

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

)	
In re: Buena Vista Rancheria)	NPDES Appeal Nos. 10-05 - 10-07 & 10-13
Wastewater Treatment Plant)	
)	EPA Region IX's Response to Motions to
NPDES Permit No. CA 0049675)	Stay Issuance of a Notice to Proceed
)	

As directed in the Environmental Appeals Board's ("EAB" or "Board") Order dated July 26, 2011, Region IX ("Region") of the United States Environmental Protection Agency ("EPA") submits this Response to Motions to Stay Issuance of a Notice to Proceed ("Motions To Stay") filed by Amador County ("County"), Dkt. No. 22 (July 15, 2011), Friends of Amador County ("FOAC") (Dkt. No. 21, 32¹ (July 13, and 25, 2011), and Ione Band of Miwok Indians ("Ione Band") (collectively "Movants"), Dkt. No. 24 (July 20, 2011).²

Pending before the Board are petitions filed by the County (NPDES Appeal No. 10-06), the Ione Band (NPDES Appeal No. 10-13), FOAC (NPDES Appeal No. 10-07), and Mr. Glen Villa, Jr. (NPDES Appeal No. 10-05) (collectively "Petitioners"), each seeking review of a National Pollution Discharge Elimination System ("NPDES") permit issued by the Region on June 25, 2010, under section 402 of the Clean Water Act ("CWA"), 33 U.S.C. § 1342, to the Buena Vista Rancheria of Me-Wuk Indians ("Buena Vista Tribe") to operate a wastewater treatment plant at its proposed casino project.

¹ By letter dated July 20, 2011, FOAC informed the Board that it joins with the Ione Band and County in their requests for a stay. For convenience, the Region directs its response to arguments of the County and Ione Band but responds to FOAC by this submission as well.

² Petitioners FOAC and Mr. Glen Villa, Jr. have also written letters to the Board asking it to prevent issuance of the Notice to Proceed. *See* Ltr. from J. Cassesi to EAB, Dkt. No. 21 (July 13, 2011); Ltr. from G. Villa to EAB (July 12, 2011) (not docketed) ("Exhibit A"). To the extent the Board deems these letters to be motions for a stay or other relief, the Region responds to them by this submission.

On July 5, 2011, the Region notified the Board, Petitioners, and the Buena Vista Tribe of developments related to the proposed project. *See* Ltr. from Region to Board, Dkt. No. 18. The Region's notice informed the Board of its intention to issue to the Buena Vista Tribe, no sooner than 21 days from the date of the Region's letter, a Notice to Proceed ("NTP") contemplated under a Memorandum of Agreement ("MOA" or "NHPA MOA") entered into under Section 106 of the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f. *Id.* at 3. Additionally, the Region brought to the Board's attention ongoing federal court litigation between the County and the U.S. Department of the Interior ("DOI") regarding the DOI Secretary's approval (through inaction) of an amendment to the gaming compact between the Buena Vista Tribe and the State of California. *Id.*

In response to the Region's letter, the Movants filed motions requesting that the Board stay the Region's issuance of the NTP. *See* Dkt. Nos. 21, 22, 24, 26, 32. The County also moved the Board to stay all construction activities at the proposed casino project. *See* Cty Request for Stay, Dkt. No. 22 at 12. Subsequently, the Buena Vista Tribe filed Motions for Leave to Intervene and to Oppose the Motions To Stay. Dkt. Nos. 31, 32. On July 21, 2011, the Region filed a motion seeking an extension of time to respond to the Motions To Stay. Dkt. No. 29. As part of its request for additional time, the Region noted that it would issue the NTP no earlier than 21 days following submission of its response to the Motions To Stay, and that it would address in that response the Region's view on the appropriate manner in which to proceed with regard to the NTP. *Id.* at 2. On July 26, 2011, the Board issued an order extending the time for the Region to file a response to the Motions To Stay until August 15, 2011. Dkt. No. 33.

For the reasons outlined in its July 5th letter and as discussed below, the Region believes that issuance of a NTP to the Buena Vista Tribe is consistent with the CWA and its

implementing regulations and the NHPA section 106 process conducted in connection with this NPDES permit. As discussed in this response, it is well settled that the CWA does not prohibit the construction of facilities that require permits to discharge pollutants. Further, the NTP itself is not an authorization for construction, nor does its issuance indicate that any actual construction is imminent. Rather, it constitutes EPA's finding that the Buena Vista Tribe has satisfied certain requirements of the NHPA MOA – which, under the NHPA section 106 regulations, governs implementation of the undertaking – designed to provide procedural safeguards to ensure that appropriate historic property surveys were conducted with regard to the project site. Fulfillment of those obligations was the only prerequisite agreed to by the MOA parties prior to issuance of the NTP.

