

**Back Country Coalition**  
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SAN DIEGO REGIONAL  
WATER QUALITY  
CONTROL BOARD

October 7, 2009  
Via Electronic Mail  
[ctamaki@waterboards.ca.gov](mailto:ctamaki@waterboards.ca.gov)

2009 OCT -8 P 1:00

John H. Robertus, Executive Officer  
California Regional Water Quality Control Board  
San Diego Region 9174  
Sky Park Court Suite 100  
San Diego, CA 92123-4340

**Subject: Gregory Canyon Ltd. LLC Application for CWA Section 401 Water Quality Certification For Proposed Bridge over the San Luis Rey River to Connect the Proposed Landfill to State Route 76**

Dear Mr. Robertus:

The Back Country Coalition (BCC) is an organization dedicated to the protection of natural, cultural and scenic resources, promotion of responsible land use planning practices, and enhancement of quality of life throughout San Diego County.

BCC has been following the events surrounding the progress/regress of the Gregory Canyon Landfill (GCL) project over many years. We believe your Board should be aware that the project's latest maneuver to gain approval for the construction of a bridge over a stream that flows directly to the San Luis Rey River separately from the original project is inconsistent with the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA). The proposed bridge, by CEQA and NEPA standards, is part of the original project. The significant negative environmental direct and indirect impacts of the bridge to the stream, the river and the surrounding environment must be considered at the same time with those of the whole project.

**The bridge must be constructed to enable access to the Gregory Canyon landfill. There is no function for the bridge other than to provide ingress and egress to and from the dump site. The CRWQCB examination of an application for only the bridge construction, rather than considering it together with the original 100 million ton landfill it will serve, violates the following CEQA statutes.**

Under CEQA, environmental review must be prepared "as early as feasible in the planning process to enable environmental considerations to influence project program and design." CEQA Guidelines Section 15004, subd. (b). The early preparation requirement is designed to avoid piecemeal review leading to the "environmental considerations becoming submerged by chopping a large project into many little ones - each with a minimal potential impact on the environment." *Bozung v. Local Agency Formation Co.*, (1975) 13 Cal.3d 263, 283-284.

CEQA Guidelines define a project as “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. . .” (CEQA Guidelines, Section 15378(a)). “Project’ is given a broad interpretation in order to maximize protection of the environment.” (*McQueen v. Board of Directors of the Midpeninsula Regional Open Space District* (1988) 202 Cal.App.3d 1136, 1143 [249 Cal.Rptr. 439]).

This is to assure that a lead agency will fully analyze each project in a single environmental document so “that environmental considerations do not become submerged by chopping a large project into many little ones, each with potential impact on the environment, which cumulatively may have disastrous consequences.” (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592 [284 CalRptr.498]).

The bridge segment of the GCL project must be included in yet another revision to the project’s EIR, because without fully analyzing the significant impacts of the bridge together with the rest of the project, the EIR is incomplete and inadequate. The need for a bridge was well known at the beginning of the review process for the GCL project. Therefore, the requirement for including the bridge’s significant environmental impacts with the WHOLE OF THE PROJECT is necessary to comply with CEQA.

CEQA disfavors deliberate misrepresentation, inaccurate and incomplete information in environmental review documents. The CEQA Guidelines (p. 414) state: “The project description must be accurate and consistent throughout the EIR. An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR. *County of Inyo v. City of Los Angeles* 3d Dist. 1977) 71 Cal. App. 3d 185, 193 [139 Cal. Rptr. 396] (*County of Inyo*).”

**The application for a water quality certificate from your RWQC Board is inappropriate as the project proponents attempt to bypass State law in an end run to gain approval for the bridge. This is a blatant misrepresentation of the significance of overall project environmental impacts, as the proponents attempt to piecemeal the project into smaller segments to avoid review of overall impacts.**

The CEQA Guidelines (p. 91) describes “*Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal. 3d 376, 396 [253 Cal. Rptr. 426] (Laurel Heights), the court declared that ‘an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable *consequence* of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effect.” (Italics added.)

And, "In the authors' view, the most significant aspect of their formulation is the element of *causation* implicit in it." **The bridge has been a necessary part of the entire GCL project since its inception.**

We attach a letter from the National Resources Defense Council (NRDC) dated September 10, 2009 to Colonel Thomas H. Magness, IV, U.S. Army Corps of Engineers, regarding the proposed GCL project. Especially noted on Pages 5 and 6 are NEPA case laws and arguments pertaining to "the fact that the waters will be affected, and further, whether the waters must be affected to fulfill the projects goals."

