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COUNTY OF AMADOR

10 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
11 BEFORE THE ENVIRONMENTAL APPEALS BOARD

13 In re: Buena Vista Rancheria  
14 Wastewater Treatment Plant  
15  
16 NPDES Permit No. 0049675

} NPDES Permit No.: 0049675 -  
Buena Vista Rancheria (Casino)

} **MOTION REQUESTING  
ENVIRONEMTAL APPEALS  
BOARD TO STAY EPA'S  
ISSUANCE OF NOTICE TO  
PROCEED**

18 **INTRODUCTION**

19 Petitioner Amador County and other interested parties have petitioned the  
20 Environmental Appeals Board ("EAB") to review the conditions of NPDES Permit  
21 No. 0049675, which the U.S. Environmental Protection Agency ("EPA") Region 9  
22 issued to the Buena Vista Rancheria of Me-Wuk Indians ("Tribe") for a Wastewater  
23 Treatment Plant associated with the Tribe's proposed casino. That petition is  
24 currently pending before the EAB.

25 On July 5, 2011, EPA notified EAB of its intention, notwithstanding the  
26 pending petitions for review, to issue a "Notice to Proceed" ("NTP") with  
27 construction of the Wastewater Treatment Plant.<sup>1</sup> According to EPA's July 5, 2011

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<sup>1</sup> Appendix 1, July 5, 2011 letter from EPA to EAB, at p. 3.

1 letter, EPA's authority to issue an NTP is derived from a memorandum of  
2 agreement ("MOA") between EPA Region 9 and the Calif. State Historic  
3 Preservation Office ("SHPO") dealing with requirements of the National Historic  
4 Preservation Act ("NHPA") § 106.<sup>2</sup> EPA now claims that since the Tribe has  
5 allegedly resolved adverse effects on historic properties and Region 9 has consulted  
6 with SHPO, EPA now has a "clear basis" for issuance of an NTP. The July 5, 2011  
7 letter further contends that issuance of an NTP is needed to ensure the Tribe's  
8 access to the "volatile high-yield bond market."<sup>3</sup>

9 As explained in more detail below, any resolution of issues under the NHPA  
10 has no bearing whatsoever on the serious jurisdictional questions AMADOR  
11 COUNTY has raised under the Clean Water Act ("CWA"). EPA is attempting to  
12 ignore its lack of jurisdiction over Buena Vista Rancheria ("BVR")—or even that  
13 issues respecting its jurisdiction have ever been raised—and use alleged compliance  
14 with NHPA as a smokescreen to convince EAB that commencement of construction  
15 is now warranted despite the lack of jurisdiction.

16 Contrary to the position taken by EPA, resolution of the jurisdictional  
17 question *before* construction takes place is essential to preserving EAB's authority  
18 to review the NPDES permit in question, not to mention AMADOR COUNTY's and  
19 other petitioner's due process right to petition EAB for review. If construction  
20 moves forward now, there will be no way to put the proverbial "genie back in the  
21 bottle" if EAB finds AMADOR COUNTY'S arguments to be meritorious because the  
22 illegal action will have already been irrevocably completed. Furthermore, going  
23 forward with construction at this point may very well have detrimental  
24 environmental effects and flies in the face of the serious jurisdictional questions  
25 that have been raised. Therefore, EAB should stay issuance of the NTP and any  
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27 <sup>2</sup> Appx. 1, at pp. 1-2.

28 <sup>3</sup> Appx. 1, at p. 2

1 construction activities until EAB has had the opportunity to substantively consider  
2 the points raised by petitioners, including Petitioner AMADOR COUNTY.

### 3 **JURISDICTION**

#### 4 **The Code of Federal Regulations Authorize EAB to Stay Issuance of an NTP** 5 **and all Construction Activities**

6 The express provisions of the Code of Federal Regulations empower EAB to  
7 stay construction of new facilities while a request for review is ongoing. 40 CFR §  
8 124.16(a)(1) states that “If a request for review of a...NPDES permit...is filed, the  
9 effect of the contested permit conditions shall be stayed...If the permit involves a  
10 new facility...the applicant shall be without a permit for the proposed new  
11 facility...See also § 124.60.” 40 CFR § 124.16(a)(2)(i) further declares that  
12 “Uncontested conditions which are not severable from those contested shall be  
13 stayed together with contested conditions.”

