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October 23, 2009

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

Re: Comments on the Revised Application Dated September 28, 2009, for
Certification Under Section 401 of the Federal Clean Water Act

Dear Mr. Robertus:

These additional comments on the new application for state water quality certification under Section 401 of the Clean Water Act described above for the proposed Gregory Canyon landfill are submitted on behalf of the Pala Band of Mission Indians. These comments are in addition to comments previously submitted on an earlier application by Gregory Canyon Ltd. ("GCL") dated September 17, 2009. That September 17th application was deemed incomplete by the Regional Board as reflected in a letter to GCL dated September 28, 2009. GCL then submitted a new application dated September 28, 2009. A letter from the Regional Board dated October 13, 2009, deemed the September 17th application complete, even though an entirely new application had been submitted.

A number of comments were provided to the Regional Board by the Pala Band and other interested parties identifying problems with the September 17th application and approval of the project in general. Those comments addressed the September 17th application because that was the only application posted on the Regional Board website. Even today, the website states that comments on the September 17th application must be submitted "21 days from the date" the application was posted on the website. The clear indication is that time for commenting on the new Section 401 application expired in early October. That misstates the fact that the regional Board must accept comments until action is taken on the certification. It also indicates that the

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- a. Regional Board has failed to provide adequate public notice on the new September 28th application.¹

The Regional Board also appears to be taking the position that the operable application is the September 17th application, even though that application was submitted on the wrong form and was deemed incomplete. The fact that the Regional Board now has deemed the second application complete indicates that it believes the new application included information not included in the September 17th application. If that is the case, it is the new September 28th application that the Regional Board is processing, and a proper notice must make clear that comments should be provided on the new application.

A. The Regional Board Should Not Process the New Application Because There is No Valid Section 404 Permit Application.

As noted in previous comments, we remain puzzled as to why the Regional Board has chosen to use its limited resources to process this Section 401 application given that there is no valid application pending for a Section 404 permit under the Clean Water Act. As you know, the Regional Board's legal duties under Section 401 arise only if there is a valid permit application under Section 404. As discussed below, there is no valid application.

- a. The September 28th Section 401 application confirmed that the Section 404 application for a nationwide permit ("NWP") is dated September 28, 2005. As pointed out in previous comments, the NWP that GCL was seeking with that 2005 application expired on March 18, 2007. Those previous comments provided specific quotes from the rules of the Army Corps of Engineers ("Corps") stating that when an NWP expires, all authorizations under that NWP also expire within one year. (*See* 33 C.F.R. §§ 330.1(g) and 330.6(b).) Given that activities authorized by an NWP had to be completed by 2008, a mere application for an expired NWP clearly is no longer valid. As one court recently has stated regarding expired NWPs, "[t]he Corps can no longer authorize any activity under that permit and indeed no activities authorized by that permit continue to be or even can be in operation at this time because the twelve-month extension period has run." (*Ohio Valley Environmental Coalition v. Hurst*, 604 F.Supp.2d 860 (S.D.W.Va. 2009); *see also Kentuckians for the Commonweath, Inc. v. Rivenburgh*, 269 F.Supp.2d 710, 715-16 (S.D.W.Va. 2003).) Until GCL files a valid Section 404 permit, the Regional Board should not consider an application for Section 401 certification.

The Regional Board's rush to process this invalid application is even more puzzling given that the existing jurisdictional determination ("JD") for the proposed Gregory Canyon landfill expires on October 28, 2009. While the new Section 401 application only seeks

¹ The comments submitted previously by the Pala Band and all other comments are hereby incorporated into and made part of these additional comments.

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certification under Section 401 for the bridge to the proposed landfill, the new JD could conclude that the stream in Gregory Canyon where the proposed landfill would be located is a “water of the United States.” Such a finding would require GCL to obtain an individual Section 404 permit for the entire landfill project, including the bridge. The rules of the Corps are clear that, if an individual permit was needed for the proposed landfill, the bridge could not be permitted using a separate NWP because it has no “independent utility.” (33 C.F.R. § 330.6(d).) The Regional Board cannot simply ignore the fact that the JD will expire and that a new JD could require an individual permit for the entire landfill and continue to process an application for the bridge alone.

B. The New Application is Internally Inconsistent and Still Does Not Provide Sufficient Information for the Issuance of a Section 401 Water Quality Certification.

