.¹⁰

The Tribe does not have federally-approved water quality standards for waters located on the Buena Vista Rancheria, and the State of California's water quality standards do not apply on the Rancheria. However, the discharge of wastewater from the WWTP flows off the Rancheria to a tributary of the Mokelumne River (via Dry Creek and Jackson Creek), for which the State of California has established water quality standards. Therefore, water quality standards applicable to this segment of the Mokelumne River (Camanche Reservoir to Delta) and its tributaries must be met at the point where the effluent leaves the Rancheria and reaches State waters.¹¹

The Region has applied water quality standards consistent with the provisions of the Water Quality Control Plan for the Sacramento and San Joaquin River Basins - Fourth Edition – 1998 (“Basin Plan”).¹² In accordance with the Basin Plan, the beneficial uses designated for Jackson Creek and its tributaries are those that apply to the Mokelumne River from Camanche Reservoir to the Delta and are listed as: Agricultural supply (AGR), Water Contact Recreation (REC-1), Non-contact Recreation (REC-2), Warm Freshwater Habitat (WARM), Cold Freshwater Habitat (COLD), Migration of Aquatic Organisms (MIGR), Spawning, Reproduction, early Development (SPWN) and Wildlife Habitat (WILD), and Municipal and Domestic Supply (MUN).¹³

⁹ The Fact Sheet erroneously describes the flow of wastewater in the swale as going to the southwest corner of the property. The swale, however, reaches Coal Mine Road at the northwest corner of the property. *See* AR at 121-122 (Engineering Report at 4-5, Figure 1-22).

¹⁰ AR at 128 (Engineering Report at 11).

¹¹ Based on the seasonal absence of natural flow, the permit requires that the effluent meet State water quality standards at Outfall 001, without dilution. AR at 27 (Fact Sheet at 3); *see also infra* Section II.C.3.

¹² AR at 1229-1230 (Water Quality Control Plan for the State of California, Region 5, Water Quality Control Board (“Basin Plan”), December 4, 1994 at II.-2.00), *available at* http://www.swrcb.ca.gov/rwqcb5/water_issues/basin_plans (last viewed on September 27, 2010).

¹³ *Id.*; *see also* AR at 27-28 (Fact Sheet at 3-4).

2. Permit application, review, and proposal

In contemplation of building its casino, the Tribe applied to the Region in May 2005 for a NPDES permit to discharge tertiary treated wastewater.¹⁴ The discharge of pollutants occurs on “Indian lands” for purposes of 40 C.F.R. § 123.1(h) (administration of NPDES program on Indian lands) because it occurs on an Indian reservation.¹⁵ Therefore, the Region has jurisdiction to issue the Permit to the Buena Vista Rancheria under the authority of CWA §§ 402, 518, 33 U.S.C. §§ 1342, 1377, and under 40 C.F.R. § 123.1(h).

a. 2005 Proposed Permit

The Region first issued a public notice of proposed draft permit on December 21, 2005 (“2005 Proposed Permit”), and held a public hearing on March 21, 2006 in Ione, CA to receive public input on the draft permit.¹⁶ The Region received comments from approximately 30 parties both in writing and in oral testimony.¹⁷ Among other issues, commenters stated that EPA needed to conduct a consultation under the National Historical Preservation Act.¹⁸

b. National Historic Preservation Act process

Under Section 106 of the NHPA and its implementing regulations, EPA determined that the proposed project was an “undertaking,” as defined in 36 C.F.R. § 800.16(y), with the potential to affect historic properties. Once EPA determined that the proposed project was an undertaking, it initiated NHPA 106 consultation with appropriate parties which includes the SHPO,¹⁹ the Tribe and other federally-recognized tribes that might attach religious or cultural significance to historic properties that may be affected, the Army Corps of Engineers

¹⁴ See AR at 101-112 (Permit Application)

¹⁵ See AR at 76-77 (RTC at 30-31, Response to Comment 11a); see also AR at 118 (Engineering Report at 1).

¹⁶ AR at 443-444 (Notice of Proposed Permit (Dec. 16, 2005)); AR at 485 (Classifieds, Ledger Dispatch at B6 (Dec. 21, 2005)); AR at 486 (Letter of Public Hearing (Feb. 6, 2006)).

¹⁷ See AR at 47-100 (RTC).

¹⁸ AR at 75 (RTC at 29, Comments 9a-9c).

¹⁹ AR at 1301-1302 (Feb. 17, 2007 letter from EPA to SHPO requesting consultation).

(“Corps”),²⁰ and other interested parties. *See* 36 C.F.R. § 800.2. Specifically, with respect to the Indian tribes, the Region requested consultation with and solicited information from the Ione Band of Miwok Indians, Jackson Rancheria of Me-Wuk Indians, and Shingle Springs Band of Miwok Indians. The Ione Band of Miwok Indians and the Jackson Rancheria of Me-Wuk Indians expressed interest in participating in the process, whereas Shingle Springs declined the Region’s invitation to consult.²¹

Based on a review of the plans for the proposed project, the Region determined the geographic areas which directly or indirectly might be affected by the undertaking (“Area of Potential Effect” or “APE”), and then based on a “reasonable and good faith effort,” identified historic properties located within the APE. 36 C.F.R. §§ 800.4, 800.16(d). This effort included review of existing information and studies, site visits and consultation with appropriate parties which included representatives from the SHPO, the Corps, the County of Amador, the Ione Band of Miwok Indians, the Jackson Rancheria of Me-Wuk Indians, and the Tribe. Following these consultations, the Region determined, with appropriate concurrences obtained as part of the Section 106 process, that two cultural resources located in the APE are “historic properties,” as defined in 36 C.F.R. § 800.16(l), and that both are eligible for the National Register of Historic Places (NRHP).²² Consequently, the Region, in consultation with the consulting parties, applied the criteria set forth in 36 C.F.R § 800.5 in order to determine whether the proposed project would have adverse effects on the historic properties.

²⁰ AR at 1301-1302 (Feb. 17, 2007 letter from EPA to SHPO requesting consultation, describing that EPA and Corps had agreed that EPA would be lead federal agency for the NHPA consultation).

²¹ AR at 1347-1348 (Memorandum of Agreement among U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, the California State Historic Preservation Officer, and the Buena Vista Rancheria of Me-Wuk Indians Regarding the Buena Vista Rancheria of Me-Wuk Indians Gaming and Entertainment Facility Project, Buena Vista, Amador County, California (“MOA” or “Memorandum of Agreement”), signed between May 6, 2010 and June 1, 2010).

²² AR at 1301-1302 (Feb. 17, 2007 letter from EPA to SHPO requesting consultation). *See also* AR at 1323-1324 (April 10, 2009 letter from SHPO to EPA concurring on APE).

Through application of the adverse effects criteria, the Region determined that the proposed project would have adverse effects on the two historic properties. Specifically, EPA determined that the cultural affiliation between the two historic properties would be adversely affected as a result of visual and audible intrusions from the proposed project.²³ Consequently, in accordance with 36 C.F.R. § 800.6(a), the Region continued its consultation with the consulting parties to seek ways to avoid, minimize and mitigate the adverse effects. Following these consultations, in accordance with the provisions of 36 C.F.R. § 800.6(c), a Memorandum of Agreement was executed by the Tribe, SHPO, Corps and the Region to resolve the identified adverse effects.²⁴

c. 2009 Proposed Permit

Subsequent to the preparation of a draft MOA and Historic Properties Treatment Plan (“HPTP”), the Region re-proposed the permit on August 5, 2009 (“2009 Proposed Permit”) and published a public notice to solicit comments on the MOA, HPTP and the draft permit.²⁵ At this time, in response to comments received on the first proposal, the Region proposed several minor revisions, including adding effluent limitations for total residual chlorine and total flow.²⁶ Additionally, the 2009 Proposed Permit differed from the 2005 Proposed Permit because the Tribe projected that a smaller casino would be built than was initially conceived in 2005, which would result in the generation of lower flows and a smaller capacity WWTP.²⁷ Thus, the 2009 Proposed Permit decreased the allowable mass discharge loading rates for Biochemical Oxygen

²³ AR at 88-89 (RTC at 42-43, Response to Comment 18c). *See also* AR at 1323-1324 (April 10, 2009 Letter from SHPO to EPA concurring on APE).

²⁴ AR at 147-1348 (Memorandum of Agreement).

²⁵ AR at 514-533 (2009 Proposed Permit); AR at 554 (Region IX, Notice of Proposed Action (Aug. 5, 2009)).

²⁶ *See* AR at 514-533 (2009 Proposed Permit).

²⁷ AR at 27-29 (Fact Sheet at 3-5).

Demand (BOD) and Total Suspended Solids (TSS) in response to changes to the WWTP flow capacity design.²⁸

The 2009 Proposed Permit established effluent limitations, terms and conditions to implement secondary treatment standards²⁹ and to protect the designated uses of the receiving waters as adopted by the State of California.³⁰ The 2009 Proposed Permit reflected that the WWTP will be designed to accommodate an average annual flow of 100,000 gallons per day (gpd) and will be comprised of an immersed membrane bioreactor (MBR), which is a tertiary treatment system similar to an activated sludge treatment plant with the addition of membrane technology.³¹

The public comment period was open from August 5, 2009 to September 4, 2009.³² The Region received comments from several parties on the 2009 Proposed Permit, including comments from the four petitioners.³³

d. Final Permit issuance

The Region made minor changes to the Permit and Fact Sheet following the public comment process to address comments received, including establishing a requirement to conduct in-stream monitoring of water quality in the tributary.³⁴ The Region issued the Final Permit on June 25, 2010.³⁵

²⁸ AR at 515 (Second Proposed Permit at 3, Table 1).

²⁹ AR at 29 (Fact Sheet at 5) to implement 40.C.F.R. § 133.102, “Secondary Treatment Regulation” for Biochemical Oxygen Demand, Settleable Solids, and pH.

³⁰ AR at 30-36 (Fact Sheet at 6-12); AR at 1241 (Basin Plan, *supra* footnote 12).

³¹ See AR at 1321-1325 (Wastewater Management Fact Sheet: Membrane Bioreactors (EPA 2007), available at http://www.epa.gov/owmitnet/mtb/etfs_membrane-bioreactors.pdf (last viewed on September 22, 2010).

³² AR at 554 (Region IX, Notice of Proposed Action (Aug. 5, 2009)).

³³ See AR at 47-100 (RTC).

³⁴ AR at 7 (Final Permit at 5).

³⁵ AR at 1-21 (Final Permit).

C. Standard of review

Under 40 C.F.R. § 124.19, a petitioner does not have an appeal as of right of the Region's permitting decision. *See In re City of Phoenix, Arizona*, 9 E.A.D. 515, 523 (EAB 2000) (*citing In re Arizona Municipal Storm Water NPDES Permits*, 7 E.A.D. 646, 651 (EAB 1998); *In re City of Port St. Joe and Florida Coast Paper Co.*, 7 E.A.D. 275, 282 (EAB 1997); *In re Florida Pulp and Paper Ass'n*, 6 E.A.D. 49, 51 (EAB 1995)). The Board has repeatedly underscored, and the preamble to the Part 124 regulations makes clear, that the Board was intended to exercise its powers of review "only sparingly" and that "most permit conditions should be finally determined at the Regional level." "Consolidated Permit Regulations: Final Rule," 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see also In re Rohm & Haas Co.*, 9 E.A.D. 499, 504 (EAB 2000).