The NRDC letter noted above is relevant to the application for a water quality certification insofar as it proves inadequate analysis has been conducted by the project proponents and responsible agencies with jurisdiction over its approval or denial.

Moreover, the Council on Environmental Quality's implementing regulations for NEPA indicates that: "Actions are connected if they cannot or will not proceed unless other actions are taken previously or simultaneously (40 CFR 1508.24(a)(I)(ii))."

Clearly, the proposed bridge segment of the GCL project is part of the larger project to provide access to and from the project site. Without the bridge, the GCL could not function. It is obvious that construction and use of a bridge would cause lasting significant, negative environmental impacts to the waters of the San Luis Rey River as well as the riparian area ecosystems surrounding the bridge, along with significant impacts inherent in its future use, and must be considered along with those of the entire project.

The request for a water quality certification is inappropriate, untimely and fraudulently misleading. The project must go back to the drawing boards and provide complete analysis of the bridge segment with the entire GCL project in a revised EIR, along with all the other significant, negative environmental impacts the project will cause.

CEQA and NEPA statutes are clear. Your Board must deny the application for a clean water permit for GCL or find itself in collusion with noncompliance with state and federal statutes.

Thank you for your consideration of this crucial information.

Sincerely,

George Courser

BCC Director

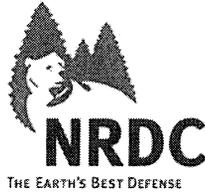
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Attachment: NRDC Letter 9.10.09



NATURAL RESOURCES DEFENSE COUNCIL

September 10, 2009

Colonel Thomas H. Magness, IV  
58th Commander, Los Angeles District  
U.S. Army Corps of Engineers  
915 Wilshire Blvd., Suite 1101  
Los Angeles, CA 90017

Mr. David J. Castanon  
Chief, Regulatory Branch  
U.S. Army Corps of Engineers  
Los Angeles District  
Box 532711  
Los Angeles, CA 90053-2325

Dear Col. Magness and Mr. Castanon:

The Natural Resources Defense Council (“NRDC”), a national, non-profit environmental organization with over 250,000 members and activists in California, provides this letter to express the concerns of its members about a pending application for a nationwide permit (“NWP”) under Section 404 of the Clean Water Act (“CWA”) for the proposed Gregory Canyon Landfill (“Landfill”) in northern San Diego County. The NWP would allow the applicant, Gregory Canyon Ltd. (“GCL”), to construct a bridge across the San Luis Rey River for the sole purpose of providing access to Gregory Canyon where 30 million tons of garbage is proposed to be dumped.

NRDC’s position is that issuance of a NWP to allow construction of the bridge and the Landfill would be wrong because the Army Corps of Engineers (“Army Corps” or “Corps”) (1) has improperly concluded that it does not have jurisdiction under the CWA over the blue-line stream in Gregory Canyon, (2) has ignored its legal obligations under the National Environmental Policy Act (“NEPA”) to take a hard look at the impacts of the entire Landfill project, and (3) has failed to comply with the consultation requirements of Section 106 of the National Historic Preservation Act (“NHPA”).

## **I. Background**

Briefly, the applicant proposes to construct a 308-acre Landfill footprint in Gregory Canyon adjacent to the San Luis Rey River. The area along the river is designated as critical habitat for the endangered least Bell’s vireo and the southwestern willow flycatcher, and provides important habitat for the endangered southwestern arroyo toad and the threatened coastal California gnatcatcher. Golden eagles have been identified on

Gregory Mountain, which borders the east side of the canyon. Gregory Canyon itself contains coastal sage scrub and live oak woodland habitat that supports numerous species. The Landfill would significantly impact this habitat.

The Landfill also would threaten important sources of drinking water. The San Diego Aqueduct, two pipelines that supply most of the drinking water used in San Diego County, bisects the site. In addition, the Pala Basin aquifer and other connected downstream aquifers that underlie the San Luis Rey River provide critical drinking water sources for thousands of residents and businesses throughout the region.

Finally, the proposed Landfill also would desecrate sites considered sacred by the Pala Band of Mission Indians ("Pala Band") and other Luiseños. These sites include Gregory Mountain, a residence of the powerful spiritual being Taakwic and a site considered to be a source of spiritual power and healing, and Medicine Rock, a spiritual site with ancestral rock art figures that is located just outside the footprint of the proposed Landfill.