The Region does not believe that any of the Movants has met the burden of demonstrating that any criteria that might be applicable for the relief they seek have been met. The Region thus respectfully requests that the Board deny the Motions To Stay.

In addition, consistent with the July 5th letter, the Region believes that expeditious issuance of a NTP is appropriate in the circumstances of this case. The Buena Vista Tribe has met the relevant requirements and demonstrated eligibility for a NTP. In addition, in the context of its correspondence with the Region and its motion for leave to intervene in this matter, the Buena Vista Tribe has demonstrated that it continues to suffer prejudice from delays in its ability to move forward with its proposed project. The Region too has an interest in ensuring that it efficiently fulfills its commitments related to NPDES permitting and, in this case, to implementation of its NHPA compliance. Subject to any further order by the Board, the Region thus intends to issue a NTP to the Buena Vista Tribe expeditiously upon the expiration of 21 days from the date of this response.

I. Background

On June 25, 2010, the Region issued an NPDES permit to the Buena Vista Tribe to operate a wastewater treatment plant at its proposed casino project in Amador County, California. This decision is being challenged by the Petitioners, who are each seeking review from the Board of the Region's decision to issue this permit. The Petitioners make a variety of arguments including the following: (1) certain determinations made by the Region as part of its NHPA section 106 compliance were flawed; and (2) the Region does not have NPDES permitting jurisdiction based on a theory that Buena Vista Rancheria – which is the location of the permitted discharge – is not “Indian country.”

When federal laws other than the CWA are applicable to the issuance of an NPDES permit, EPA must follow those laws' procedures. 40 C.F.R. § 122.49. In this instance, the Region determined that pursuant to section 106 of the NHPA, and its implementing regulations codified at 36 C.F.R. Part 800, issuance of the NPDES permit was an "undertaking" as defined at 36 C.F.R. § 800.16(y), with the potential to affect historic properties. Accordingly, the Region initiated the consultation process required under section 106 of the NHPA. At the conclusion of that process, the Region entered into the MOA with the Army Corps of Engineers (“Corps”), the California State Historic Preservation Officer (“SHPO”), and the Buena Vista Tribe that resolves adverse effects on historic properties identified during the section 106 consultation. Under the NHPA implementing regulations, such an MOA appropriately concludes the section 106 consultation and governs implementation of the undertaking, and the federal agency must ensure that the undertaking is carried out in accordance with the MOA. 36 C.F.R. § 800.6(c).

Under the NHPA MOA, the parties agreed to a variety of provisions relating to the undertaking. Of relevance here, the parties established a process by which the Buena Vista Tribe agreed to withhold commencement of any construction activities prior to completing certain additional surveys of the project area. Pursuant to this process, EPA (in consultation with the Corps and SHPO) was charged with reviewing the Buena Vista Tribe's survey work and, assuming all was in order, issuing NTPs confirming that the relevant MOA condition(s) had been satisfied. As is apparent, these conditions were established solely as an additional safeguard to ensure that previously unevaluated historic properties did not exist at the site of, or would not be adversely affected by, construction of the project segment at issue.³ They did not, nor could they, create any additional EPA authority over construction of the project.

On December 10, 2010, the Tribe submitted to the Region the completed fieldwork phase of the Archaeological Testing Program established under the NHPA MOA and its related Historic Properties Treatment Plan ("HPTP"). Attached as "Exhibit B." The Region has

³ AR at 1025-1035 (MOA at 3-4). Specifically, Section IV of the MOA provides:

IV. NOTICES TO PROCEED WITH CONSTRUCTION

EPA may issue Notices to Proceed (NTP) under any of the conditions listed below. Issuance of a NTP by the EPA does not constitute and shall not be interpreted to be authorization to discharge dredged and/or fill material pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344.

A. EPA, in consultation with SHPO, determines that there are no unevaluated historic properties within the APE for a particular construction segment; or

B. EPA, in consultation with SHPO, determines that there are no historic properties within the APE for a particular construction segment; or

C. EPA, in consultation with SHPO and signatories, determines that for a particular construction segment: (1) the fieldwork phase of the "Archaeological Testing Program," provision of the HPTP has been completed; and (2) EPA has accepted a summary of the fieldwork performed and a reporting schedule for that work.