Furthermore, in all appeals of NPDES permit decisions, the petitioner bears the burden of establishing that review is appropriate. 40 C.F.R. § 124.19(a); *see in re Rohm & Hass*, 9 E.A.D. 499, 504 (EAB 2000). For Board review to be appropriate, the petitioner must meet two general requirements. First, the petitioner and the issues being raised in the petition for review must meet basic threshold requirements. 40 C.F.R. § 124.19(a). Second, the petitioner must show with specificity that the Region based a permit condition on either a clear error of law or fact or on an exercise of discretion that the Board should review. 40 C.F.R. § 124.19(a)(1) & (2).

1. Threshold requirements

For the EAB to grant review of a petition for review, the petitioner must meet certain threshold requirements. First, in order to petition the Board for review, a person must have participated in the permit process leading up to the permit decision, either by filing comments on a proposed permit or by participating in a public hearing. 40 C.F.R. § 124.19(a). A person who

has not filed comments or participated in a hearing on a draft permit may petition for review only with respect to the “changes from the draft to the final permit decision.” 40 C.F.R. § 124.19(a).

Second, the issues raised in the petition for review must have been preserved during the public comment period. The petitioner must have raised “all reasonably ascertainable issues” and “all reasonably available arguments supporting [his] position” by the close of the public comment period. 40 C.F.R. § 124.13; 40 C.F.R. § 124.19(a). In addition, “the petitioner must have raised during the public comment period the specific argument that the petitioner seeks to raise on appeal; it is not sufficient for the petitioner to have raised a more general or related argument during the public comment period.” *See In re Government of the District of Columbia Municipal Separate Storm Sewer System*, 10 E.A.D. 323, 339 (EAB 2002) (*construing In re RockGen Energy Ctr.*, 8 E.A.D. 536, 547-48 (EAB 1999)). This threshold requirement allows the Region the opportunity to respond fully to comments raised during the comment period and to correct any errors in the final permit it issues. *Id.* (*citing In re RockGen Energy Ctr.*, 8 E.A.D. 536, 547-48 (EAB 1999)).

2. Petitioner’s burden

As stated previously, the petitioner bears the burden of showing that Board review of a permit is appropriate. 40 C.F.R. § 124.19(a); *see In re Rohm & Hass*, 9 E.A.D. 499, 504 (EAB 2000). In order to meet its burden, a petitioner must demonstrate that the permit condition for which review is sought is based on either: (1) a clear error of law or fact, or (2) an exercise of discretion or an important policy matter that the Board should, in its discretion, review. *See* 40 C.F.R. § 124.19(a)(1) & (2); *see also In re Dominion Energy Brayton Point*, 12 E.A.D. 490, 509 (EAB 2006). In doing so, the petitioner must be specific in showing why the Region erred and its objections must address specific permit conditions. Finally, although the Board should grant

review of all permit conditions only “sparingly,” the petitioner’s burden is particularly high when it is asking the Board to review the Region’s technical decisions.

First, the mere repetition of objections made during the comment period or the “mere allegation of error” without specific supporting information is insufficient to warrant review. *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 496, 520 (EAB 2002); *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000). Rather, the petitioner must argue with specificity why the Board should grant review. *In re Puerto Rico Electric Power Authority*, 6 E.A.D. 253, 255 (EAB 1995). To meet the threshold of specificity required under 40 C.F.R. § 124.19(a), a petitioner must: (1) state the objections to the permit decision that are being raised for review, and (2) explain why the Region’s previous response to those objections is clearly erroneous or otherwise warrants review. *See In re NPDES Permit for Wastewater Treatment Facility of Union Township*, NPDES Appeal Nos. 00-26, 00-28, at 10-11 (EAB Jan. 23, 2001), *pet. for rev. denied*, *Michigan Dep’t of Env’tl. Quality v. EPA*, 318 F. 3d 705, 708-09 (6th Cir. 2003) (*citing In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 2005)).

Second, a petitioner must object to a specific permit condition because the EAB’s jurisdiction under 40 C.F.R. § 124.19(a) is to ensure that the Region’s permit decision comports with the applicable requirements of the NPDES program. *In re Knauf Fiber Glass*, 8 E.A.D. 121, 161-62 (EAB 1999). The Board’s review is limited to “permit ‘conditions’ that are claimed to be erroneous.” *In re Federated Oil & Gas of Traverse City*, 6 E.A.D. 722, 725 (EAB 1997). In other words, the Board is “not at liberty to resolve every environmental claim brought before [it] in a permit appeal but must restrict [its] review to conform to [its] regulatory mandate.” *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 514 (EAB 2002) (refusing to review the facility’s impacts on water rights during a NPDES permit appeal) (*citing In re Encogen Cogeneration Facility*, 8

E.A.D. 244, 259 (EAB 1999); *In re Knauf Fiber Glass*, 8 E.A.D. 121, 127 & 161-172 (EAB 1999). Thus, if the petitioner's petition for review does not address a specific permit condition, the Board should deny review.

Finally, when a petitioner seeks review of a permit decision based on issues that are fundamentally technical in nature, the petitioner's burden of demonstrating review is appropriate is particularly high. *In re Dominion Energy Brayton Point*, 12 E.A.D. 490, 510 (EAB 2006). A petitioner cannot establish clear error or a reviewable exercise of discretion simply by presenting a difference of opinion or alternative theory regarding a technical matter. *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001). Instead, when a petitioner challenges the Region's technical judgment, "[p]etitioners must provide compelling arguments as to why the Region's technical judgments or its previous explanations of those judgments are clearly erroneous or worthy of discretionary review." *Id.* at 668 (citing *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 404 (EAB 1997)). Thus, deference to the Region's decision is generally appropriate if "the record demonstrates that the Region duly considered the issues raised in the comments and if the approach ultimately selected by the Region is rational in light of all the information in the record." *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567-68 (EAB 1998), *rev. denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999).

II. ARGUMENT

The issues raised in the four petitions for review fall into three main categories: (A) EPA's jurisdiction, (B) National Historic Preservation Act, (C) Clean Water Act, and (D) procedural issues.

A. The Region has jurisdiction over the proposed Facility

Petitioner County of Amador raises two separate but related issues regarding the Region's authority to issue the NPDES permit to the Tribe. Neither presents any clear legal or factual error or other basis for the Board's review. Moreover, as explained below, the County has acknowledged in prior legal proceedings that the Tribe's land meets the definitions of "Indian country" and "reservation" and should not be heard to argue otherwise in this case.

The County's first contention is that the Region's NPDES jurisdiction is limited to facilities located on Indian reservations. Because the County argues that the current facility is not located on a "reservation," the County contends that the Region does not have jurisdiction to issue the Tribe's NPDES permit.³⁶ This assertion misreads EPA's CWA regulations and is also belied by both the history of the Buena Vista Rancheria and the County's own admissions in prior proceedings relating to the Rancheria.

The County's second contention is that the Tribe's wastewater treatment system does not meet the definition of a "publicly owned treatment works," and therefore must be treated as a "new source," as defined in 40 C.F.R § 122.2.³⁷ As explained in the Response to Comments³⁸ and below, the Buena Vista Rancheria meets the definition of "Indian lands" which is the operative term in determining EPA jurisdiction, and the Tribe is an "Indian tribe" within the meaning of EPA's regulations. The Tribe's wastewater system is thus a "POTW." The Region will address each of the County's contentions in turn.

The Region notes that contrary to Petitioner County's assertion, under the CWA and its implementing regulations, EPA has authority throughout "Indian lands" – and not just on Indian "reservations" – to implement the NPDES program where the State has not demonstrated that it

³⁶ County Petition at 2-4.

³⁷ County Petition at 4-5.

³⁸ See AR at 76-77 (RTC at 30-31, Response to Comments 11a and 11b).

has authority to regulate and the relevant tribe has not been approved. 40 C.F.R. § 123.1(h). Since California has not demonstrated that it has authority to regulate NPDES activity on the Buena Vista Rancheria, and EPA has not approved the Tribe to implement the NPDES program, the Region would have authority to issue the permit to the Tribe if the Facility is located on “Indian land.” As described below, clear federal court precedent – to which Petitioner County was a party – holds that the Rancheria is both Indian country (and thus Indian land under EPA’s regulations) and reservation.

For purposes of determining federal jurisdiction to implement the NPDES program, EPA has treated “Indian lands,” and “Indian country” as synonymous, which has been upheld by the Environmental Appeals Board. *See In re Mille Lacs Wastewater Treatment Facility*, 11 E.A.D. 356, 366 (EAB 2004).³⁹ Thus, where a discharge is located within Indian country, it is likewise located within Indian lands under EPA’s regulations. While the history of the Tribe’s land base is complex,⁴⁰ the salient facts reflect that the original boundaries of the Buena Vista Rancheria were reinstated by an order issued by a federal district court, and not by the National Indian

³⁹ In its petition, the County suggests that the *Mille Lacs* decision only applies to trust land. County Petition at 3. In a recent EAB decision, the Board addressed this exact argument and noted the “Petitioner [] misinterprets the EAB’s focus in *Mille Lacs* on the trust status of the relevant facility location,” In finding *Mille Lacs* controlling precedent, the Board noted that the trust status of the land at issue in *Mille Lacs* “simply provided an alternative basis on which to conclude that the land was Indian country”. . . “and that [n]owhere in [*Mille Lacs* decision] did EPA argue, nor did the EAB find, that the ownership of land (e.g., fee or trust) within the exterior boundaries of a *formal* Indian reservation make any difference to the Indian status of the land.” *See In re Circle T Feedlot, Inc.*, NPDES Appeal Nos. 09-02 & 09-03, slip op. at 9 (EAB June 7, 2010) (emphasis in original).

⁴⁰ Several tribes, including the Tribe successfully challenged the administrative implementation of the California Rancheria Act of 1958 and overturned their termination. Through a series of lawsuits that were either adjudicated or settled, federal courts found that the Secretary of the Interior had failed to comply with a condition precedent to termination and thus found the purported terminations unauthorized and void. In the Stipulation and Order cited above, the court found in pertinent part that the Tribe and the Buena Vista Rancheria “were never and are not now lawfully terminated, . . . in that the requirements of section 3 of [the California Rancheria Act] were not fulfilled prior to the conveyance of the deeds to the [original reservation],” and that “as a consequence this Court has authority as a court of equity to remedy the effects of this premature and unlawful termination of the [original Buena Vista reservation].” As discussed above, the remedy ordered by the Court included a restoration of the original boundaries of the reservation as both Indian country and reservation land. Therefore, contrary to what the County asserts in its petition, the Region’s determination that it has jurisdiction under 40 C.F.R. § 123.1(h) is based on the court’s findings and order and not on a finding “that the National Indian Gaming Commission has ruled the land is deemed ‘restored lands.’” *See* County Petition at 3.

Gaming Commission as the County asserts.⁴¹ Pursuant to this court order, “all land within these restored boundaries of the [Buena Vista Rancheria] [is] declared to be “Indian Country.”

Hardwick v. United States, No. C-79-1710 SW (N.D. Cal. Filed 1979) Stipulation and Order (Amador County) Para.2.C., at 4, May 14, 1987 (emphasis in original).⁴² In addition, the order goes on to state that “[all lands within the exterior boundaries of the Buena Vista Rancheria] shall be treated by the **County of Amador** and the United States of America, as any other federally recognized Indian **Reservation**.” Stipulation and Order Para.2.D (emphasis added). Importantly – and notwithstanding its contrary argument in this permit appeal – Petitioner County was a party to the proceedings in which this order was issued and was, in fact, a signatory on the Stipulation and Order. The County has thus explicitly agreed in prior proceedings that the Rancheria is both Indian country and reservation land.⁴³ Accordingly, because the Tribe’s land was restored as “Indian country,” which is equivalent to “Indian land” under EPA’s CWA regulations, the Region has authority to administer the CWA program on the Buena Vista reservation as provided in 40 C.F.R. § 123.1(h).