14 40 CFR § 124.60(b)(1) reiterates EAB’s authority in this context. It states that  
15 “if an appeal of an initial permit decision is filed under § 124.19, the force and effect  
16 of the final permit shall be stayed until final agency action under § 124.19(f) [when  
17 EAB administrative review is exhausted].” 40 CFR § 124.60(b)(4) specifies that  
18 “Uncontested conditions, if inseverable from a contested condition, shall be  
19 considered contested.” Finally, 40 CFR § 124.60(b)(6)(iv) states that uncontested  
20 conditions include “construction activities.”

21 Here, by contesting EPA’s jurisdiction to issue the NPDES permit in the first  
22 instance, AMADOR COUNTY contests all permit conditions because, without  
23 jurisdiction over the land in question, EPA cannot impose any conditions since it  
24 has no authority to issue the permit altogether.<sup>4</sup> Moreover, construction activities  
25 are unquestionably inseverable from the contested permit conditions. If the entire  
26 permit is invalid on the grounds that EPA lacks authority to issue it, then  
27 construction of facilities cannot legally take place and would be illegitimate. Since  
28 the Code of Federal Regulations empower EAB to stay all contested and inseverable

4 See Petitioner Amador County’s Petition for Review, at p. 2.

1 uncontested permit conditions, and construction activities are inseverable from  
2 contested conditions, EAB may validly stay issuance of the NTP and any associated  
3 construction activities.

4 **EAB may Validly Consider and Rule Upon Motions Requesting Stays of**  
5 **Issuance of an NTP and all Construction Activities**

6 According to the EAB's *Practice Manual*, although relevant regulations do  
7 not specifically provide for motions practice in the context of a permit appeal, EAB  
8 "regularly considers motions received from parties in a Part 124 proceeding."<sup>5</sup> (See  
9 *In re Peabody W. Coal Co.*, CAA Appeal No. 10-01, slip op. at 5-8 (EAB Aug. 13,  
10 2010) 14 E.A.D. \_\_\_\_: "In the part 124 context, despite the lack of detailed  
11 procedures in the regulations, the Board has exercised *broad discretion* to manage  
12 its permit appeal docket by ruling on motions presented for various purposes."  
13 Emphasis added.) Moreover, federal courts have long recognized the discretion of  
14 administrative agencies to manage their procedural rules when justice requires it.  
15 (See *Am. Farm Lines v. Black Ball Freight Service* (1970) 397 U.S. 532, 539 – "[I]t  
16 is *always within the discretion...* of an administrative agency to *relax or modify* its  
17 procedural rules adopted for the orderly transaction of business before it when in a  
18 given case the ends of justice require it." Emphasis added.)

19 If an NTP is issued and construction activities commence before EAB has the  
20 opportunity to fully consider AMADOR COUNTY'S challenge to EPA's jurisdiction,  
21 AMADOR COUNTY will be irreparably harmed. Nor does AMADOR COUNTY have  
22 any adequate remedy at law since construction of facilities is *irreversible* even if  
23 EAB determines that EPA lacks jurisdiction over the property in question.

24 Therefore, the interests of justice require EAB to stay EPA's issuance of the  
25 NTP.  
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5 Environmental Appeals Bd., *Practice Manual* (Sept. 2010) at p. 44.

1 **ARGUMENT**

2 **Resolution of Issues Under the NHPA has no Bearing on Issues Raised under**  
3 **the Clean Water Act**

4 As stated in its own July 5, 2011 letter, EPA freely admits that issuance of a  
5 NPDES permit was subject to *NHPA § 106*, and that an MOA was established  
6 between EPA and the SHPO in order to resolve adverse effects on historic  
7 properties.<sup>6</sup> EPA further states that the *NHPA* MOA established a process for  
8 issuance of NTPs for construction of segments of the proposed project once  
9 determinations with respect to *historic properties* at the proposed site were made.<sup>7</sup>