D. EPA, in consultation with SHPO and signatories, determines that conditions resulting in the issuance of a "Stop Work," under the HPTP have been resolved.

consulted with the SHPO and the Corps, who concur with the Region that the Archaeological Testing Program's findings are acceptable, thus satisfying Section IV.C of the governing MOA and establishing a clear basis for issuance of a NTP. By meeting this requirement, the Buena Vista Tribe has satisfied the safeguard agreed to by the MOA parties and is now eligible for issuance of a NTP.

By letter dated May 26, 2011, the Buena Vista Tribe requested that the Region issue a NTP as soon as possible. *See* Ltr. from Region to Board, Enc. 1, Dkt. No. 19 at 2. As explained in that letter, the Tribe risks not being able to obtain long-term financing for the proposed project if the NTP is further delayed. In its motion for leave to intervene in this matter, the Buena Vista Tribe provides further explanation of the current financial harm to the Tribe and the risk to the project as a whole engendered by the continuing delay in its ability to move forward, which at this point appears to hinge on issuance of the NTP by the Region.

On July 5, 2011, the Region notified the Board that it "intend[s] to issue a [Notice to Proceed] to the Tribe no sooner than 21 days" from that date. *See* Dkt. No. 18, at 3. In addition, as a courtesy, the Region brought to the Board's attention a recent decision by the U.S. Court of Appeals for the D.C. Circuit in litigation currently ongoing between the County and DOI. *Amador County v. Salazar*, No.10-5240 (D.C. Cir. May 6, 2011). *See* Ltr. from Region to Board, Enc. 2, Dkt. No. 20. The Region noted that it had not been aware of this litigation until the Tribe and its project developer brought the lawsuit to the Region's attention. Of relevance here is that the federal court litigation includes the County's claim that the Buena Vista Rancheria is not Indian lands for purposes of the DOI action at issue in that case. This is a similar argument the County asserted in its appeal before the Board to the Region's NPDES permitting jurisdiction. As described in the Region's July 5th letter, the federal court litigation

has yet to reach the merits of the County's claim and has no effect on the Region's position – which is the position of the United States as a whole – that the Rancheria is an Indian reservation. Accordingly, the Buena Vista Tribe's proposed project is within the Region's NPDES authority.

Subsequently, the Movants filed their Motions to Stay the Region from issuing the NTP and in the case of the County, to stay all construction activities. Dkt. No. 21, 22, 24, 26, 32. Buena Vista has sought leave to intervene and oppose the Motions to Stay. Dkt. Nos. 31,32.

II. Response to Motions To Stay

The Motions To Stay should be denied. Contrary to their contentions, the Movants fail to demonstrate either: (1) that issuance of a NTP is stayed by operation of EPA's permitting regulations, or (2) that they meet any criteria that would support the Board's issuance of a discretionary stay. Notably, neither the regulations governing appeals of NPDES permits, nor the Board's guidance, establish criteria for evaluating motions requesting the type of relief the Movants seek here: *i.e.*, an order restraining a party to a permit appeal (in this case the Region) from proceeding with an act (issuance of a NTP and all construction activities) not prohibited by the CWA or its implementing regulations. Even if the Board were to look to the criteria federal courts generally apply in reviewing motions for similar types of injunctive relief, the circumstances of this case strongly militate against granting the relief sought by the Movants. As discussed below, the CWA does not prohibit construction of facilities pending final agency action on NPDES permit applications. The record is replete with information supporting the Region's jurisdiction and NHPA compliance. The Buena Vista Tribe has, under the NHPA MOA, clearly demonstrated its eligibility for a NTP as well as the potential prejudice it suffers as

a result of continued delay in the issuance of the NTP. Accordingly, the Motions To Stay should be denied.

A. Issuance of a NTP Is Not a Permit Term Subject to Stay under CWA Regulations

With somewhat distinct rationales, both the Ione Band and the County appear to argue that issuance of a NTP consistent with the NHPA MOA is prohibited under those elements of EPA's CWA permitting regulations relating to stays of contested permit conditions. See 40 CFR §§ 124.16 and 124.60. The Ione Band, for instance, asserts that because it challenges the sufficiency of the Region's NHPA compliance, such compliance is included within the contested permit conditions subject to the regulatory stay provisions. Expanding on this rationale, the Ione Band argues that issuance of a NTP – which is a finding by EPA that the Buena Vista Tribe has met certain provisions in the governing MOA – would similarly qualify as a contested permit condition. See Dkt. No. 24 at 4. Taking a slightly different tack, the County appears to argue that its challenge to the Region's permitting jurisdiction fundamentally contests all conditions of the permit. Perhaps relying on section 124.60(b)(4) of EPA's regulations, the County then asserts that construction of the project should be viewed as inseverable from such contested conditions, and thus, presumably, must also be viewed as contested and stayed. See Dkt. No. 22 at 3-4.