## **II. Because The Corps Has Jurisdiction Over The Stream In Gregory Canyon, An Individual Section 404 Permit Is Required.**

The Corps' position regarding its jurisdiction over fill activities in Gregory Canyon has changed over the years. Based on a jurisdictional delineation completed by GCL's consultant, Helix Environmental Planning, Inc., the original Section 404 permit application submitted in 1998 identified impacts to 7.3 acres of jurisdictional waters from construction of the bridge, the Landfill footprint, and a proposed 65-acre borrow pit. These included wetlands and other waters identified by the presence of an ordinary high water mark ("OHWM"). Even after the project design was modified, on May 1, 2001, the Corps determined that the footprint of the proposed Landfill contained approximately 1.03 acres of waters of the United States. That conclusion was based on the presence of an OHWM in the Gregory Canyon stream, an updated 2000 Jurisdictional Report by Helix, and site visits by Mr. Terry Dean of the Corps.

At that time, however, the Corps' jurisdiction was in question because of the ruling in *Resource Investments, Inc. v. U.S. Army Corps of Engineers*, 151 F.3d 1162 (9th Cir. 1998), that there was no jurisdiction under the CWA over solid waste landfills if a permit for the landfill had been issued under the Resource Conservation and Recovery Act ("RCRA") or a state-law equivalent. In response to that case, the Corps and EPA issued new rules confirming CWA jurisdiction over fill activities at landfills. 67 Fed. Reg. 31,129 (May 9, 2002). In a letter to GCL dated January 17, 2003, the Corps acknowledged that it had withdrawn GCL's previous Section 404 permit application, and indicated that any new Section 404 permit application would need to address fill activities in Gregory Canyon itself.

Because the new rule confirmed that the Corps could regulate fill activities in Gregory Canyon, GCL maneuvered the Corps into making a complete about-face regarding its jurisdiction. In October of 2003, representatives of GCL and their consultant, former

Corps employee David Barrows, met with Mr. Durham and Mr. Castanon regarding the project, and Mr. Barrows claimed that there was no OHWM in Gregory Canyon. In response to the Corps' request, in May of 2004, Mr. Barrows submitted a new jurisdictional report prepared by URS Corporation ("URS Report").

The URS Report dismissed the previous delineation by Helix, and claimed that there were no "waters of the United States" in Gregory Canyon. URS supported that conclusion primarily with hydrological modeling data, which URS argued showed that regular water flows in the canyon did not create an OHWM. Based on the URS Report, the Corps reversed its position, and in a letter dated October 28, 2004, agreed that there were no longer any "waters of the United States" in Gregory Canyon. This decision limited the Corps' jurisdiction to the bridge crossing of the San Luis Rey River.<sup>1</sup>

The Corps maintained that position even though the Pala Band provided a critique of the URS modeling in May of 2005, and photographs of significant water flows in Gregory Canyon from January of that year. While the San Diego County Flood Control District determined that the flows in the photographs were from a two-to-five year storm event, URS claimed that the flows were representative of 10-37 year flows based on their previous modeling (*i.e.*, the 14.1-inch annual rainfall modeling). The Corps agreed with URS as indicated in its letter to the Pala Band dated November 9, 2005.

The Pala Band rejected the Corps' position in a letter dated March 10, 2006. We have reviewed that letter and agree with its conclusions.

First, the Corps' theory that the OHWM disappeared due to "erosion and accretion" is not supported by any evidence. The Corps had theorized that the OHWM had disappeared as the result of small to moderate storm events that caused surface flow to spread out over the valley floor, depositing sediment, eliminating physical evidence of the stream channels, and leaving only marginal evidence of surface flow. However, the Corps offered no evidentiary basis for this novel theory. In fact, the Corps has admitted that this would be a "fairly unusual" situation for an ephemeral stream, because the typical dry land river/stream system does not usually exhibit this type of erosion/accretion process.

Second, NRDC rejects the Corps' position that its jurisdiction is limited to those areas impacted by five-year or smaller flow events. The definition of an OHWM focuses on the presence of *physical evidence* -- such as a "clear, natural line impressed on the bank," the "presence of litter and debris," or "other appropriate means that consider the characteristics of the surrounding areas." 33 C.F.R. § 328.3(e). Contrary to the Corps' position, nothing in the regulations limits the Corps' jurisdiction to those areas of a streambed impacted by five-year or smaller flood events.

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<sup>1</sup> We note that the URS modeling was based on a median annual rainfall of 14.1 inches. In recent revisions to the Environmental Impact Report for the Landfill, however, GCL used an annual average rainfall of 25 inches to calculate the "safe yield" from groundwater monitoring wells on the site. If the annual average rainfall is actually 25 inches, the URS modeling cannot be used to support the argument that there is no OHWM in the canyon.