Additionally, the County’s argument that the Tribe’s wastewater treatment facility does not meet the definition of POTW must also fail. A “publicly owned treatment works” or “POTW” is defined in 40 C.F.R. § 404.3. *See also* 40 C.F.R. § 122.2 (*citing* 40 C.F.R. § 403.3). In pertinent part, 40 C.F.R. § 404.3 provides that a “POTW means a treatment works as defined

⁴¹ AR 1293-1300.

⁴² AR 1293-1300.

⁴³ The Region also notes that under the federal Indian country statute, reservation land is one of three categories of land that comprise Indian country. Specifically, “Indian country,” is defined to include:

(a) all land within the limits of any Indian **reservation** under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation; (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. 18 U.S.C. § 1151 (emphasis added).

by section 212 of the [CWA], which is owned by a State or a municipality (as defined by section 502(4) of the [CWA]).” Section 502(4) of the CWA defines “municipality” to include “an Indian Tribe.” Accordingly, the WWTP which is owned by the Tribe would be a POTW, if the Tribe meets the definition of “Indian Tribe.”⁴⁴ The CWA regulations define “Indian tribe” to include any federally recognized tribe “exercising governmental control over a Federal Indian reservation.” 40 C.F.R. § 122.2. In its Petition, the County argues that the Facility is “clearly not” on a reservation, and therefore the Tribe’s wastewater treatment facility is not a “POTW.”⁴⁵

As explained above, the original boundaries of the Tribe’s Rancheria were reinstated by a federal district court order as “Indian country” which is defined to include reservation land. Further, and as agreed to by the parties to the district court Stipulation and Order (including the County of Amador) the Tribe’s land also qualifies as a reservation. Accordingly, because the Tribe is a federally recognized tribe⁴⁶ and its land – the Buena Vista Rancheria –is a reservation, the Tribe’s WWTP meets the definition of POTW, and Petitioner County’s argument must fail.

B. The Region fully complied with the National Historic Preservation Act

Petitioner Villa and Petitioner Ione Tribe raise a number of arguments related to potential effects the Facility may have on historic properties. Specifically, Mr. Villa asserts that: (1) the Region improperly characterized historic properties located within the geographic area affected by the project; (2) the landscape plan which is included as a mitigation measure in the Historic Properties Treatment Plan (“HPTP”) is inadequate; and (3) the Region failed to provide

⁴⁴ Although unclear from the face of the petition, Petitioner Villa may be challenging the Region’s treatment of the Tribe as an “Indian tribe.” Specifically, Petitioner Villa states that “[the Buena Vista Rancheria] is not a Tribe in the true sense of the definition. There is only one individual.” Villa Petition at 1. In determining whether an entity is a federally recognized tribe, the Region relies on the Department of Interior’s determination of such status. As set forth in footnote 46 *infra*, the Department of Interior has determined that the Tribe is a federally recognized tribe.

⁴⁵ County Petition at 4.

⁴⁶ The “Buena Vista Rancheria of Me-Wuk Indians of California” is included on the Secretary of Interior’s list of “Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs.” 74 Fed. Reg. 40218, 40219 (August 11, 2009). In doing so, the Department of Interior, in effect, has affirmed that the Tribe exercises authority over its members. See 25 C.F.R. § 83.7(c).

information related to the change in scope of the project in a timely fashion. The Ione Tribe asserts that the Region: (1) erred in failing to identify the entire Buena Vista Rancheria as a historic property; (2) failed to conduct adequate archaeological testing of the site particularly in the area where the Facility is proposed to be built; and (3) erred in finding that the proposed project would not physically damage one of the areas identified as a historic property. As set forth in detail in the Response to Comments⁴⁷ and below, Petitioners Ione Band and Villa's arguments fail because as the record demonstrates the Region: (1) properly identified historic properties; (2) adequately mitigated adverse impacts as provided in the Memorandum of Agreement ("MOA"); (3) timely provided information to the public, including to Petitioner Villa; and (4) otherwise fully complied with the provisions of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. § 470, *et seq.* ("NHPA").

As noted above, to meet the threshold of specificity required under 40 C.F.R. § 124.19(a), a petitioner must: (1) state the objections to the permit decision that are being raised for review, and (2) explain why the Region's previous response to those objections is clearly erroneous or otherwise warrants review. *See In re NPDES Permit for Wastewater Treatment Facility of Union Township*, NPDES Appeal Nos. 00-26, 00-28, at 10-11 (EAB Jan. 23, 2001), *pet. for rev. denied*, *Michigan Dep't of Env'tl. Quality v. EPA*, 318 F.3d 705, 708-09 (6th Cir. 2003) (*citing In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. at 255). Both Petitioners fail to meet this threshold by essentially reiterating comments already made without demonstrating why the Region's responses thereto warrant review. Specifically, Mr. Villa and the Ione Band fail to demonstrate why the Region's response to comments are clearly erroneous or otherwise warrant review with respect to the following: (1) the adequacy of identifying and characterizing historic properties⁴⁸;

⁴⁷ AR at 82-100 (RTC at 36-54, Response to Comments 18a-18l).

⁴⁸ AR at 83-84, 88-89 (RTC at 37-38, 42-43, Response to Comments 18a and 18c).

(2) the adequacy of mitigation measures⁴⁹; and (3) providing information related to the proposed project to parties.⁵⁰ Accordingly, because both Petitioners merely duplicate the challenges they made in comments on the draft permit, with no attempt made to contest the adequacy of the Region's response to the comments, review by the Board should be denied.

As noted by the EAB “we have repeatedly held that where petitions merely restate previously submitted comments without indicating why the permit agency's responses thereto were clearly erroneous or otherwise warrant review, review will be denied.” *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 496, 520 (EAB 2002); *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000). Although the petitions should be denied on this basis, the Region will nonetheless explain below the various procedures the Region undertook that demonstrate full compliance with NHPA obligations.

1. Section 106 consultation process

The NHPA establishes certain procedural obligations on federal agencies with respect to “historic properties.” Specifically, Section 106 of NHPA requires that prior to the issuance of any license (in this case a federal NPDES permit), a federal agency must “take into account the effect of the undertaking on any district, site, building, structure, or object that is included or eligible for inclusion in the National Register.” 16 U.S.C. § 470f. In addition, the agency must “afford the Advisory Council on Historic Preservation ... a reasonable opportunity to comment with regard to such undertaking.” *Id.* Federal agencies “take into account” the potential effects of their actions, i.e., undertakings, by engaging in a consultation process primarily with the appropriate State Historic Preservation Officer (“SHPO”), and other consulting parties, including federally recognized Indian Tribes, and local governments. These procedures which are often

⁴⁹ AR at 92-94 (RTC at 46-48, Response to Comment 18e).

⁵⁰ AR at 97-98 (RTC at 51-52, Response to Comment 18j).

referred to as “the Section 106 process” are set forth in the implementing regulations found at 36 C.F.R. Part 800. Importantly, Section 106 establishes procedural obligations for federal agencies to consider the effects of their undertakings on historic properties. It does not mandate a particular substantive outcome. Where a federal agency fulfills the procedural obligations, as the Region did in this case, the NHPA is satisfied. *Coliseum Square Association v. Jackson*, 465 F. 3d 215, 225 (5th Cir. 2006), *cert. denied*, 552 U.S. 810 (2007).

Under the Section 106 process, once a federal agency determines that its action is an undertaking, such as when it issues a permit, that has the potential to affect historic properties, it initiates consultation with appropriate parties and obtains certain concurrences from the consulting partners (*e.g.*, the SHPO) on its determinations with respect to: (1) the geographic area directly or indirectly affected by the undertaking (“area of potential effect” or “APE”); (2) the historic properties identified within the APE; (3) the assessment of adverse effects caused by the undertaking; and (4) the resolution of such adverse effects, if any. Adverse effects from an undertaking are generally addressed in a Memorandum of Agreement (“MOA”) signed by the federal agency, SHPO and/or tribal equivalent, and, if the Advisory Council on Historic Preservation (“ACHP”) chooses to participate in the consultation process, the ACHP.⁵¹ In addition, other consulting parties may sign the agreement, but their refusal does not invalidate the MOA. 36 C.F.R. § 800.6(c).

⁵¹ At several points throughout the Section 106 process, the ACHP may enter the consultation. In some instances, the ACHP may enter a consultation because a party requests its participation, or because the regulations require that the federal agency notify the ACHP of certain determinations, and afford the ACHP an opportunity to participate. *See e.g.*, 36 C.F.R. § 800.2 (b)(2), 800.6(a)(1). On April 4, 2007, the Region notified the ACHP of the Buena Vista consultation process, invited its participation and provided supporting documentation regarding EPA’s determination that the undertaking would cause adverse effects. *See AR at 1304-1305*. By letter dated August 13, 2009, the ACHP declined EPA’s invitation to participate but noted “if we receive a request for participation from ... affected Indian tribe, a consulting party, or other party, we may reconsider this decision.” *See AR at 1306*. By letter dated January 8, 2010, Petitioner Ione Band sent a letter to the ACHP and among other things requested its participation in the Buena Vista consultation. *See AR at 1307-1313*. By letter dated, April 20, 2010, the ACHP declined Petitioner Ione Band’s request to participate. *See AR at 1319-1320*.

Under the NHPA, when it is determined that an undertaking will have an adverse effect, the regulations provide that an executed MOA and a federal agency's implementation of its undertaking in accordance therewith, is evidence that the federal agency has complied with Section 106. 36 C.F.R. § 800.6(c), 16 U.S.C. § 470h-2(l).

As set forth in detail in the Response to Comments, the Region properly followed the Section 106 process by initiating consultation with appropriate parties, obtaining concurrences on the required determinations, and fully executing a MOA with the SHPO, the Corps and the Tribe.⁵² Accordingly, the Region fully complied with Section 106 of the NHPA, and the Ione Band and Mr. Villa's assertions that the Region failed to adequately consider and address potential effects of its undertaking on historic properties are without merit. Neither Petitioner has identified any error of fact or law (let alone a clear error) nor any other basis supporting review by the Board.

2. The Region properly identified historic properties and the APE

Although not explicitly stated in its Petition, it appears that Mr. Villa is asserting that the Region improperly identified the historic properties within the APE by failing to include "the middle 1/3" area of the Reservation,⁵³ *i.e.*, the area where the project will be constructed. Similarly, the Ione Tribe asserts that the Region erred by not identifying the entire Buena Vista Rancheria as a historic property. As explained in the Response to Comments and again below, the Region considered and properly determined that the project construction area is not part of a historic property, and otherwise properly identified the historic properties at issue.⁵⁴

Once the Region determined that it had an undertaking with the potential to affect historic properties, it initiated consultation with appropriate parties including the SHPO, the Tribe, the

⁵² See AR at 82-100 (RTC at 36-54, Response to Comments 18a-18l).

⁵³ AR at 1321-1322 (September 3, 2009 Mr. Villa Comment Letter).

⁵⁴ AR at 83-84, 88-89 (RTC at 37-38, 42-43, Response to Comments 18a and 18c).

Corps, the County of Amador, the Ione Band of Miwok Indians, the Jackson Rancheria of Me-Wuk Indians, and interested individuals and groups.⁵⁵ Consistent with the Section 106 process, the Region consulted with these parties on its delineation of the APE and on the identification of historic properties. 36 C.F.R. § 800.2(c)(2)(ii).