Even if these factors did not make consideration of the new Section 401 certification application premature, the new application remains incomplete for the following reasons.

1. Item 4 of the Regional Board’s September 28th letter indicating that the September 17th application was incomplete requested a description of the “type of drilling that will be done, potential sources of pollutants from that drilling method, seasonal staging of the drilling operation and pier construction relative to the rainy or monsoon season, and if coffering will be used.” But the September 28th application contains no information that addresses those issues, and the section entitled “Description of Activity” was barely changed.

It appears that GCL’s consultant URS attempted to address the issues raised by the Regional Board by providing a letter to the Regional Board dated October 8, 2009, describing borehole drilling methods and best management practices (“BMPs”) for that drilling. The URS letter is not referred to or incorporated in the September 28th application, so it is not entirely clear that it is part of the application. However, statements in the URS letter directly contradict statements in the September 28th application. Specifically, the URS letter states the following on page 3:

- EC-1 -- “Construction will be conducted outside of the rainy season between May 31 and October 1.”
- NS-5 -- “Coffer dams will not be required because higher flows which would necessitate this technology are not anticipated during summer months.”

But the new Section 401 application states on page 4 under “Description of Activity” that “[p]ending issuance of required permits, construction of the bridge is currently anticipated to occur starting November 2009 with completion in December 2010” and on page 6 under “Protection of Water Quality” that “[c]onstruction activities in surface water will be conducted

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outside of periods of high water flow in the San Luis Rey River.” The application does not indicate what would constitute a “period of high water flow.”

If construction is proposed to begin in November of 2009 or at any time during the rainy season, the applicant has not provided any information on or analysis of proposed BMPs for wet-weather construction activities in the San Luis Rey River, and the water quality impacts of the project have not been evaluated. If construction activities would only be conducted in the summer months as represented in the URS letter, then the Section 401 application is incomplete and misleading. In either case, that direct conflict must be rectified before the new application can be deemed complete.

2. The URS letter claims that the BMPs for the installation of the bridge piers are shown on a map included as Attachment B to its letter. But the map at Attachment B only shows what are termed “clearwater diversion” BMPs, which are described in the URS letter at “NS-5” as being applicable only during summertime construction. Again, this conflicts with the text of the new application itself.

3. The URS letter also states in “EC-2” that “[v]egetation located in the bridge access/work area boundary [Attachment A] will not be permanently removed and will be permitted to naturally revegetate” However “Attachment A” does not identify where this vegetation is located, and even if URS actually meant to refer to Attachment B, that drawing does not identify the area of vegetation that would be impacted either.

4. There is no information in the URS letter or in the September 28th application to indicate where “vehicle and equipment cleaning” (NS-8 in the letter) will be conducted and what BMPs would be used. The URS letter claims that if vehicle maintenance and equipment cleaning is conducted on site “technologies and practices described in the BMP fact sheet will be employed.” (NS-10 of the letter). The letter states that these “BMP fact sheets” are provided in Attachment Q of the Storm Water Pollution Prevention Plan (SWPPP). Of course, if one goes to Attachment Q of the SWPPP included on the Regional Board’s website, that Attachment is blank – there are no “fact sheets.”

This failure to either refer to a source with no information or to refer generically to an outside source of information was a problem with the earlier application and is a problem with the new application. The Regional Board’s own rules require a complete application to provide detailed descriptions of all of the listed activities and citations to specific page numbers in any documents referenced in the application. While the URS letter here refers to a specific section of the SWPPP (where there is no information), the new application like the old application refers generically to the EIR or the Joint Technical Document, but does not provide required citations to specific sections of those large documents. Without that information, the new application is incomplete as was the earlier application.

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5. The URS letter also provides conflicting descriptions as to how drilling spoils and excess concrete will be managed. First, on page 3, the URS letter states that “[d]rilling spoils and excess concrete will be removed from the site and disposed of in an upland area.” The upland area where this disposal will occur is not identified, and there is no discussion of the permits that would be obtained to dispose of this solid waste (and possibly hazardous waste) in these unspecified “upland areas.”