At the outset, the Region notes that the relevant permitting regulations distinguishing contested from uncontested permit conditions for purposes of stays pending appeal are focused on existing facilities. Where, as here, the permit involves a new facility or discharger, the regulations are clear that the applicant shall simply be without a permit pending final agency action following EAB review. 40 C.F.R. § 124.16(a). It thus appears that the specific regulatory

effect posited by both the County and the Ione Band is off context for purposes of the Buena Vista Tribe's NPDES permit.⁴

More importantly, however, the Region disagrees that any aspect of the NHPA compliance in this case – including issuance of a NTP consistent with the NHPA MOA – or any construction activities undertaken in furtherance of the project, would constitute a condition of the NPDES permit issued to the Buena Vista Tribe that could be subject to EPA's regulatory stay provisions. Although NHPA compliance is generally required for federally-permitted projects, such compliance does not automatically result in conditions being added to the permits. Section 106 of the NHPA and its implementing regulations impose procedural obligations to consider impacts on historic properties and establish mechanisms (*e.g.*, through MOAs) to resolve any adverse effects. They do not, however, require that conditions be added to federal agency permits to address effects on historic properties; nor do they expand an agency's organic authority to include such conditions. *See National Mining Ass'n v. Fowler*, 324 F.3d 752, 755

⁴ This reading of the EPA's regulations has long been recognized by the Agency, including the Board. For example, the Board, in its Practice Manual, characterizes these regulations as follows:

"The regulations distinguish between an appeal involving an existing facility that is already operating under a permit and an appeal involving a new facility that is applying for its first permit. If the appeal involves a new facility or new injection well, new source, **new discharger**, or recommencing discharger, the permit applicant will be without a permit pending final agency action and may not proceed under the permit during that time period. 40 C.F.R. § 124.16(a)(1). If the appeal involves a RCRA, UIC, or NPDES permit for an existing facility, the facility may continue to operate under the uncontested conditions of the old permit and under those uncontested conditions of the new permit that are severable from the contested conditions. *Id.*" (emphasis added.) Environmental Appeals Board Practice Manual (Sept. 2010) ("EAB Manual") at 51-52.

See also, 64 Fed. Reg. 46058, 46061 (August 23, 1999) ("Under 40 CFR 124.16 and 124.60 of EPA's permit decisionmaking procedures, a "new discharger," whose permit is the subject of a pending administrative appeal, is without a permit until the appeal process has concluded and the Agency's action has become final. On the other hand, an existing facility, whose permit is the subject of a pending administrative appeal, is not without a permit until the appeal process has concluded. The uncontested terms of an existing facility's permit take effect pending the conclusion of an administrative appeal.")

(D.C. Cir. 2003) (requirements imposed by § 106 are procedural, not substantive); *cf. Natural Resources Defense Council v. EPA*, 859 F.2d 156, 169 (D.C. Cir. 1988) (holding that notwithstanding 40 C.F.R. §122.49, which requires compliance with NEPA, EPA cannot create “non-water quality permit conditions.”)

In this case, the relevant consulting parties, including the SHPO and the Corps, entered into the NHPA MOA, and the Region did not include in the permit any conditions relating to impacts on historic properties. Indeed, given the nature of the potential impacts identified in the consultation – *e.g.*, impacts related to siting and other physical elements of the project which are unrelated to the NPDES permit discharge – it is unlikely that EPA would have relevant authority under the CWA to impose mitigating conditions in the Buena Vista Tribe’s NPDES permit. *See Natural Resources Defense Council v. EPA*, at 169 (invalidating EPA regulations authorizing imposition of permit conditions unrelated to the discharge of pollutants based on considerations under the National Environmental Policy Act (NEPA)).

Moreover, that the Region appropriately addressed NHPA issues through entry into the NHPA MOA does not expand EPA’s CWA permitting authority or otherwise convert that MOA into a permit condition enforceable by EPA under existing CWA authority. Thus, while the EAB has reviewed the merits of EPA’s NHPA compliance under 40 C.F.R. § 122.49, such compliance is not converted into a permit condition subject to stay under the CWA regulations. Similarly, construction of the project cannot be deemed a permit condition, whether contested or otherwise. Any other result would run squarely afoul of controlling D.C. Circuit precedent clearly holding that EPA is without authority under the CWA to prohibit construction of facilities

even though such projects may require pollutant discharge permits.⁵ *Natural Resources Defense Counsel v. EPA*, 822 F.2d 104, 126-131 (D.C. Cir. 1987).