As explained in its Response to Comments, the Region's effort to identify historic properties included a review of existing information and studies, and a site visit.⁵⁶ After consulting with the parties, which included three meetings, the Region with appropriate concurrence, determined the scope of the APE and identified historic properties located within the APE. Specifically, two historic properties were identified, and as Mr. Villa notes, one of these, the Buena Vista Peaks (sometimes referred to herein as "Peaks") is located on the "southern 1/3 of the project site," and the other, Upüsüni Village (Village) is located on the "northern 1/3" of the project site.⁵⁷

In identifying the two historic properties, the Region evaluated the project construction area that Petitioners Villa and Ione Band contend is part of a historic property and concluded, with appropriate concurrence as part of the Section 106 process, that this area is not a historic property or part of a historic property because it does not contain any elements that contribute to the National Register eligibility of either the Village or the Buena Vista Peaks. Consistent with this conclusion, the Region confirmed (as the Tribe had also expressed) that the project construction area was not included within the recorded site area for either the Peaks or the Village. By letter dated April 10, 2009,⁵⁸ the SHPO provided formal concurrence on the Region's identification of historic properties within the APE. Therefore, the Region properly

⁵⁵ The Region identified these parties in accordance with the provisions of 36 C.F.R. §§ 800.2, 800.3, which require a federal agency to invite as consulting parties the SHPO, federally-recognized Indian tribes, local governments, and the applicant for a federal permit. 36 C.F.R. § 800.2(c)(2)(ii).

⁵⁶ See AR at 82-84 (RTC at 36-38, Response to Comment 18a).

⁵⁷ *Id.*

⁵⁸ AR at 1323-1324 (April 10, 2009 Letter from SHPO to EPA concurring on APE).

identified the historic properties, and Petitioners Villa and Ione Band's assertions that the construction area was erroneously not included as a historic property must fail and presents no basis for review by the Board.

While not a historic property, the Region acknowledges, as Petitioner Villa asserts, that the construction area is not "lacking cultural sensitivity." In fact, as set forth in the HPTP, the Region agrees that there is a relationship, or cultural affiliation between the Village and the Buena Vista Peaks which formed the basis of the Region's determination that there would be visual and audible adverse effects from the project. Specifically, the Region, as part of the consultation, assessed the effects of the construction of the proposed casino on these two historic properties jointly because the Village and the Buena Vista Peaks are culturally linked. This assessment led the Region to conclude that the cultural affiliation between the two historic properties would be adversely affected and that the introduction of the proposed project would degrade both properties' integrity of setting, design, feeling, and association.⁵⁹ Consequently, the Region continued the Section 106 consultation process to develop and evaluate mitigation measures.

3. The Region adequately mitigated adverse impacts from its undertaking

Petitioner Villa contends that the landscape plan in the HPTP, an attachment to the MOA, is inadequate, and that the HPTP was prepared hastily. Specifically, Mr. Villa asserts that the landscape plan in the HPTP provides for the planting of trees that will impede the view between the two historic properties. As explained in the Response to Comments⁶⁰ and again below, the Region provided the consulting parties with sufficient opportunity to comment on the draft HPTP, including the landscape plan, and the final landscape plan reflects changes made in

⁵⁹ AR at 42-43 (Fact Sheet at 18-19).

⁶⁰ AR at 94 (RTC at 48, Response to Comment 18e(v)).

response to comments the Region received, including those from the SHPO. Therefore, Mr. Villa's assertions that the landscape plan is inadequate and that the HPTP was prepared hastily are without merit. The Region followed the process established by section 106 of the NHPA and the implementing regulations and thus fully complied with all requirements for the consideration of impacts on the historic properties at issue.

Contrary to Mr. Villa's assertion that the HPTP was prepared hastily, the Region provided the consulting parties with several opportunities to provide input on the MOA and the HPTP. As described in Sections 18(b) and (j) of the RTC, the Region hosted five separate meetings with the consulting parties, including a visit to the site, and provided the parties with two drafts of the HPTP for review and comment. Therefore, Mr. Villa's assertion that the HPTP was prepared hastily is baseless.

As noted above, the Region's determination that its undertaking would have an adverse effect was based on a finding that the proposed project would introduce visual and audible intrusions. Consistent with this adverse effect finding, the goal of the landscape plan is to help minimize these intrusions. One of the specific changes made to the draft was to require that native vegetation, including trees and shrubs, be planted in the area between the Village and the project, and along the north and east side of the project access driveway, both to muffle automobile sounds and to obscure views of automobiles from the cemetery. While Mr. Villa is concerned that views of the Peaks will be obscured, one of the specific goals of the landscape plan is to ensure that native trees be planted between the project site and the Village that will obscure views of the project facilities but not block the views of the Buena Vista Peaks from the Village. As evidenced by the execution of the MOA, the Region has determined, with

appropriate concurrences from the consultation process, that the landscape plan is an appropriate mitigation measure.

4. Adequate archaeological testing of the site was conducted.

Petitioner Ione Band contends that there have been insufficient archaeological studies in the area where the casino structure is proposed. In support of its argument, the Petitioner simply cites to provisions in the HPTP which provide for the services of a qualified archaeological firm to conduct a geographical study within the project footprint. As explained in the Response to Comments⁶¹ and again below, it is often the case that no matter how many studies are conducted, additional historic properties may still be discovered during the conduct of an undertaking. Consequently, the NHPA regulations provide that MOAs should include provisions that address “subsequent discovery or identification of additional historic properties affected by the undertaking.” 36 C.F.R. § 800.6(c)(6). Therefore, while there are no known or even suspected archaeological remains in this area, the testing program set forth in the HPTP was developed to provide an additional safeguard that will help ensure no cultural resources are damaged during construction. The Ione Band’s argument that the inclusion of additional safeguards (consistent with the NHPA regulations) is somehow proof that the Region did not conduct adequate archaeological studies is totally without merit.

5. The MOA adequately protects the Village

Petitioner Ione Band contends that the Region erred in finding that the proposed project would not physically damage the Village. In support of this assertion, the Petitioner offers no support but simply cites provisions in the HPTP which prohibit construction personnel, vehicles and equipment from entering the Village historic property, and then states that the Ione Band *questions* whether, “given the small size and narrow shape of the Rancheria, construction

⁶¹ AR at 94-95 (RTC at 48-49, Response to Comment 18f).

equipment and personnel - and the impacts therefrom - could indeed be excluded from the [Village area].”⁶² The Ione Band also states that it made this comment earlier and the Region did not respond.

The Region did not address the Petitioner’s statement in its RTC because the statement did not, and Petitioner still has not, presented any specific argument or issue to which the Region could respond. The Petitioner itself characterizes its position as a mere “question” and does not articulate any basis for why it is in doubt. Petitioner’s statement is thus nothing more than speculation unsupported by any factual assertion or argument. The EAB has recognized that “mere allegations of error” or in this case, mere allegations of doubt, unsupported by specific information are insufficient to warrant review. See *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000). Therefore, the Board should decline to review this issue.

In any event, Petitioner Ione Band’s suggestion that the HPTP does not protect the Village historic property is without merit. The Region believes that the provision in the HPTP prohibiting access to the Village historic property is completely reasonable and feasible. While the project site area has certain constraints, as do most construction sites, the Region believes it is reasonable to conclude that construction activities can be conducted in such a way – including the use of fencing – as to maintain a secure boundary around the historic area. Moreover, the Region notes that there appears to be sufficient area on the proposed project site to conduct construction and staging activities without accessing or interfering with the Village historic area. Should space constraints become an issue, access to the Village historic property is legally prohibited by the MOA, and the contractor will be required to pursue commonly used alternatives such as construction phasing, or leasing of off-site staging areas. Therefore, the Region believes that the provisions protecting the Village historic property are feasible,

⁶² Ione Band Petition at 8.

reasonable and legally enforceable. The HPTP was developed as part of the Section 106 consultation process. It both meets all procedural requirements of that process, and provides reasonable mitigation for the Village property. Petitioner Ione Band's "doubts" are unfounded and provide no basis for review by the Board.

C. The Region properly complied with the Clean Water Act

1. The Region set appropriate discharge prohibitions and permit conditions concerning allowable flows

The County of Amador claims that the Region erred in establishing permit conditions because it used incorrect wastewater flow rates. The County claims the Region erred because it based the wastewater flow on the redesigned casino, which is significantly smaller than the one it previously planned on building. The County alleges that the Region should have established permit conditions that reflect a greater volume of flow to be discharged because, the County asserts, the Tribe "has no intention of utilizing the smaller, reduced-size version of the Gaming Facility."⁶³

The County fails to show that the Region was clearly erroneous in calculating a flow limit based upon the project's current design. In the permit, the Region properly established a flow limit of 0.1 mgd as monthly average daily discharge flow rate, and 0.2 mgd as a daily maximum discharge flow rate based on the design capacity of the treatment system.⁶⁴ For POTWs, limitations must be based on the design flow of the facility. 40 C.F.R § 122.45(b)(1). Because the Region appropriately made these calculations based on the most current design of the Facility, the Board should deny the County's petition for review on this point.

⁶³ See County Petition at 5-6.

⁶⁴ AR at 5 (Final Permit at 3, Table 1).

As noted in Section I.B, *supra*, the Region first received a NPDES permit application from the Tribe in May 2005.⁶⁵ The permit application projected an average daily flow rate of 0.17 million gallons per day (“mgd”) based on the size of the casino envisioned at that time.⁶⁶ During the 5-year period from the permit application to the permit issuance, the Tribe downsized the casino, and therefore recalculated the projected flow rates that would result from the Facility.⁶⁷

Due to these changes in the size of the project, the Tribe modified the projections for wastewater flows, modified the size of the POTW accordingly, and submitted to the Region a revised projection of the wastewater flows to be generated by the Facility.⁶⁸ The Region concluded that the revised projections were a reasonable estimation of wastewater flows to be generated by the proposed WWTP, and EPA included a description of the revised flows and POTW design in the 2009 Proposed Permit and Fact Sheet.⁶⁹ Thus, the Region based the limitations required by the permit on the current design flow of the Facility, as required by 40 C.F.R. § 124.45(b)(1).

The County does not appear to disagree with the projected flow rates, but appears to argue that the Facility may expand and that the Region has not accounted for a potential expansion that may or may not occur. If the Facility decides to expand and would generate additional wastewater volume to be treated and discharged, the Tribe would be required to submit an application for a permit modification to the Region. *See* 40 C.F.R. § 122.62. The Region would then consider the request for an increased discharge and public notice the modification if appropriate.

⁶⁵ See AR at 101-112 (Permit Application).

⁶⁶ AR at 125 (Engineering Report at 8).

⁶⁷ AR at 27-29 (Fact Sheet at 3-5).

⁶⁸ AR at 53 (RTC at 7, Response to Comment 5flow-c, Table 2 “Projected Flows and Design Capacity for the Buena Vista WWTP”).

⁶⁹ AR at 515 (2009 Proposed Permit at 2); AR at 535 (Fact Sheet at 2).

As an additional safeguard against exceeding the WWTP's treatment capacity, the Region has placed notification requirements in the permit which requires the permittee to "file a written report with EPA within ninety (90) days after the average dry-weather waste flow for any month either equals or exceeds 90 percent of the annual dry weather design capacity of the waste treatment and/or disposal facilities."⁷⁰ Thus, the Region has carefully conditioned the permit so that the Region and the permittee will be aware of flows that may approach the permit limits.