In addition, the Corps' decision on its jurisdiction must be revisited based on the Supreme Court's ruling in *Rapanos v. United States*, 547 U.S. 715 (2006), and guidance issued by the Corps and EPA in response to that decision. While the stream in Gregory Canyon may be a non-navigable and not relatively permanent tributary, it clearly has a significant nexus to the San Luis Rey River, a traditionally navigable water ("TNW"). The fact that the stream in Gregory Canyon has the ability to carry pollutants to a TNW, provides significant habitat for numerous species, and serves as a transitional area between upland areas and the river are all factors the guidance points out as being evidence of a significant nexus.

An accurate determination of the Corps' jurisdiction is critical to ensuring that permitted projects do not frustrate the CWA's stated objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Corps cannot simply ignore past evidence of an OHWM, and GCL's use of a low annual rainfall amount, to claim no jurisdiction exists. The Corps also cannot limit its jurisdiction over areas with an OHWM created by five-year-or-less storm events, and must revisit its jurisdictional determination based on *Rapanos*.

### **III. A Nationwide Permit Is Inappropriate For A Project With Such Significant Environmental Impacts.**

Even if the Corps did not have jurisdiction over the stream in Gregory Canyon (which we believe it does), authorizing the proposed Landfill by issuing a NWP for construction of the bridge necessary to access the Landfill would be wrong. NWPs were intended for activities that have only "minimal" adverse effects on the environment, such as maintenance activities, minor alterations to existing projects, and minor discharges. 33 U.S.C. § 1344(e); 33 C.F.R. § 330.1(b); 72 Fed. Reg. 11,092 (Mar. 12, 2007). The Corps' rules specifically state that if the "proposed activity would have more than minimal individual or cumulative net adverse effects on the environment or otherwise may be contrary to the public interest," the Corps "shall" modify the NWP "to reduce or eliminate those adverse effects" or require an individual permit. 33 C.F.R. § 330.1(d).

NRDC believes that the Corps must require an individual permit for the Landfill because landfills are not the type of projects that fit any preapproved NWP category of minimally harmful activities. *See* 33 U.S.C. § 1344(e). A NWP also would provide no opportunity for public participation, which is critical for a project with such a large ecological footprint. NWPs are for "minor activities that are usually not controversial and would result in little or no public or resource agency comment if they were reviewed through the standard permit process." 67 Fed. Reg. 2020, 2022 (Jan. 15, 2002). While NRDC disagrees strongly with the Corps' abdication of its CWA jurisdiction, it also opposes the use of an NWP to allow the project to proceed.

**IV. A Nationwide Permit Is Inappropriate Given The Significant Impacts The Proposed Landfill Would Have On Sacred Gregory Mountain.**

As you are aware, the proposed Landfill would result in the disposal of millions of tons of garbage on the side of Gregory Mountain, a site eligible for listing on the National Register of Historic Places. By rule, a NWP cannot be issued for any “activity which may affect properties listed or properties eligible for listing in the National Register of Historic Places . . . until the [District Engineer] has complied with the provisions of 33 CFR part 325, appendix C.” 33 C.F.R. § 330.4(g) (emphasis added). An activity “may affect” a historic resource if it causes the “[i]ntroduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting” or if it “may diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.” 33 C.F.R. Part 325, App. C.15. All of these “adverse effects” would occur if 30 million tons of garbage was buried on this sacred mountain.

The rules also prohibit a non-federal permittee from beginning a proposed activity until the Corps notifies the permittee “that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized.” 33 C.F.R. § 330.4(g)(2). Critically, if activities within the “permit area” will adversely affect a historic property, the Corps may properly require an individual permit. *Id.* at (g)(2)(ii). A “permit area” includes “uplands directly affected as a result of authorizing the work or structures,” and upland areas are considered “permit areas” if the activity (1) “would not occur but for the authorization of the work or structures within the waters of the United States,” (2) is “integrally related to the work or structures to be authorized,” and (3) is “directly associated (first order impact) with the work or structures to be authorized.” 33 C.F.R. Part 325, App. C.1.g. Because the bridge would provide the only means of access to the Landfill footprint (and would provide access only to the Landfill footprint), the “permit area” includes Gregory Mountain, and an individual permit application should be required.<sup>2</sup>

**V. NEPA Requires The Corps To Assess The Environmental Impacts Of The Entire Landfill Project And Evaluate A Range Of Alternatives.**

Case law is clear that the scope of analysis under NEPA may extend well beyond the “waters that provide the initial jurisdictional trigger,” and if a development cannot proceed without a Federal permit, the Federal involvement is “sufficient to grant ‘Federal control and responsibility’ over the project” under NEPA. *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1039-40 (9th Cir. 2009); *see also* 33 C.F.R. Part 325, App. B §§ 7.b(1), 7.b(2)(iv)A. Thus, the fact that the area proposed to be filled under the NWP would be small is irrelevant. As the court in *White Tanks* stated, “[i]t is

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<sup>2</sup> As a threshold matter, issuance of any permit by the Army Corps would be premature. First, consultation under Section 106 of the NHPA, which is a prerequisite to issuance, has not yet occurred. In addition, the California Regional Water Quality Control Board has not issued a certification for the project under Section 401 of the CWA.

not the quantity of the water that matters, but the fact that the waters will be affected, and further, whether the waters must be affected to fulfill the project's goals." 563 F.3d at 1041.