10 Conversely, EPA's July 5, 2011 letter is quite clear that the *NHPA* MOA only  
11 deals with issues arising under the *NHPA*, *not* the Clean Water Act ("CWA").<sup>8</sup>  
12 While compliance with the *NHPA* may or may not have been achieved, that has no  
13 bearing whatsoever on whether EPA has jurisdiction over BVR under the CWA.  
14 *AMADOR COUNTY* challenges EPA jurisdiction over BVR on the grounds that BVR  
15 does not satisfy the definition of "Indian country" found in 18 U.S.C. § 1151. In law,  
16 the outcome of the jurisdictional question is completely divorced from compliance  
17 with *NHPA § 106*. However, in fact they are connected on the basis that the  
18 jurisdictional question is lost forever if construction commences *even if AMADOR*  
19 *COUNTY prevails on the point that EPA lacks jurisdiction over BVR.*

20 *AMADOR COUNTY* urges EAB not to be lulled into a false sense of security  
21 that compliance with the *NHPA* MOA resolves all outstanding issues relative to the  
22 construction of facilities at BVR. Much more consequential questions remain to be  
23 answered. *AMADOR COUNTY* respectfully requests that EAB stay issuance of the  
24 NTP so that those consequential questions may be properly and fairly addressed.

25 <sup>6</sup> Appendix 1, at pp. 1-2.

26 <sup>7</sup> *Id.* at p. 2.

27 <sup>8</sup> Although Petitioner *AMADOR COUNTY* did not raise *NHPA* issues in its petition for review, other  
28 Petitioners did so. (See Appendix 1, at p. 1 [EPA noting that "Two of the petitions...challenge elements of the  
Region's compliance with...(NHPA)."].)

1 **EPA Seeks to Nullify EAB Appellate Review and Circumvent Amador County's**  
2 **Jurisdictional Challenge by Going Forward with Construction**

3 In its petition for review by EAB, AMADOR COUNTY alleges that EPA does  
4 not have jurisdiction over the proposed BVR wastewater treatment plant because  
5 BVR is not a reservation, is not allotted lands, and is not Indian country.<sup>9</sup> If EPA  
6 does in fact lack jurisdiction over BVR, then EPA is completely powerless to  
7 authorize the construction of wastewater facilities at BVR and any such construction  
8 must be authorized pursuant to the jurisdiction of the State of California.

9 Apparently worried that its jurisdictional claim over BVR is in jeopardy, EPA  
10 now seeks to "change the facts on the ground" before EAB can consider the merits  
11 of AMADOR COUNTY'S petition for review. EPA's July 5, 2011 letter indicates that  
12 once the NTP is issued, the Tribe will commence construction of the wastewater  
13 treatment plant and possibly other portions of the casino project. If construction of  
14 facilities goes forward now but *EAB eventually determines EPA lacks jurisdiction*  
15 *over BVR*, there will be no way for EAB to correct the illegal action, as the act to be  
16 prevented; i.e., construction of facilities pursuant to invalid EPA jurisdiction, will  
17 have already been completed. The proverbial 'ship' will have already sailed and  
18 EAB's power of review will be emasculated. Just the same, commencement of  
19 construction would also have practical effect of destroying AMADOR COUNTY'S  
20 right to petition EAB for review since the ability to petition for review of an action  
21 that is already completed and irreversible is greatly impaired.

22 In order to preserve its own authority, in addition to AMADOR COUNTY'S  
23 right to petition EAB for review under the Code of Federal Regulations (not to  
24 mention the same rights of other Petitioners), EAB must stay EPA's issuance of the  
25 NTP until administrative review has been exhausted.

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9 See Petitioner Amador County's Petition for Review, at p. 2.

1 **Even Assuming Arguendo that BVR Does Qualify as Indian Lands, EPA Would**  
2 **Still Lack Jurisdiction Over the BVR Wastewater Facility Because the**  
3 **Discharge Point Source is Located Outside of BVR**

4 As stated on EPA's own website, an NPDES permit is required where a  
5 wastewater facility discharges from a point source (discrete conveyance such as a  
6 pipe or channel) into a water of the United States:

7 The federal Clean Water Act requires that all municipal, industrial and  
8 commercial facilities that discharge wastewater or *stormwater directly from*  
9 *a point source* (a discrete conveyance such as a pipe, ditch or channel) *into a*  
10 *water of the United States* (such as a lake, river, or ocean) must obtain a  
11 National Pollutant Discharge Elimination System (NPDES) permit. All  
12 permits are written to ensure the receiving waters will achieve their Water  
13 Quality Standards.<sup>10</sup>