Moreover, if the Facility were to expand, causing it to exceed the flow limitations located in the permit, without seeking a permit modification, the permittee would have violated the terms of its permit. *See* 40 C.F.R. § 122.41(a). Therefore, EPA could pursue an enforcement action against the permittee to enforce the terms of the permit, seeking injunctive relief and/or administrative or civil penalties. *See* CWA § 309, 33 U.S.C. § 1319.⁷¹

In short, the Region has correctly established permit effluent limitations and conditions based on the design flow of the POTW facility to be constructed. The County does not argue that the Region's calculations are erroneous; it has merely argued that the Region should base wastewater flows on a speculative future expansion of the Facility, rather than the actual design flow of the proposed Facility – something that the Tribe's revised projections did not require the Region to do. The County's Petition for Review on this point should therefore be denied.

2. The Region properly considered the downstream impacts of increased flow due to wastewater discharges.

The Petitioners raise two issues related to downstream impacts due to the increased flow in Jackson Creek and in the vicinity of Coal Mine Road. First, Mr. Villa claims that the discharge will increase flow into the Jackson Creek channel, which will adversely impact a

⁷⁰ AR at 9 (Final Permit at 7, Section II.B).

⁷¹ Further, if EPA were to determine that the permittee either negligently or knowingly violated the terms of its permit, the Agency could choose to pursue criminal enforcement against the permittee. CWA § 309(c); 33 U.S.C. § 1319(c).

cultural site downstream of the proposed project that may be eligible for Nation Registry of Historic Places.⁷² Second, both the County and FAC argue that the Region did not properly address the potential for flooding of roads due to the Facility's wastewater discharges. As discussed below, the Board should deny the petitions based on these arguments because the Petitioners do not assert that the Region has clearly erred in its analysis or in establishing a permit condition. Rather, the Board should find that the Region has properly considered the downstream impacts of the increased flows due to the wastewater discharges, and review is therefore unwarranted.

a. EPA properly determined there would be no downstream impacts on artifacts in the Jackson Creek Channel

Mr. Villa is concerned that the discharges from the WWTP will increase flows into Jackson Creek, causing erosion and damaging a downstream cultural site, CA-AMA-56, which Mr. Villa asserts may be eligible for the National Registry of Historic Places ("NRHP").⁷³ Specifically, Mr. Villa alleges that the method the Region used to calculate the increased flow of Jackson Creek was faulty because the Region did not consider that much of the water flowing in Jackson Creek is pumped from the creek to use for agricultural purposes upstream of the cultural site. Mr. Villa also states that the Region should have considered the impacts to the cultural site during 10-year and 100-year storm events.⁷⁴

First, and most importantly, the Board should deny review of this issue because the issue was not preserved during the public comment period. No comments received during the public comment period specifically addressed concerns over potential downstream impacts of increased

⁷² Villa Petition at 2.

⁷³ Although this issue states concerns relating to cultural resources, and thus relates to the Region's NHPA analysis, the underlying concern involves the off-site impacts (downstream flooding) of the wastewater discharge, and it is therefore discussed in this part of the Region's Response to Petitions for Review.

⁷⁴ See Villa Petition at 2.

flows on any downstream historical sites, let alone specifically CA-AMA-56. Some comments were concerned with the potential for increased flooding of roads due to the discharges.⁷⁵ Additionally, one comment concerning the Region's NHPA consultation did allege that the Region failed to consider off-site and downstream impacts, but was concerned with the widening of roads and auditory impacts from increased traffic, not the impact of increased flows in Jackson Creek.⁷⁶ As stated previously, "the petitioner must have raised during the public comment period the specific argument that the petitioner seeks to raise on appeal." *See In re Government of the District of Columbia Municipal Separate Storm Sewer System*, 10 E.A.D 323, 339 (EAB 2002). Therefore, because neither Mr. Villa, nor any other commenter, raised this specific issue during the public comment period, the Region was not given the opportunity to address it fully. Thus, the Board should deny review.

Although no comments specifically addressed the issue Mr. Villa raises in his petition, the Region fully analyzed how the discharges from the Buena Vista Rancheria WWTP would impact flows in Jackson Creek during the NHPA consultation to assess potential erosion impacts on cultural resources. During the consultation, the Region evaluated both the potential impacts to off-site properties that might occur from potential road widening activities and from increased flows due to the proposed discharges from the wastewater treatment facility and stormwater runoff from the project site.⁷⁷ The Region provided results of the analysis described below to all parties during the consultation, including Mr. Villa. The Region determined and the SHPO concurred that there are no historic properties that would be impacted by discharges from the wastewater treatment facility.⁷⁸

⁷⁵ See AR at 72 & 75 (RTC at 26 & 29, Comments 18a & 18h).

⁷⁶ AR at 87,89, and 90(RTC at 41, 43, and 44, Comments 18c, 18d, and 18e).

⁷⁷ AR at 90 (RTC at 44, Response to Comment 18d).

⁷⁸ AR at 1340-1343 (December 18, 2008 Letter from EPA to SHPO and attachment: December 10, 2008 Flow

As documented in the response to comments, the Region determined, during the NHPA process, that the project may increase flows in Jackson Creek by up to 1% during storm events, and by less than 8% during summer months.”⁷⁹ Based on this determination, the Region concluded that “there is virtually no potential for increased erosion of the stream banks.”⁸⁰

To make this determination, as stated in the Response to Comments, the Region compared existing flows in Jackson Creek to the increase in flows that may result from the project. The flow of Jackson Creek is largely determined by the releases from Lake Amador, which are controlled by the Jackson Valley Irrigation District (“JVID”).⁸¹ The Region utilized very conservative assumptions in its analysis of how the flow of Jackson Creek would be impacted by the project. First, the Region assumed a typical peak flow that was equal to the maximum overflow of Amador dam in 2007.⁸² Second, the Region used the flow volume of the wastewater treatment plant based on the size of the casino before it was reduced. Thus, the Region assumed that the highest projected flow from the casino would be 250,000 gallons per day (0.39 cfs), rather than the actual projected flow for the reduced-size casino, which is 160,000 gallons per day.⁸³ Third, the Region did not account for the mitigation controls the Tribe will construct to control stormwater flow⁸⁴ or the emergency storage volumes available for the Tribe

Calculations for Jackson Creek and the Proposed Project); *see also* AR at 1323-1324 (April 10, 2009 Letter from SHPO to EPA).

⁷⁹ *Id.* This analysis included the impacts from the discharges from the WWTP and the stormwater runoff from the project site.

⁸⁰ *Id.*

⁸¹ AR at 72-73 (RTC at 26-27, Response to Comment 8a); AR at 128 (Engineering Report at 11). Lake Amador dam is approximately 1.8 miles east of where the Mokelumne River enters Jackson Creek. *Id.*

⁸² AR at 72 (RTC at 26, Response to Comment 8a). “Based on data provided by JVID, typical overflows from the Amador dam reached 2900 acres-feet/day (1460 cfs), with typical peak overflows ranging from 500-1,000 acre-feet (250-500 cfs). During dam overflows, actual flows in Jackson Creek will be higher than the dam overflows due to rainfall flowing to Jackson Creek from the watershed downstream of the dam. However, EPA conservatively assumed a typical peak dam overflow of 1500 cfs for the purposes of this analysis. During summer months, flows average around 10-20 acres-feet/day (5-10 cfs). During the dry season, the flows in Jackson Creek are largely dependent on the dam overflows.”

⁸³ *Id.*

⁸⁴ *Id.* Although the permit does not regulate stormwater discharges from the project and thus does not require

to store effluent during a flooding event,⁸⁵ both of which will decrease the flow being discharged from the WWTP during peak events. Thus, the Region's determination that the project would not increase the flow of Jackson Creek as to cause erosion that would impact cultural resources is based on a thorough and conservative analysis and is reasonable.

With regard to Mr. Villa's specific assertions that the Region's analysis was insufficient, Mr. Villa is incorrect on both counts. First, the Region did not account for flows pumped from Jackson Creek for agricultural purposes because, as stated previously, the Region utilized conservative assumptions to model the worst-case scenario which could contribute to the greatest erosion in Jackson Creek. The Region did not consider water withdrawn for agricultural use because this would lessen the flows in Jackson Creek.. If the Region were to incorporate this calculation, the potential impacts of erosion on CA-AMA-56 would be even less than that the Region has calculated. Second, and similarly, the Region's flow calculations were also based on a worst-case scenario, the 100-year storm event. It was not necessary to conduct additional analysis for lesser events, such as the 10-year storm event or even the 1-year storm event, because the results would simply demonstrate an even less significant impact than what the Region has already considered for the worst-case scenario. Mr. Villa's petition does not allege that the Region's analysis or conclusions were erroneous, and essentially only alleges that the Region's analysis should be more extensive. Mr. Villa has suggested that a more sophisticated analysis, including modeling, should have been conducted. However, as discussed above, the Region reasonably concluded that its analysis of flow increases was sufficient and that

mitigation for stormwater flows to be generated by the project, the Tribe has proposed to build an underground storage detention system capable of detaining 4800 cf stormwater, sufficient to retain the 100 year peak runoff event for a short time period. *See* AR at 403 (Technical Drainage Study Update: Flying Cloud Casino at Buena Vista Rancheria ("Technical Drainage Study Update") (Kimley-Horn & Associates 2009) at Stormwater Detention System Worksheet).

⁸⁵ *See* AR at 52 (RTC at 6, Response to Comment 5flow-a, Table 1: Hours of Emergency Storage for Buena Vista WWTP).

additional, more sophisticated modeling was unnecessary to demonstrate that there would not be an impact on the area of concern to Mr. Villa. A mere difference in opinion about the Region's evaluation of a technical matter is not sufficient to establish Board review. "Petitioners must provide compelling arguments as to why the Region's technical judgments or its previous explanations of those judgments are clearly erroneous or worthy of discretionary review." *In re: Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 668 (EAB 2001). Because Mr. Villa has failed to do this, the Board should deny review of his petition regarding this issue.

b. The Region was not required to address the impacts of wastewater discharges on flooding of Coal Mine Road

Both the County and FAC petitions challenge how the Region addressed concerns regarding the flooding of Coal Mine Road, which runs adjacent to the unnamed tributary of Jackson Creek. FAC contends that the Region ignored the problem of annual flooding of roads leading to the proposed project, which, it claims, will be "greatly exacerbated by wastewater discharge of the magnitude allowed by the permit."⁸⁶ The County claims that the discharges will "greatly exacerbate" flooding of Coal Mine Road, and that the Region failed to adequately address comments regarding the flooding of Coal Mine Road in its Response to Comments.⁸⁷

The Board should deny petitioners' appeal on this issue because they fail to cite to any specific permit condition or any omission that amounts to error on the Region's part. Neither the Clean Water Act nor its implementing regulations require the Region to include permit conditions that address impacts to roadways due to flooding. Thus, the fact that there is no permit condition addressing concerns that discharges may exacerbate existing flooding of Coal Mine Road is not clearly erroneous.

⁸⁶ FAC Petition at 3.

⁸⁷ County Petition at 8-9.

In its Response to Comments, the Region did not discuss this issue or state that the NPDES program does not require EPA to address potential impacts to the roadway due to increased flows in the vicinity of Coal Mine Road due to the discharges. However, if the Region failed to adequately address this issue, the error is not worthy of remand. As stated previously, neither the Clean Water Act nor its implementing regulations require the Region to include permit conditions that address impacts to roadways due to flooding. Therefore, although the Region may not have responded to Petitioners' comment concerning impacts to Coal Mine Road due to flooding, the NPDES program does not regulate such potential impacts, and therefore the Region's response would not have led it to include new or revised conditions in the final permit. This amounts to harmless error, for which the Board need not remand the permit to EPA for further proceedings. *In re Dominion Energy Brayton Point, LLC*, 13 E.A.D. 407, 444 (EAB 2007) ("The Board typically declines to review errors that have no bearing on the ultimate conclusion by the permit writer.").