As a result, implementation of the NHPA MOA, including the Tribe's completion of the field study, EPA, SHPO and Corps review of the study, and the Region's issuance of the NTP, all of which are consistent with the NHPA MOA, is not stayed under the permitting regulations.

B. Movants Fail to Demonstrate that the Board Should Issue a "Stay"

The Movants also appear to request that the Board exercise discretionary authority to stay issuance of a NTP by the Region. The County, without any supporting authority, also requests that the Board stay all construction activities by the Buena Vista Tribe. While the Movants style their requests as motions for a stay, the requested relief seeks an order from the Board that is more in the nature of interim injunctive relief against the Region – *i.e.*, that would restrain the Region from issuing the NTP as contemplated in the NHPA MOA. The Region has found no prior occasion where the Board has considered, let alone ordered, similar relief. The Movants, however, make no attempt to fill this void or otherwise address questions related to the Board's authority to order such extraordinary relief or the criteria that might be applicable. Moreover, the Movants fail to make any compelling argument that would warrant the relief they seek. As described below, under any potentially applicable criteria, the Movants fail to demonstrate that the Board should act to restrain the Region's issuance of a NTP.

⁵ Indeed, although the County incorrectly asserts that the Board is empowered to stay construction of new facilities pending review of a permit appeal, the County also repeatedly acknowledges that issues regarding the NHPA process and the Region's compliance with that statute have no bearing on CWA requirements or the County's jurisdictional claims. *See* Dkt No. 22 at 2, 5. The Region agrees with this view, which further supports the Region's position that the NHPA process did not result in any CWA permit conditions in this case.

1. The Board's Past Practice Reveals No Precedent for the Movants' Requested Relief

While the regulations controlling the procedures for permit appeals do not address motions,⁶ the Board has found that where gaps exist in its procedural rules, it has broad discretionary authority “to manage its permit appeal docket by ruling on motions presented to it for a variety of purposes.” *In re Peabody Western Coal Co.*, CAA Appeal No. 10-01, slip op. at 8 (Aug. 13, 2010). Moreover, as cited in the Environmental Appeals Board Practice Manual (Sept. 2010) (“EAB Manual”), “[I]t is always within the discretion of * * * an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.” *See* EAB Manual at 44, quoting *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S 532, 539 (1970).

Consistent with this authority, the Board has considered and ruled on a variety of motions, including those seeking stays of proceedings before the Board, relief from discovery requests, and voluntary remands. *See, e.g., In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03 to 08-06, slip op. at 13 (EAB Sept. 24, 2009), 14 E.A.D. ____ (granting voluntary remand after prior grant of review of air permit); *In re GMC Delco Remy*, 7 E.A.D. 136, 169-70 (EAB 1997) (granting voluntary remand for corrective action study revisions); *In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, (EAB May 20, 2004) (Order Denying Respondent’s Motion for Voluntary Partial Remand and Petitioners’ Cross Motion for Complete Remand, and Staying Decision on Petition for Review at 5-6) (denying motions for remand and imposing stay of proceedings as more suitable remedy). Notably, while the Board has considered a variety of motions, in each case they have been requests that the Board delay or otherwise alter its own procedures or proceedings. The Region has also reviewed orders regarding similar relief issued

⁶ *See* 40 C.F.R. Part 124.

by EPA Administrative Law Judges. *See, e.g., In re Strong Steel Products, LLC*, Docket No. CAA-5-2003-0009, 2004 EPA ALJ LEXIS 12 (ALJ 2004); *In re John Crescio*, EPA Docket No. 5-CWA-98-004, 1999 EPA ALJ LEXIS 25 (ALJ 1999) (ALJ, Order Granting Motion For Stay Proceedings), February 26, 1999). In general, these EAB and ALJ precedents focus on overarching concerns with ensuring fairness and efficiency of the pending proceedings.

These past EAB and ALJ orders provide little, if any, precedent for Movants' Motions To Stay. As described elsewhere, the Movants are not requesting that the Board relax or modify its procedures. Rather, they seek an order in the nature of interim injunctive relief and ask the Board to restrain the Region from taking an act that is both permissible under the CWA and contemplated by the MOA governing the Region's NHPA compliance. Although the Region respectfully recognizes the Board's broad discretionary authority to manage its pending matters, there is, at a minimum, an absence of clear precedent for the Movants' requested relief, and the Movants cite no relevant authority or applicable criteria.