14 As additionally stated on EPA's own website, with the exception of "Indian  
15 lands," full NPDES program authority has been delegated to the State of California:

16 The NPDES permit program, including stormwater permitting, has been  
17 delegated to the state in Arizona, California, Hawaii and Nevada (except for  
18 Indian lands in these states).<sup>11</sup>

19 Therefore, EPA's authority has been delegated to the State of California, and  
20 the only way EPA maintains jurisdiction is if the point of discharge (i.e., where a  
21 pipe or channel meets a water of the United States) occurs on Indian lands.  
22 BVR does not qualify as Indian land because it is not held in trust, was never a  
23 reservation, is not allotted lands, and in no other way satisfies the definition of  
24 "Indian country" found in 18 U.S.C. § 1151. However, even assuming *arguendo* that  
25 BVR did actually qualify as Indian land, EPA still would not have jurisdiction over  
26 the wastewater treatment plant because the point of discharge (where a pipe or  
27 channel meets a water of the United States) does not occur on BVR. Rather, it  
28 occurs on the far side of Coal Mine Road on land outside of BVR clearly under State  
jurisdiction.

<sup>10</sup> <http://www.epa.gov/region9/water/npdes/index.html>. (Emphasis added.)

<sup>11</sup> <http://www.epa.gov/region9/water/npdes/stormwater.html>. (Emphasis added.)

1 As explained by EPA, the BVR wastewater treatment plant will “discharge to a  
2 *constructed, vegetated swale* south of the parking garage and casino and will travel  
3 on-site for approximately 1/2 mile. At the southwest corner of the property (at Coal  
4 Mine Rd.), the water will flow *through a reverse siphon into a drain under Coal*  
5 *Mine Road to an unnamed tributary*/drainage channel which flows east for several  
6 miles before entering Jackson Creek.”<sup>12</sup>

7 As can be seen in EPA’s own description, the BVR wastewater treatment plant  
8 will include a constructed “swale (essentially a channel), a reverse siphon (a pipe), a  
9 drain under Coal Mine Road (another pipe), and will not discharge into a tributary  
10 of Jackson Creek (a water of the United States) until it leaves BVR on the far side of  
11 Coal Mine Road, which happens to be a location that is clearly on land under State  
12 jurisdiction.

13 Even setting aside for a moment the fact that BVR does not qualify as Indian  
14 lands, what is uncontested here is that (1) a NPDES permit is only required where a  
15 wastewater facility discharges from a point source (discrete conveyance such as a  
16 pipe or channel) into a water of the United States; (2) full NPDES permitting  
17 authority in California has been delegated to the State of California; (3) EPA only  
18 retains permitting jurisdiction in California when a wastewater facility discharge  
19 point source is located on Indian lands; (3) the discharge point source of the  
20 proposed BVR wastewater facility is located on the far side of Coal Mine Road; and  
21 (4) the land on the far side of Coal Mine Road is not within BVR and is clearly under  
22 State jurisdiction.<sup>13</sup>

23 <sup>12</sup> <http://www.epa.gov/region09/water/npdes/pdf/ca/tribal/BuenaVistaFactSheetFnl-6-22-2010.pdf>.  
24 (Emphasis added.)

25 <sup>13</sup> The BVR wastewater discharge proposal appears to be completely novel in light of other NPDES  
26 permits issued by EPA to tribes in California. In what appears to be every other instance, the discharge point  
27 source into a water of the United States was clearly located within the boundaries of the Indian land in  
28 question. While AMADOR COUNTY vehemently contests the notion that BVR qualifies as Indian Land, it is  
noteworthy that EPA has deviated from its normal practice of requiring the discharge point source to be  
located on Indian lands before asserting jurisdiction. See  
<http://www.epa.gov/region09/water/npdes/permits.html#tribalcalif>, listing all permits EPA has issued on  
tribal lands in California. The fact sheet for the Santa Ynez Band of Chumash Indians permit states that the  
receiving water is Zanja de Cota Creek, at a point located inside the reservation . (Permit Fact Sheet, p. 2.)