Moreover, EPA did consider increased flows as part of its NHPA analysis when it evaluated potential flooding from the project in downstream waters.⁸⁸ The Region is aware that the project may result in an increase of downstream flows due to the increase of impervious surfaces and discharge flow,⁸⁹ and it conducted a proper analysis of the potential impacts of the permitting action. The Region relied on the Tribe's Technical Drainage Study,⁹⁰ which the Tribe prepared in order to evaluate potential impacts to flooding at the intersection of Coal Mine Road. The Tribe estimated peak storm runoff from the site using the rational method described in the *Erosion & Sediment Control Guidelines for the Developing Areas of the Sierra 1981*.⁹¹ The

⁸⁸ See AR at 90 (RTC at 44, Response to Comment 18d).

⁸⁹ See AR at 72 (RTC at 26, Response to Comment 8a).

⁹⁰ AR at 380-442 (Technical Drainage Study Update).

⁹¹ AR at 429-436 (Technical Drainage Study Update, Appendix C).

Technical Drainage Study estimated peak storm runoff was estimated for the project site in the existing and proposed conditions for the 25-year, 24-hour event and the 100-year, 24-hour peak runoff event.⁹² The Technical Drainage Study found that increased flow resulting from the project consists almost entirely of increased flow of stormwater (13 cfs) resulting from the project's addition of impervious surface areas.⁹³ The Region calculated significantly less increased flow due to WWTP effluent (less than 0.39 cfs).⁹⁴ This is significant because the permit only regulates the effluent discharged from the WWTP and does not regulate stormwater from the site.

Furthermore, although it is not a required condition of the permit, the Region notes that in order to retain the peak runoff event, the Tribe is building an underground detention system consisting of large diameter pipes where peak runoff volumes will be stored. Thus, the analysis, which considered modeled peak runoff volumes and on-site storage capacity, concluded that post-development runoff will not exceed pre-development conditions.⁹⁵

In short, the petitioners have failed to point to any specific permit conditions or omissions that are clearly erroneous. Although the Region conducted an analysis of increased flows that may result from the Tribe's project, it is not required to specifically address concerns regarding potential impacts to roadways due to flooding. Thus, petitioners on this issue fail to meet a key requirement for Board review.

3. The Region properly established water quality monitoring requirements in the permit

FAC claims that the Region erred in requiring water quality monitoring of the receiving water. FAC's argument is two-fold: first, it claims that the Region did not define the discharge

⁹² AR at 387 (Technical Drainage Study Update at 5).

⁹³ AR at 387 (Technical Drainage Study Update at 5).

⁹⁴ AR at 72 (RTC at 26, Comment 8a).

⁹⁵ AR at 388 (Technical Drainage Study Update at 6).

point or the receiving water in the permit or Fact Sheet. Second, it claims that the Region improperly established monitoring requirements because the receiving water does not flow upstream from the discharge point and because EPA must require the permittee to acquire access rights from property owners adjacent to the downstream monitoring sites in the receiving water before issuing the permit.

The Board should deny FAC's petition for review on this issue. First, FAC did not properly preserve the issue for review. Second, on the substantive issue, the Region defined the receiving water and discharge point in the Fact Sheet and established appropriate water quality monitoring requirements in the permit.

a. FAC did not properly preserve the issue for review

FAC claims that the Region erred because it did not properly define the discharge point or receiving water, and therefore the permit's monitoring requirements are unclear.⁹⁶ The Board should deny FAC's petition to review this issue because the Region received no comments addressing the location of the discharge point or the identity of the receiving water.⁹⁷ "The petitioner must have raised during the public comment period the specific argument that the petitioner seeks to raise on appeal." *In re: Government of the District of Columbia Municipal Separate Storm Sewer System*, 10 E.A.D. 323, 339 (EAB 2002). When a petition fails to do so, as in this case, Board review is inappropriate.

FAC specifically points to Comments 7, 7w, and 12-1 in EPA's Response to Comments. However, none of those comments suggests that the Region did not clearly define the discharge

⁹⁶ FAC Petition at 1-2.

⁹⁷ FAC did not comment on the in-stream monitoring locations because those monitoring requirements were not included in the draft permits. In-stream monitoring requirements were added to the Final Permit in response to comments. AR at 74 (RTC at 28, Comment 8f). This addition merely required supplemental monitoring; it did not modify any other conditions in the permit. None of the Petitioners have asserted, and the Board should therefore not consider, that this addition to the final permit raised "substantial new questions" and should have been made available for public comment. 40 C.F.R. § 124.14(b).

point or receiving water. Comment 7 merely states that “the discharge will likely cause off-site water quality impacts.”⁹⁸ Comment 7w claims that there is a reasonable potential for excessive algal growth due to the discharge, and notably identifies the receiving water in the comment, rather than stating that the receiving water is unclearly defined.⁹⁹ Finally, Comment 12-1 simply requests that the Region seek approval for discharge from property owners adjacent to receiving water.¹⁰⁰

Because no comments claimed that the Region erred in clearly defining the discharge point or receiving water locations, the Board should deny FAC’s request for review on this issue. The requirement that an issue be raised with specificity during the public comment period is a threshold requirement for any petition for review. This requirement ensures that the Region has an opportunity to respond to all concerns and/or modify a draft permit before issuing a final permit and ensures that most permit decisions are made at the Regional level. *See* 45 Fed. Reg. at 33,412. If there was uncertainty about the discharge point and/or receiving water in the 2009 Proposed Permit or Fact Sheet, the Region could have clarified any unclear issue during the public comment period. However, because the specific issue was not raised, the Region was never given the opportunity to elucidate any ambiguities.

b. EPA acted reasonably in defining water quality monitoring requirements in the permit

The Region reasonably established effluent monitoring requirements in the Permit to ensure that the effluent meets technology-based and water quality-based effluent limitations at

⁹⁸ AR at 58-59 (RTC at 12-13, Comment 7).

⁹⁹ AR at 69 (RTC at 23, Comment 7w) (“the effluent will travel for several miles in a constructed channel . . .”).

¹⁰⁰ AR at 77 (RTC at 31, Comment 12-1). Although FAC did not point to this comment in its petition for review, perhaps Comment 8b comes closest to addressing the issue. Comment 8b stated that the “public does not know exact route of wastewater to Jackson Creek.” AR at 73 (RTC at 27, Comment 8b). However, this comment is not sufficiently related to FAC’s claim. First, that comment does not suggest that the Region failed to identify the discharge point or the receiving water, nor does it claim that the confusion surrounding the exact route of the wastewater to Jackson Creek creates confusion in the monitoring requirements. Thus, because comment 8b, and no other comments address the specific issue in the petition, the petition for review should fail on this issue.

the point of discharge, Outfall 001.¹⁰¹ Outfall 001 is located specifically at N. 38° 16' 23", W. 120° 54' 36".¹⁰² The monitoring requirements in the permit require the permittee to monitor “downstream from the last treatment process.”¹⁰³ In recognition that the receiving water “may have no natural flow during certain times of the year,” the permit requires the effluent to meet downstream water quality standards at the point of discharge, rather than allowing for dilution.¹⁰⁴ Although the effluent must meet downstream water quality standards at the point of discharge, the permit also requires in-stream monitoring of the receiving water.¹⁰⁵

FAC first claims that the Region erred in establishing water quality monitoring points because the receiving water is unclear. This ignores the fact that the waterbody referred to as the “receiving water” is clearly identified in the permit as the unnamed tributary to Jackson Creek.¹⁰⁶ Furthermore, its location is clearly described in the Fact Sheet:

*The effluent from the WWTP will discharge to a constructed, vegetated swale south of the parking garage and casino which will travel on-site for approximately ½ mile. At the southwest [sic] corner of the property (at Coal Mine Rd.), the water will flow through a reverse siphon into a drain under Coal Mine Road to an unnamed tributary/drainage channel which flows east for several miles before entering Jackson Creek. Jackson Creek subsequently flows into Dry Creek and to the lower Mokelumne River.*¹⁰⁷

¹⁰¹ AR at 58 (RTC at 12, Response to Comment 7).

¹⁰² AR at 3 (Final Permit at 1).

¹⁰³ AR at 11 (Final Permit at 9) The permittee must monitor for ammonia, BOD, Electrical Conductivity, Total Coliform, Bacteria, Nitrate, Oil and Grease, Settleable Solids, TSS, Total Residual Chlorine, Turbidity, Whole Effluent Toxicity, pH, hardness, and the entire suite of 126 priority pollutants. AR at 5 (Final Permit at 3).

¹⁰⁴ AR at 27-28, 31 (Fact Sheet at 3-4, 7). As stated in the Fact Sheet, neither the Tribe nor EPA has established water quality standards (“WQS”) specific for Tribal Waters. However, the Region developed water quality-effluent limitations in the permit, which are equal to WQS found in the California Toxics Rule and the State of California’s federally-approved WQS found in the Basin Plan for the Sacramento and San Joaquin River Basins. (AR at 27-28 (Fact Sheet at 3-4)). See *supra* Section I.B.1.

¹⁰⁵ AR at 7 (Final Permit at 5); see also AR at 63, 74 (RTC at 17, 28, Response to Comments 7m, 8f).

¹⁰⁶ AR at 3 (Final Permit at 1). The unnamed tributary would not normally be referred to using the term “receiving water,” as it is ½ mile downstream from the point of discharge, Outfall 001, the location of which is discussed below. However, the Permit Application identified it as such (AR at 7 (Permit Application at 5)), and this was carried over in the Region’s preparation of the Final Permit and supporting documents.

¹⁰⁷ AR at 27 (Fact Sheet at 3).

Part I.B.2. of the permit requires weekly water quality monitoring when water is present in the unnamed tributary at points 10 feet upstream and 100 feet downstream of the point where the discharge enters the receiving water, locations which are identified in relation to Outfall 001.¹⁰⁸ This could be a cause for some confusion, because the coordinates for Outfall 001 are located upstream, in the vicinity of the planned WWTP.¹⁰⁹

Had a commenter pointed out this potential ambiguity during the comment period, EPA could have clarified these locations in response to comments. However, any ambiguity concerning the receiving water should be irrelevant, because the Region would not have considered this as a basis for modifying the final permit. As explained above, there are no federally-approved water quality standards for tribal waters, therefore the Region established water quality-based effluent limitations to meet downstream State water quality standards. Thus, effluent limitations were established in the permit to protect downstream State waters, and they are to be met at the WWTP, without dilution.¹¹⁰ Further clarification of the locations of Outfall 001 and the water identified as the receiving water would not have led to any modification of these requirements.

FAC further claims that the Region erred in establishing the upstream monitoring requirement because there are “no definite waterways that would constitute an ‘upstream’ point to monitor.” While FAC is correct that at many times during the year the tributary does not have natural flow, the permit provision contemplates that upstream monitoring may not be possible at such times by only requiring the permittee to monitor when such flow is present in the receiving

¹⁰⁸ AR at 7 (Final Permit at 5). Part I.B.2 of the Permit specifically states that “[t]he permittee shall conduct weekly receiving water quality monitoring for pH, dissolved oxygen, turbidity, total dissolved solids, and temperature at the following locations when water is present in the receiving water: M001U – Outfall 001 Upstream: Approximately 10’ upstream of location where discharge enters receiving water. M001D – Outfall 001 Downstream: Approximately 100’ downstream of location where discharge enters receiving water.”

¹⁰⁹ The point of discharge, Outfall 001, is identified in the permit as N. 38° 16’ 23”, W. 120° 54’ 36”. AR at 3 (Final Permit at 1).