Nonetheless, to the extent the Board believes it appropriate to address the request as a typical motion for a stay of proceedings, the Region strongly believes considerations of fairness and efficiency militate against issuance of the requested relief. For instance, as described in greater detail below (see section II.B.2, *infra*, analyzing similar considerations under principles of federal jurisprudence addressing preliminary injunctive relief), the Movants have not demonstrated that they will be substantially or irreparably harmed – or, in the County's case, that its claims will be affected at all – by virtue of the Region's issuance of a NTP. Further, and as also detailed below, the Region believes that both the Buena Vista Tribe and EPA have significant interests in efficient implementation of the CWA regulatory process and implementation of the NHPA MOA. The Movants have presented no argument or information

suggesting that the dictates of fairness or efficiency would overcome these interests or somehow warrant the type of extraordinary relief at issue here. Accordingly, the Board's prior precedent provides no apparent support for the Motions To Stay, which should be denied.

2. The Movants Do Not Meet Standards Established By Federal Courts for Injunctive Relief

As described above, the relief sought by Movants with regard to the NHPA process is in the nature of a preliminary injunction or some equivalent restraint against the Region's issuance of a NTP. It thus differs markedly from motions seeking stays previously considered by the Board. The Region was unable to locate any precedent in the Board's prior cases establishing criteria by which such a request would be evaluated. However, given the close analogy to injunctive relief often sought in judicial proceedings, the Region believes it may be reasonable for the Board to be informed by federal jurisprudence addressing motions for preliminary injunctions.⁷ The U.S. Supreme Court has established that a party seeking preliminary injunctive relief must demonstrate that it meets the following criteria: 1) that it is likely to succeed on the merits; 2) that it is likely to suffer irreparable harm in the absence of preliminary relief; 3) that the balance of equities tips in its favor; and 4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008). Additionally, as noted by the Court "[a] preliminary injunction is an extraordinary remedy." *Id.* at 375-76. As addressed below, neither Movant makes the requisite showing to support its request for such extraordinary relief. As such, the Motions To Stay should be denied.

a. Movants Have Not Shown a Likelihood of Success on the Merits

Although each of the Movants generally restates the claims from its respective Petition for Review, none attempts to demonstrate a likelihood of success on the merits sufficient to

⁷ Although citing to a somewhat distinct federal court precedent, the Buena Vista Tribe's Opposition to the Motions To Stay relies on the same criteria as described herein.

support the requested interim relief. For instance, the County's principal claim is that the Region lacks NPDES permitting authority over the proposed facility because the discharge point, in the County's view, is not within Indian country. This argument is premised on the mistaken view that the Buena Vista Rancheria is not an Indian reservation. Although this same issue remains subject to ongoing federal court proceedings involving certain of the Petitioners in these appeals and other federal agencies, neither of the courts in those cases has yet reached the merits of the land status issue. Importantly, however, in briefs filed by the U.S. Department of Justice in the litigation currently ongoing in the D.C. federal courts, the United States has expressed its clear position that the Rancheria has Indian reservation status. Those briefs – filed on behalf of the U.S. Department of the Interior, the federal agency with principal expertise in tribal matters – reflect the longstanding governing position of the United States and are entirely consistent with current federal court precedent. Indeed, the most recent federal court holding on this question unequivocally finds that the Rancheria is, in fact, an Indian reservation.⁸ *Hardwick v. United States*, No. C-79-1710 SW (N.D. Cal. Dec. 22, 1987). The County presents no argument suggesting that it will likely overcome this substantial weight of authority. Clearly, its motion cannot satisfy any reasonable standard for likelihood of success on the merits.⁹

Similarly, although the Ione Band generally restates its claims challenging the sufficiency of the Region's NHPA section 106 compliance, it provides no argument explaining why it would

⁸ As noted in prior briefs filed in these appeals, the County was a party to that judgment and specifically stipulated to treat the Rancheria as an Indian reservation.