1 Therefore, just based on the uncontested facts alone, EPA has conceded at the  
2 very least that it lacks permitting authority over the BVR wastewater facility. While  
3 the larger question of whether EPA has jurisdiction over BVR *at all* given that BVR  
4 does not qualify as Indian lands has greater significance, on this basis alone EAB  
5 should stay construction so that any facilities can be properly permitted by the  
6 appropriate government authority.

7 **Resolution of CWA Jurisdictional Questions BEFORE Construction**  
8 **Commences is Imperative for the Protection of the Environment**

9 The State of California, through its Regional Water Quality Control Boards,  
10 has full NPDES program authority for discharges onto State lands. As stated on  
11 EPA's own website, "*The NPDES permit program, including stormwater*  
12 *permitting, has been delegated to the state in Arizona, California, Hawaii and*  
13 *Nevada (except for Indian lands in these states)."*<sup>14</sup>

14 As can be seen, with the exception of Indian lands—of which BVR does not  
15 qualify—the NPDES permit program has been delegated to the State of California.  
16 Furthermore, the State of California has far greater resources dedicated to the  
17 protection of water quality in California than does EPA. Whereas EPA Region 9  
18 covers four entire *states* and several Pacific territories, California has *nine* regional  
19 water quality control boards dedicated to protecting water quality within the State.<sup>15</sup>  
20 The level of water quality monitoring, oversight, and control that will eventually be  
21 applied to BVR is in large part dependent upon the agency with jurisdiction over the  
22 land in question. With the environmental interests at stake for AMADOR COUNTY

23 The fact sheet for the Coyote Valley Band of Pomo Indians permit states that the receiving water is Forsythe  
24 Creek, which flows along the boundary of the reservation. (Permit Fact Sheet, p. 2.) The fact sheet for the  
25 table Mountain Rancheria permit states that the receiving water is a tributary that "runs next to the WWTP  
26 and passes around the casino." (Permit Fact Sheet, p. 2.) The Picayune Ranch-Chukchansi Indians' permit  
27 states that the treated effluent is discharged "to an unnamed creek on Tribal land...." (Permit Fact Sheet, p.  
28 1.) The Agua Caliente Band permit states that the receiving waters are Whitewater Creek *and a number of*  
*local tributaries.* (Permit, p. 6, emphasis added.) (Agua Caliente Tribal lands are located in a dense urban  
environment in a checkerboard pattern across the Palm Springs area.)

14 <http://www.epa.gov/region9/water/npdes/stormwater.html>. (Emphasis added.)

15 [http://www.waterboards.ca.gov/publications\\_forms/publications/factsheets/docs/region\\_brds.pdf](http://www.waterboards.ca.gov/publications_forms/publications/factsheets/docs/region_brds.pdf).

1 and the area surrounding BVR, it is imperative that EAB not allow the review  
2 process to be short-circuited.

3 The environmental stakes could not be higher. As noted in Petitioner  
4 AMADOR COUNTY'S petition for review, EPA concedes that the design of the  
5 proposed BVR wastewater facility is "very similar" to the plant serving the Thunder  
6 Valley Casino, and it is undisputed that the Thunder Valley Casino plant has been  
7 fraught with water quality problems.<sup>16</sup> The California Regional Water Quality  
8 Control Board has repeatedly found that the Thunder Valley plant has been  
9 consistently unable to comply with effluent limitations for a variety of toxic  
10 substances and has been forced to go so far as to seek civil penalties against  
11 Thunder Valley for violating water quality controls.<sup>17</sup> Despite these grave and  
12 proven environmental problems caused by a "very similar" plant design, EPA now  
13 seeks to move forward with construction at BVR before EAB has the opportunity to  
14 consider these matters itself. Given the environmental dangers and the fact that  
15 California is so much better equipped to handle water quality issues at the proposed  
16 site, resolving the jurisdictional issue before construction starts is vital.