¹¹⁰ AR at 58 (RTC at 12, Response to Comment 7).

water. The Region included the upstream monitoring provision to ensure that the discharge would not have water quality impacts on the receiving stream during periods when the stream is not merely effluent-dominated.¹¹¹

Finally, FAC also claims that the Region erred in establishing the monitoring point 100 feet downstream from the discharge point. Petitioner FAC assumes that the permittee may not be able to access the monitoring point because the land adjacent to the monitoring point is owned by private property owners. FAC claims the Region should not issue the permit until the permittee has acquired access rights.¹¹²

The Region is not required to determine if permittee has access rights to the monitoring location the Region finds most appropriate for the discharge. *See* 40 C.F.R. § 122.48 (requiring that a permit shall include the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods, as well as the monitoring type, intervals, and frequency). “The permit writer is responsible for determining the most appropriate monitoring location and explicitly specifying this in the permit. Ultimately, the permittee is responsible for providing a safe and accessible sampling point that is representative of the discharge.”¹¹³ Thus, the Region is to determine the most appropriate location for monitoring, which the Region did by defining a point 100 feet downstream of the discharge point, and it is the permittee’s responsibility, not the Region’s, to gain access to the sampling location.

¹¹¹ *See* AR at 27-28 (Fact Sheet at 3-4). The water quality impacts of the discharge during periods when there is no other flow in the receiving stream are measured at the outfall. As noted above, the Region contemplated the lack of upstream flow by conditioning the permit such that dilution is not considered and water quality standards must be met at the discharge point prior to entering the receiving water.

¹¹² FAC Petition at 2.

¹¹³ NPDES Permit Writers’ Manual at p. 17, (*citing* 40 C.F.R. § 122.41(j)(1) (“Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity”). A copy of the complete NPDES Permit Writers’ Manual is *available at* http://cfpub.epa.gov/npdes/writermanual.cfm?program_id=45 (last viewed September 27, 2010).

It is worth noting that although land on one side of the receiving water is owned by private property owners, the permittee will likely be able to access the receiving water either from Coal Mine Road or by agreement with the landowner. Therefore, despite the fact that the Region is not responsible for ensuring that the permittee can gain access to the monitoring point before issuing the permit, FAC's concerns about access are likely unfounded.

4. The Region did not err regarding the Erosion Protection condition of the permit

In another argument, which is related to its argument concerning the definitions of the point of discharge and the receiving water, FAC claims that Part II.A of the permit, which requires the permittee to take measures to prevent erosion between the discharge point to the receiving water,¹¹⁴ is unclear.¹¹⁵ Specifically, FAC claims the Region did not sufficiently identify the area from the discharge point to the receiving water, making the condition unclear.

Like FAC's previous argument,¹¹⁶ the EAB should deny FAC's petition on this issue because the issue was not preserved during the public comment period. No comments received during the public comment period suggested that the receiving water was unclear¹¹⁷ and no comments addressed the erosion protection condition at all.¹¹⁸ Because no comments addressed this issue, the Board should deny FAC's request to review this condition.

If the Board does review this provision, the Board should not remand the permit to revise this condition because it is clear what the Region intended to require of the permittee. The erosion protection condition requires the permittee to "design and install erosion protection

¹¹⁴AR at 9 (Final Permit at 7, Section II.A "Erosion Protection"). "The permittee shall design and install erosion protection measures to prevent erosion from the discharge point to receiving water. The erosion measures shall be designed to protect adjacent wetlands from harm."

¹¹⁵ FAC Petition at 2.

¹¹⁶ *Supra* section II.C.3.

¹¹⁷ *See supra* section II.C.3.

¹¹⁸ The Region did address potential erosion issues in relation to questions regarding the flow. *See* AR at 72-73 (RTC at 26-27, Response to Comment 8a). However, no comments specifically addressed erosion as a problem or mentioned the erosion protection condition at issue in FAC's petition for review.

measures to prevent erosion from the discharge point to receiving water. The erosion measures shall be designed to protect adjacent wetlands from harm.”

As discussed above, the discharge point is Outfall 001. From this point, the discharge will “travel on-site for approximately ½ mile” in a “constructed, vegetated swale south of the parking garage and casino” until it reaches Coal Mine Road and enters the unnamed tributary to Jackson Creek through a reverse siphon.”¹¹⁹ The wetlands is located “in the northwest corner of the site, adjacent to Coal Mine Road”¹²⁰ and thus at the far end of the ½-mile swale.¹²¹

While it might have been drafted in more specific terms, it is not difficult to ascertain that this provision of the permit applies to the entire length of the swale, from the outfall at the WWTP to its terminus at Coal Mine Road, and to no other location. Furthermore, the intent of this provision is clear: it ensures that the discharge shall not cause or contribute to erosion or to increased sedimentation in the adjacent wetlands.¹²²

Although not stated explicitly, the Erosion Protection condition, Permit II.A, adequately requires that the permittee prevent erosion in the ½-mile swale for the protection of the adjacent wetlands. Therefore, if the Board does consider the issue, although it was not preserved for review, the condition, read along with the description of the property and the flow of the effluent, is clear in terms of what it requires of the permittee.

5. The Region did not err in its Response to Comments regarding groundwater testing

The County claims that the Region’s conclusions regarding groundwater testing are inaccurate. In comments received during the public comment period, a commenter asked the Region, “Were there test monitoring wells done to evaluate chemicals in groundwater? This data

¹¹⁹ AR at 408 (Fact Sheet at 3).

¹²⁰ AR at 407 (Fact Sheet at 2).

¹²¹ See also AR at 408 (Fact Sheet at 3) (description of flow to receiving water).

¹²² AR at 478 (Fact Sheet at 13).

should be shared with the community.”¹²³ The Region responded by writing that “EPA is aware of no monitoring wells used to evaluate the groundwater chemistry. EPA did not require the applicant to install such wells.”¹²⁴ In its petition for review, the County claims that the Region’s response was inaccurate because the County claims that the Tribe has “undertaken monitoring of a significant number of wells to establish baseline groundwater conditions in advance of groundwater extraction.”¹²⁵ Further, the County claims that the Region’s response to Comment 8i contradicts its response to Comment 17b because the Region stated that it “does not expect the drinking water used at the casino [which will be derived from groundwater] will contain high levels of arsenic, metals, or radiological constituents that will need to be reduced prior to domestic use. EPA does not believe that the casino will be utilizing contaminated drinking water.”¹²⁶

The County’s petition to review this issue should fail because it does not meet a threshold requirement for reviewability. The County’s “mere allegation” that the Region erred when it stated that it does not know of groundwater testing that has occurred or that it believes the casino’s drinking water will not be contaminated is insufficient to meet the threshold of reviewability. *See In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995); *accord In re Phelps Dodge Corp.*, 10 E.A.D. 460, 496, 520 (EAB 2002). Specifically, the County’s petition does not raise this issue with sufficient specificity because it does not point to a permit condition that would be affected by EPA conducting or reviewing groundwater testing. In fact, this permit does not regulate groundwater, nor does it address the drinking water that will be used at the project. The Board is “not at liberty to resolve every environmental claim brought

¹²³ AR at 75 (RTC at 29, Comment 8i).

¹²⁴ AR at 75 (RTC at 29, Response to Comment 8i).

¹²⁵ County Petition at 9.

¹²⁶ County Petition at 9; *see also* AR at 81-82 (RTC at 35-36, Response to Comment 17b).

before [it] in a permit appeal but must restrict [its] review to conform to [its] regulatory mandate.” *In re Phelps Dodge Corp.*, 10 E.A.D. at 514 (refusing to review the facility’s impacts on water rights during a NPDES permit appeal). Therefore, because the NPDES permit does not address groundwater or drinking water, the issue is not subject to Board review pursuant to a NPDES permit appeal.¹²⁷

6. EPA correctly did not include conditions to address the impacts of reclaimed water discharged to groundwater

FAC asks the Board to review Part II, Section C of the permit, which addresses reclaimed water limitations, because FAC suggests the reclaimed water could negatively impact groundwater. Specifically, FAC requests that the permit require the Tribe to construct a well in order to monitor the water quality of the groundwater. FAC’s concern is that the reclaimed water that the Tribe uses for irrigation will seep into the ground and negatively impact the groundwater.¹²⁸

The Board should deny FAC’s petition to review because the issue was not preserved during the public comment period. The Region received no comments regarding impacts that the WWTP’s use of reclaimed water will have on groundwater. Rather, FAC, in its petition, points to the following: a comment that addresses concerns about the discharges’ (as opposed to the reclaimed water’s) impacts on groundwater;¹²⁹ comments concerning surface water flow and

¹²⁷ Although groundwater and drinking water are not regulated by the permit and therefore not subject to review, the Region does not believe its responses to Comments 8i and 17b are contradictory. In the Response to Comment 17b, EPA stated that it does not believe drinking water provided at the casino will be contaminated with arsenic, metals or radiological constituents. This determination was reasonable to make without evaluating groundwater tests for the simple fact that the drinking water at the casino must meet federal standards under the Safe Drinking Water Act for the protection of human health. The Safe Drinking Water Act establishes limitations for arsenic, numerous metals, radiological constituents, as well as a host of other contaminants. It is reasonable for EPA to presume that all domestic water supplied at the casino will meet these standards, and that the discharge will also not contain these pollutants.

¹²⁸ See FAC Petition at 2-3.

¹²⁹ AR at 81 (RTC at 35, Comment 17a).

quality;¹³⁰ and a comment asking whether the Region has evaluated groundwater quality based on groundwater monitoring results.¹³¹ None of these comments relate to FAC's concerns about the reclaimed water's potential impacts on groundwater. FAC did not preserve the issue during the public comment period, and the Board should deny its petition regarding this issue.

FAC's petition on this issue should also fail because FAC's concern regards impacts to groundwater, not surface water. The NPDES permit regulates the discharge of pollutants from a point source to surface waters of the United States, not to groundwater. CWA § 101(a), 33 U.S.C. § 1251(a); *see also NRDC v. EPA*, 859 F.2d 156, 169-70 (D.C. Cir. 1988) (limiting EPA's permitting authority to regulating discharges of pollutants to surface waters; EPA cannot "account for the environmental effects of the entire new facility.").

In any event, in this case, the NPDES permit requirements have the effect of protecting the quality of the reclaimed water. As described in the Fact Sheet, reclaimed water used for irrigation and interior water is treated effluent, and subject to effluent limitations which meet applicable State water quality standards "at the end of pipe."¹³² Applicable State standards are protective of several uses, including municipal and domestic water supply.¹³³ FAC does not assert or provide any information suggesting that the effluent limitations are not protective of public health. FAC's "mere allegation of error" without specific supporting information is insufficient to warrant review. *See In re Phelps Dodge Corp.*, 10 E.A.D. 460, 496, 520 (EAB 2002); *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000). Therefore, FAC's concern

¹³⁰ AR at 72-75 (RTC at 26-29, Comments 8a-h).

¹³¹ AR at 75 (RTC at 29, Comment 8i)

¹³² AR at 27-28 (Fact Sheet at 3-4).

¹³³ *Id.*

regarding “tainted domestic wells,”¹³⁴ without any other evidence, is insufficient to show Board review is appropriate.

7. The Region has properly assessed the Facility’s ability to meet effluent limitations

The County claims that the Region made an erroneous finding that the treatment system, which the Facility is planning to install, is adequate to meet the effluent limits in the permit. The County relies on past compliance of the Thunder Valley Casino WWTP, a facility similar to the Buena Vista Casino WWTP.¹³⁵ The Board should deny the County’s petition on this issue because, first, the County’s argument fails to point to an error in a permit condition and, second, it fails to establish why the Region’s previous response to comments was clearly erroneous.