⁹ The County's Motion To Stay also alleges that the discharge point of the planned gaming facility is located outside of the Buena Vista Rancheria and, therefore, would be beyond the Region's NPDES jurisdiction even if the Rancheria were an Indian reservation. Although the Region disagrees with this allegation, it is enough here to note that the County failed to raise this issue in its Petition for Review, Dkt. No. 2 (July 23, 2010) or in any of its related filings. The argument is, therefore, waived. *See, e.g., In re Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-20, at 20 (EAB Mar. 19, 2008) (arguments raised in a reply "constitute, in essence, 'late-filed appeals'").

be likely to succeed on the merits. The Region, on the other hand, has included substantial information in the record for these appeals detailing the NHPA compliance process conducted for the Buena Vista Tribe's NPDES permit. In this regard, the Region notes that section 106 of the NHPA establishes purely procedural requirements to consider the impacts of federal undertakings on protected historic properties and to consult with appropriate historic preservation partners. *See City of Oxford v. FAA*, 428 F.3d 1346, 1356 (11th Cir. 2005); *National Mining Ass'n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003). The record in these appeals clearly documents the consultation process and each of the relevant determinations – most notably through inclusion of the fully-executed NHPA MOA involving all required parties and demonstrating their agreement to the various findings and mitigation measures. Indeed, the record also demonstrates that the Advisory Council on Historic Preservation – the federal agency charged with implementing section 106 – was invited to join the section 106 process and found its participation unnecessary because the process was appropriately completed. It is the Region's position that this record insurmountably supports the merits of its NHPA section 106 compliance. For today's purposes, however, it is enough that the Ione Band has not demonstrated any likelihood that it can overcome this record and prevail on the merits.

Finally, FOAC submitted a letter to the Board expressing concern about the discharges that would be authorized by the NPDES permit issued to the Buena Vista Tribe. Although the Region firmly believes that the record supports consistency of the permit with CWA requirements, it is of more relevance here that issuance of a NTP will have no bearing on the CWA claims at issue in this appeal or on the Board's jurisdiction to consider those claims and ultimately rule on the sufficiency of the permit. And of course, no discharge will be authorized prior to final agency action on the permit. Thus, although the Region believes FOAC cannot

demonstrate a likelihood of success on any claims challenging the sufficiency of the NPDES permit as a CWA matter, the more salient point today is that these claims have no relevance to the interim relief being requested of the Board.

b. Movants Have Not Demonstrated That They Will Suffer Irreparable Harm

Although largely stated in generalities, it appears that the principal concern expressed by the Movants is that issuance of a NTP by the Region may diminish the Board's ability to review their Petitions challenging the NPDES permit issued to the Buena Vista Tribe. For instance, the County asserts that resolution of its jurisdictional claim prior to construction activity on the project is essential to preserving the Board's authority to review the NPDES permit and to the County's right to petition for such review. The County goes on to state that were it ultimately to succeed on its claim, then construction of the Buena Vista Tribe's project would be illegal and that its claim will be "lost forever" should construction commence prior to final EAB review of the permit. Similarly, the Ione Band states that failure to stay issuance of a NTP would deny it the ability to challenge the Region's NHPA compliance. None of these allegations sufficiently demonstrates irreparable harm so as to warrant the type of extraordinary interim relief at issue here.

The County's arguments are the most deeply flawed. Contrary to bedrock CWA principles, the County appears to conflate CWA authority to regulate the discharge of pollutants with a separate (non-existent) authority for EPA to control construction of discharging facilities. Thus the County asserts that commencement of construction will deprive it of its right to challenge the Region's jurisdiction to regulate the subject discharge. In fact, however, because the County's jurisdictional argument relates solely to regulatory authority over the discharge, and because no discharge can occur until final agency action on the NPDES permit application, it is

necessarily the case that neither issuance of a NTP, nor any construction activity at the project site, can affect the County's CWA claim or the Board's ability to address that claim. Indeed, the County's requested relief would directly subvert the D.C. Circuit's controlling precedent holding that EPA is without authority to impose a pre-permit construction ban on facilities regulated under the NPDES program. *Natural Resources Defense Council*, 822 F.2d at 128-30.

Similarly, the Region does not believe that the Ione Band has made a sufficient showing of irreparable harm to warrant issuance of a stay. This is because unsubstantiated allegations stating the mere possibility of harm – and even of irreparable harm – cannot without more suffice to justify issuance of an injunction. *See Winter*, 129 S. Ct. at 375-76. Underlying the Ione Band's concerns is the assumption that issuance of a NTP will necessarily result in the immediate commencement of project construction, and, presumably, that such construction will rapidly advance so as to prejudice their NHPA claims prior to consideration by the Board. The Ione Band provides no explanation why events must necessarily unfold in this manner. In fact, as stated in its opposition to the Motions To Stay, the Buena Vista Tribe informs the Board that “[i]t will take some time following issuance of the Notice to Proceed for Buena Vista to pursue financing and begin construction activities. During that time, the Board could proceed to review and dispose of the petitions.” *See* Dkt No. 31 at 12. Thus, although the Buena Vista Tribe urges the Region to issue a NTP so that the Tribe may proceed to secure financing and move forward with its project, it is by no means established that any construction activity – let alone sufficient construction to prejudice the Ione Band's claims – will occur prior to full consideration of these appeals by the Board.