17 **An Alleged Urgency in Casino Financing Does Not Warrant Abrogation of**  
18 **EPA's Lack of Jurisdiction over BVR**

19 In its July 5, 2011 letter, EPA claims that Region 9 believes "it is appropriate  
20 to issue the NTP expeditiously" in light of the Tribe's assertion, according to the  
21 bank it has retained to assist in financing the proposed casino, that the "ultimate  
22 viability of the project" will be jeopardized unless construction commences at once  
23 because of the need to rely on a "volatile high-yield bond market which risks closing  
24 at any time."<sup>18</sup>

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26  
27 <sup>16</sup> Petitioner Amador County's Petition for Review, at p. 7.

28 <sup>17</sup> *Id.*

<sup>18</sup> Appendix 1, at pp. 2-3.

1 Potentially volatile market conditions does not justify permitting construction  
2 to go forward under improper authority or which threatens the environment, as  
3 demonstrated by the California Regional Water Quality Control Board concerns  
4 over a nearly identical facility at Thunder Valley. EPA jurisdiction does not shift  
5 with market conditions. A lack of EPA jurisdiction under *any* market conditions.

6 **The Ongoing Proceedings in the D.C. District Court Confirm that Serious**  
7 **Questions Regarding EPA's Jurisdiction Over BVR Remain**

8 EPA alleges in its July 5, 2011 letter that it was until recently unaware of the  
9 federal court litigation concerning whether or not BVR qualifies as "Indian land."  
10 Despite the constructive notice derived from the fact that the suit involves another  
11 agency of the Government of the United States and involves the same Department  
12 of Justice that represents EPA, the mere fact that such litigation remains ongoing  
13 further supports the conclusion that EAB should stay the NTP and all construction  
14 activities until the jurisdictional questions are resolved. Authorizing construction to  
15 proceed at this point would not only thwart EAB's *own* jurisdiction and Petitioner's  
16 due process right to petition EAB for review, but would also make certain remedies  
17 unavailable to the federal courts for the same reason—that once construction begins  
18 the "facts on the grounds" will be forever changed.

19 **CONCLUSION**

20 Throughout this appeals process, all Petitioner AMADOR COUNTY has asked  
21 for is the opportunity to present its arguments, ask its questions, and have EAB  
22 made a decision on the merits. AMADOR COUNTY does not have any other  
23 adequate remedy at law.

24 As explained above, NHPA issues have no bearing whatsoever on the serious  
25 legal issues raised by Petitioners. EAB's authority in this matter, in addition to  
26 Petitioners' due process right to petition EAB for review will be destroyed if an NTP  
27 is issued now and construction commences. Going forward now with construction  
28 may also very well interfere with ongoing matters pending before the federal courts

1 and could undermine environmental protection efforts that are vital to AMADOR  
2 COUNTY and the surrounding area. Moreover, while EPA's jurisdiction over BVR is  
3 hotly contested, its jurisdiction over the particular wastewater facility in question is  
4 not—it clearly falls under State jurisdiction and EPA has conceded as much.

5 For the foregoing reasons, Petitioner AMADOR COUNTY respectfully  
6 requests that EAB stay EPA's issuance of the NTP and any construction activities  
7 associated therewith. On a related point, EPA states in its July 5, 2011 letter that it  
8 intends to issue the NTP "no sooner than 21 days from the date of" the July 5, 2011  
9 letter. Therefore, Petitioner AMADOR COUNTY further asks that EAB issue its  
10 decision on this Motion prior to July 26, 2011 so that AMADOR COUNTY may seek  
11 review of any adverse determination in a court of law prior to issuance of the NTP.

12  
13 Dated: July 15, 2011

NIELSEN MERKSAMER PARRINELLO  
GROSS & LEONI, LLP

14  
15  
16 By:



Cathy Christian, attorney for petitioner  
AMADOR COUNTY

## CERTIFICATE OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is 1415 L Street, Suite 1200, Sacramento, CA 95814.

On July 15, 2011, I caused the foregoing document(s) described as **MOTION REQUESTING ENVIRONMENTAL APPEALS BOARD TO STAY EPA'S ISSUANCE OF NOTICE TO PROCEED** to be served on the individual(s) listed below as indicated:

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 (VIA E-MAIL SERVICE) By electronically transmitting these documents in Adobe PDF format to the e-mail addresses listed above.

Executed on July 15, 2011, at Sacramento, California.



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BRENDA WISE