First, and most importantly, the County’s comment does not address a permit condition and thus, is inappropriate for Board review. The County’s petition for review claims that the treatment system the Facility is planning on using, which the Region described in the Fact Sheet, is insufficient to meet the effluent limits in the permit. However, the specific treatment system is not a condition of the permit. Rather, the permit establishes appropriate technology-based effluent limitations and water quality-based effluent limitations,¹³⁶ and it is the permittee’s responsibility to install a treatment system that is sufficient to meet the effluent limits in its permit.¹³⁷ The County did not suggest that the Region erred in establishing technology-based effluent limitations or water quality-based effluent limitations. Because the Board’s review is limited to permit conditions, *see In re Federated Oil & Gas of Traverse City*, 6 E.A.D. 722, 725

¹³⁴ FAC petition at 3.

¹³⁵ County Petition at 6-8.

¹³⁶ *See* AR at 5-8 (Final Permit at 3-6).

¹³⁷ If the Facility did not meet the effluent limitations required by the permit, EPA has ample authority in CWA § 309, 33 U.S.C. § 1319, to take an enforcement action against the permittee. An enforcement action can include an order to comply with a permit requirement, such as an effluent limitation. CWA § 309(a), 33 U.S.C. § 1319(a). Additionally, EPA may seek monetary penalties for any violations. CWA §§ 309(b) and (g), 33 U.S.C. §§ 1319(b) and (g).

(EAB 1997), and the County did not claim that such permit conditions are inappropriate, the petition for review on this issue should be denied.

Second, even if the Board were to consider the County's argument as relevant to the permit itself, the County's petition fails to establish why the Region's previous Response to Comments was clearly erroneous. In its comments the County claimed, as it does in its petition for review, that a "very similarly designed facility at Thunder Valley has been shown to be incapable of achieving compliance with California Toxics Rule ("CTR") constituent limitations even using a finer membrane."¹³⁸ Despite the County's contention that the Region "dodged the comment," the Region provided a thorough two-page response to the comment.¹³⁹

In its response, the Region agreed that, although the operation of the Thunder Valley Casino WWTP is not necessarily directly related to the performance of the proposed facility at Buena Vista Rancheria, the design of the wastewater treatment plant serving the Thunder Valley Casino is very similar to the proposed design of the WWTP for the Buena Vista Casino.¹⁴⁰ Thus, the historical performance of the Thunder Valley WWTP in complying with its NPDES permit can serve as a good indicator of the anticipated performance of the Buena Vista Casino WWTP.

In its Response to Comments on the Buena Vista Casino WWTP, the Region summarized and discussed effluent monitoring results since 2005 for the Thunder Valley WWTP for total suspended solids (TSS), biochemical oxygen demand (BOD) and turbidity.¹⁴¹ Levels of BOD and TSS in the Thunder Valley WWTP effluent are at Non-Detect levels, and turbidity is consistently below 0.1 NTU.¹⁴² Although Thunder Valley WWTP exceeded effluent limitations in 2003 through 2005, as the County stated, the Region understands the issues at the Thunder

¹³⁸ AR at 54 (RTC at 8, Comment 5treatment-b).

¹³⁹ AR at 54-57 (RTC at 8-11, Response to Comment 5treatment-b).

¹⁴⁰ AR at 54 (RTC at 8, Response to Comment 5treatment-b).

¹⁴¹ AR at 56 (RTC at 9, Response to Comment 5treatment-b, Table 4: 2008 Average effluent water quality data for the Thunder Valley WWTP).

¹⁴² *Id.*

Valley WWTP resulted from a faulty seal, which was replaced in 2005.¹⁴³ Data since this time, therefore, is more representative of the treatment capability of the Buena Vista WWTP. Thus, since 2005, for pollutants at issue in the permit for the Buena Vista Casino WWTP, the Thunder Valley Casino WWTP has consistently met discharge requirements.¹⁴⁴

The County points to the fact that the California Regional Water Quality Control Board has recently found that Thunder Valley is unable to consistently comply with its effluent limitations for cadmium, lead, and zinc. Although this is true, it is not relevant to the Buena Vista Casino WWTP permit because the Buena Vista Casino WWTP is not expected to contain levels of cadmium, lead, and zinc which have the reasonable potential to cause or contribute to an exceedance of applicable water quality standards, and no effluent limits are established for those pollutants in the permit.¹⁴⁵

Furthermore, the Region properly assessed the proposed treatment technology for its ability to meet the effluent limitations and conditions of the permit.¹⁴⁶ Based on a review of the type of treatment proposed and the design parameters, the Region has every expectation that the system has the ability to meet effluent limitations. A membrane bioreactor (“MBR”) system, the primary technology used to treat the wastewater, is an established technology with well-know design parameters and is especially well-suited for small flow treatment systems with high loading rates and variable flows, such as the Buena Vista Casino WWTP. EPA has shown that MBR systems demonstrated consistent compliance with permit limits for those facilities

¹⁴³ See AR at 1314 (Position Paper on Notice of Violation Issued by RWQCB on June 17, 2005 (HydroScience, 2005)).

¹⁴⁴ AR at 56 (RTC at 9, Table 4: 2008 Average effluent water quality data for the Thunder Valley WWTP).

¹⁴⁵ See AR at 28 (Fact Sheet, “Regulatory Basis for Permit Effluent Limitations”) for a discussion of EPA’s Reasonable Potential Analysis. As noted, the Region has placed a requirement in the permit that all priority pollutants be monitored within three months of discharge. The Region may re-open the permit at that time based on new data if EPA determines that there exists a reasonable potential to cause or contribute to a violation of water quality standards. AR at 10 (Final Permit at 8).

¹⁴⁶ See AR at 25-27 (Fact Sheet at 1-3, describing the treatment system the Facility is installing in detail).

evaluated.¹⁴⁷ Thus, the Facility is installing established technology that the Region reasonably believes will sufficiently treat the wastewater to meet the effluent limits required by the permit.

D. The Region properly informed the public regarding changes in the scope of the project

Mr. Villa claims that the consulting parties were not fully made aware of changes to the size and elevation of the project “throughout the process.”¹⁴⁸ Mr. Villa’s petition on this issue should fail. First, it is unclear to what “process,” the NHPA process or the permitting process, Mr. Villa is referring. Second, there is no requirement in the NHPA to provide updated information “throughout the process,” and Mr. Villa has failed to explain how the timing of his receipt of the information is relevant. Third, and most importantly, the Region provided information regarding the scope of the project to the consulting parties, including Mr. Villa, in a timely and appropriate manner.

On the last point, the revised design and smaller capacity of the project affected design rates for the wastewater treatment system and were incorporated into the 2009 Proposed Permit and Fact Sheet which were subject to public review and comment. The Fact Sheet clearly describes the decrease in projected flows to the WWTP and the rationale for these changes.”¹⁴⁹ The Region also provided a description of the changes and final flow calculations in the Fact Sheet.¹⁵⁰

Additionally, the Region presented the revised design to parties participating in the NHPA process, including Mr. Villa, prior to re-proposing the permit. At the May 1, 2007 meeting initiating the NHPA consultation, consultants for the Tribe presented maps of the area, a

¹⁴⁷ See AR at 1321-1325 (Wastewater Management Fact Sheet: Membrane Bioreactors (EPA 2007), available at http://www.epa.gov/owmitnet/mtb/etfs_membrane-bioreactors.pdf (last viewed on September 22, 2010).

¹⁴⁸ Villa Petition at 2-3.

¹⁴⁹ AR at 27-29 (Fact Sheet at 3-5).

¹⁵⁰ *Id.*

description of the project site, the proposed project, and visual renderings of the revised, smaller project. The Region provided all consulting parties, including Mr. Villa, with a hard copy of the October 2, 2008 letter from EPA to the SHPO, which included detailed maps, photos, and aerial views of the project location. Additionally, the Region organized a site visit where consulting parties, including Mr. Villa were invited to walk around the proposed site and to view the exact locations of the proposed project. For the site visit, the footprint of the proposed project was staked out at each corner, helium-filled balloons were raised to outline the height of the proposed building structures, and the Tribal consultants were available to answer questions and to provide a narrated tour of the site.¹⁵¹

Moreover, the Region presented a table entitled “Comparison of TEIR Project vs. Current Project” to NHPA participating parties, including Mr. Villa, at the March 25, 2009 site visit and also distributed the table in an email dated April 14, 2009 from EPA to consulting parties. This table was prepared as part of the Tribal Environmental Impact Report prepared in accordance with the gaming compact entered into by the Tribe and the State of California. The table compares the gaming floor area, parking levels, and other relevant information of the original design plans and the current, smaller design.¹⁵²

As evidenced above, the Region provided information on the revised size of the project on several occasions and the 2009 Proposed Permit incorporated new design rates for the wastewater treatment system based on the revised size. This provided the public with the opportunity to comment to the Region on the revised scope of the project during the NHPA process and the public comment period on the 2009 Proposed Permit. Therefore, Mr. Villa’s contention that the Region failed to provide the public with an opportunity to comment on the

¹⁵¹ See AR at 41-44 (Fact Sheet at 17-20).

¹⁵² See AR at 1325-1338; *see also* AR at 1333 (Table: Comparison of TEIR Project vs. Current Project).

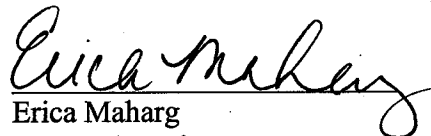
revised size of the project is simply incorrect. Thus, the Board should deny Mr. Villa's petition for review on this issue.

III. CONCLUSION

In summary, the Petitioners have failed to show that Board review of the NPDES permit for the Buena Vista Rancheria WWTP is appropriate. As stated above, in many cases, the Petitioners failed to meet basic threshold requirements required for Board review, and when they did meet the threshold requirements, Petitioners failed to show that the Region clearly erred in its permitting decisions. Because the Region has shown it has jurisdiction to issue the permit and it properly complied with the National Historic Preservation Act and the Clean Water Act, the Region respectfully requests the Board to deny Petitioners' petitions for review.

Respectfully submitted,

Dated September 27, 2010



Erica Maharg
Jo Ann Asami
Assistant Regional Counsel
EPA Region IX
75 Hawthorne St. (ORC-2)
San Francisco, CA 94131
(415) 972-3943
maharg.eric@epa.gov

Of Counsel:
Dawn Messier
Tod Siegal
Office of General Counsel, U.S. EPA
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Environmental Protection Agency Region 9's Response to Petitions for Review (signed copy), Certified Index to the Administrative Record, and excerpts from the Administrative Record *In the Matter of Buena Vista Rancheria Wastewater Treatment Plant, NPDES Appeal No. 10-05 – 10-07 & 10-13*, were filed electronically with the Environmental Appeals Board and copies were e-mailed to:

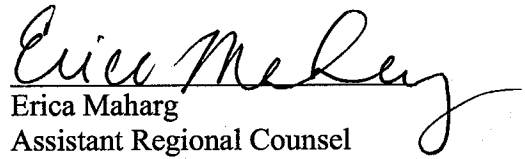
Ms. Cathy Christian
Neilsen, Mersamer, Parrinello, Mueller & Naylor, LLP
Legal Counsel for County of Amador
1415 L Street, Suite 1200
Sacramento, CA 95814
Email: cchristian@nmglovlaw.com

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

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

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

September 27, 2010


Erica Maharg
Assistant Regional Counsel
EPA, Region 9