Accordingly, the Movants have not demonstrated that the issuance of a NTP will result in irreparable harm sufficient to warrant extraordinary injunctive relief.

c. Movants Have Not Demonstrated that the Balance of Equities Tips in Their Favor

In its correspondence with the Region and in its motion seeking leave to intervene in this matter, the Buena Vista Tribe describes the financial harm and potential risk to the overall project that may ensue from continued delay in its ability to proceed with financing and development. The Region's focus in this matter remains on the sufficiency of the NPDES permit under CWA and other federal requirements. However, the Region has seriously considered the Buena Vista Tribe's concerns in determining the most appropriate course of action with regard to the NTP during pendency of the various Petitions before the Board. As an applicant for an NPDES permit, the Buena Vista Tribe has participated cooperatively and diligently in the permitting process and in the Region's NHPA section 106 consultation. The Region strongly believes that the permit meets applicable legal requirements and that the Tribe has met the requirements for a NTP under the NHPA MOA. In particular, and as described above, the Tribe has completed and submitted to the Region the fieldwork phase of the Archaeological Testing Program established under the NHPA MOA and its related Historic Properties Treatment Plan. The Region has reviewed the Tribe's submission and consulted with the SHPO and the Corps. All of the required NHPA MOA parties concur that the Archaeological Testing Program's findings are acceptable, thus satisfying the procedural safeguard built into the MOA to ensure that appropriate surveys preceded any construction activity. The Buena Vista Tribe has fulfilled its MOA commitment and established its eligibility for a NTP. In these circumstances, any prohibition on issuance of a NTP would unfairly alter the NHPA MOA and convert the limited procedural safeguard agreed to by the MOA parties into a restraint on the project not contemplated by the MOA and not otherwise available to Movants under the CWA – *i.e.*, a ban on project construction pending completion of the CWA permitting process.

In addition, the Region believes that EPA has a strong interest in the efficient transaction of its CWA regulation of private development projects. This includes effective and expeditious compliance with applicable federal cross-cutting requirements – including section 106 of the NHPA – and implementation of any procedures or other measures developed as part of that compliance. Although the Region remains respectful of the Board’s important role in reviewing permitting actions, the Region believes it is neither necessary, nor appropriate, for EPA to prohibit construction of the Buena Vista Tribe’s project pending completion of EAB review of the NPDES permit. Indeed, such action would run counter to the principles of the D.C. Circuit’s precedent specifically finding that EPA’s CWA regulation of point source discharges does not include the authority to ban construction pending completion of required analyses under NEPA. *See Natural Resources Defense Council*, 822 F.2d at 130 (noting that while it would be desirable for environmental review under NEPA to precede construction of applicant projects, the CWA does not empower EPA to “call a halt to construction activity” to allow such review to occur).

Given these circumstances, the Region believes the Buena Vista Tribe’s and EPA’s interests present significant considerations for the Board’s review of the equities in this matter and weigh heavily in favor of denying the Motions To Stay.

d. The Public Interest

The Region notes that there is a significant public interest in the effective and efficient implementation of CWA and NHPA requirements, which the Region believes have been demonstrably satisfied in this case. Further, the Region is mindful of the information presented in the Buena Vista Tribe’s opposition to the Motions To Stay regarding the potential beneficial impact of the Tribe’s project on employment in the project area. Perhaps most importantly, it is the Movants’ burden to establish that issuance of their requested extraordinary relief is in the

public interest. The Motions To Stay do not address this issue, and thus provide no basis to conclude that restraining the Region's issuance of a NTP would serve the public interest.

III. CONCLUSION

For the foregoing reasons, the Region respectfully requests that the Board deny the Motions To Stay.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the original EPA Region IX's Response to Motions to Stay Issuance of Notice to Proceed (signed copy) *In the Matter of Buena Vista Rancheria Wastewater Treatment Plant, NPDES Appeal No. 10-05 - 10-07 & 10-13*, was filed electronically with the Environmental Appeals Board and copies were e-mailed to:


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