There is no argument that "but for" the Corps' approval, a bridge could not be built. Likewise, there is no argument that without the bridge, the proposed Landfill could not be constructed and operated. In other words, as in *White Tanks*, "the developers have told the Corps that, without the permit, the project as they conceive it, could not proceed." 563 F.3d at 1041-42. Because the bridge has no "independent utility" and is required to achieve the "project's goals," the impacts of the entire Landfill project must be analyzed under NEPA.

It is also important to emphasize that the NEPA review for the Landfill must include a full and comprehensive evaluation of alternatives. 42 U.S.C. § 4332(2)(C)(iii). This is especially critical here, because no such consideration has ever been done for this project. Not only has there been no fair-minded consideration of a full range of alternative approaches (e.g., increased waste diversion, utilizing existing landfill capacity more efficiently, movement of waste by rail, etc.), but remarkably no objective, robust evaluation of alternative sites has ever been conducted to determine whether there might actually be a more appropriate location for a landfill than the applicant's own San Luis Rey River-adjacent parcel in Gregory Canyon. In fact, when the County, at the outset, reviewed a range of potential landfill sites, it actually *rejected* Gregory Canyon as a viable site, because the location failed seven out of eight County landfill siting criteria. However, in 1994, the Landfill proponents performed an end-run around the County's siting process and employed a controversial ballot initiative to authorize a landfill on the site, thus circumventing a rigorous alternatives analysis at that time.

While the environmental impact analysis prepared under the California Environmental Quality Act ("CEQA") purported to address several sites, it did so in only a cursory way, looking at two potential alternative sites in the region and then rejecting them summarily based on purported infeasibility. Final EIR at 6-37 to 6-55. Specifically, the EIR concluded that the two alternative sites were infeasible because they weren't owned by the Landfill proponents, GCL, or for sale, and were not zoned for a landfill. *Id.* at 6-46, 6-54 to 6-55. Thus, according to the EIR, the Gregory Canyon site is a superior choice solely because it is available and because its proponents were able to obtain re-zoning by way of a deceptive ballot initiative.

This self-serving, limited, and post-hoc analysis is worse than no analysis at all, because it is intended only to give an impression of fair review when, in fact, the applicant's sole purpose was to compel the selection of its own site. As such, it falls far short of what is required either as a matter of law or as a matter of common sense when, as here, the applicant has selected a previously rejected site literally on the banks of a major water source in a drought-afflicted region like north San Diego County – a site that, "coincidentally," the applicant happens to own. Such an analysis makes a mockery of the common-sense requirements in CEQA and NEPA that a reasoned and fair assessment of

all reasonable alternatives be prepared, circulated for public review and comment, and considered by the decision-maker *before* any permitting decisions are made.

And these obligations exist independently under state and federal law. Thus, however one assesses the adequacy of the CEQA review of this Landfill project, there can be no question that a comprehensive NEPA analysis, including an analysis of alternatives, is vital and legally required.

**VI. Conclusion**

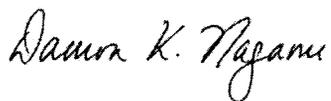
The proposed Landfill presents a real and substantial threat to the region's precious drinking water supplies. It threatens to destroy hundreds of acres of pristine open space and wildlife habitat. It will encroach upon sacred Native American lands. The Corps must not adhere to its erroneous jurisdictional determination and let this project proceed without adequate scrutiny. NRDC strongly urges the Corps to restore its initial jurisdictional determination that Gregory Canyon contains "waters of the United States" and require an individual permit for the proposed project. The Corps also must comply with the NHPA and NEPA. Only in that manner can the Corps ensure that this ecologically valuable watershed is protected to the fullest extent our environmental laws allow.

Thank you for your attention to this important matter.

Very truly yours,



Joel Reynolds  
Senior Attorney  
Director, Urban Program



Damon Nagami  
Staff Attorney

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Ms. Lenore Lamb, Pala Band of Mission Indians  
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Fallbrook Public Utility District  
San Luis Rey Municipal Water District