But further down the page, the letter claims that “[d]rilling spoils will be stored offsite in an upland area where appropriate stockpile management technologies will be implemented.” (WM-3). Given the previous statements, there is no assurance that “offsite” means off the Gregory Canyon site on some undefined upland area or merely away from the river in some undefined upland area of the site. In either case, clarification must be provided. If the drilling spoils and excess concrete remain on the site, the application must provide some discussion of where the materials will be placed and the BMPs that will be implemented to protect water quality. If those materials are to be disposed of on the site or elsewhere, appropriate permits must be obtained.

6. Neither the application nor the URS letter specifically state how drilling spoils or slurry or concrete will be collected to prevent them from discharging to the San Luis Rey River bed, even if there is no water flowing at the time. Item Number 4 of the Regional Board’s “incomplete” letter of September 28th also required that information. Page 6 of the application refers in passing to the fact that BMPs “may include” temporary storage of materials in the riverbed on geotextile materials. That is not an adequate description for the Regional Board to assess whether that potential BMP would prevent the discharge of those materials into the riverbed and protect water quality from the materials themselves or their residues. Without that description the new application is not complete.

7. Although the URS letter provides some information on drilling activities (although the information still is inadequate), neither the letter nor the new application discuss the other facets of the bridge construction to determine what methods are required to prevent impacts to water quality. The construction will take place in and over the riverbed and spills, metal shavings or grindings, lubricating oils and other materials could end up in the river bed. None of that is discussed as part of the activity of constructing the bridge. GCL also fails to identify where construction staging areas would be located or how the south side of the river would be accessed prior to construction of the bridge. For these reasons as well, the application is not complete.

8. The new application also claims that the existing “low-flow” crossing would be abandoned and the culverts and “cover” removed. But there is no discussion of BMPs for that activity if it were to occur. In addition, the claim on page 4 of the new application that removing the crossing would “improve the hydrogeomorphological performance of the river by improving downstream water flow the location of the existing low flow crossing” is pure speculation

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because there has been no analysis done of the effect of the crossing on the river to allow such a comparison. Some photographic evidence of the condition of the low-flow crossing also should be provided.

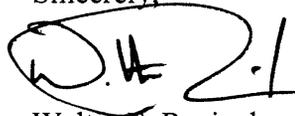
9. Page three of the new application indicates water velocities and shear for the existing river, but does not provide that information with the bridge in place. The Regional Board's September 28th letter finding the application incomplete required that this information be provided for "pre- and post-construction conditions." That has not been done and so the application is not complete.

10. The new application still fails to provide any information on "past/future impacts" of other activities that "may impact the same water body." The new application still states there are no applicable projects "that would result in effects on the river *that would be related to the bridge.*" That is not the information that is required, and the answer provided is simply non-responsive. That is another reason why, notwithstanding the Regional Boards October 13th letter, the new application also is incomplete.

Conclusion

A number of the comments included in this letter showing why the September 28th application was incomplete were submitted previously on October 9th in comments on the September 17th application. A number of other comments identifying inadequacies in the application also were provided by other interested parties at the same time. Unfortunately, those comments do not appear to have been considered because the Regional Board declared the new application to be complete on October 13th, the work day following its receipt of these numerous comments, and those same problems are apparent in the new application. We trust that those previous comments, these comments, and any other comments submitted will be given full consideration now.

Sincerely,



Walter E. Rusinek

cc: Robert Smith, Chairman of the Pala Band of Mission Indians
Lenore Lamb, Director, Pala Environmental Services
Ms. Laura Yoshii, United States Environmental Protection Agency, Region IX
Ms. Michelle Moreno, United States Fish & Wildlife Service
Ms. Theresa O'Rourke, United States Army Corps of Engineers
Representative Bob Filner, 51st Congressional District
Representative Susan Davis, 53rd Congressional District

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Assemblymember Diane Harkey, 73rd Assembly District
Assemblymember Lori Saldaña, 76th Assembly District
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San Diego City Council
Mr. Jerry Sanders, Mayor, City of San Diego
Mr. Jim Wood, Mayor, City of Oceanside
Mr. Bud Lewis, Mayor, City of Carlsbad
Ms. Maureen Stapelton, San Diego County Water Authority
Mr. Scott Harrison, Surfrider Foundation
Mr. Dave Seymour, Rainbow Municipal Water District
Mr. Joel Reynolds, Natural Resources Defense Council
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Mr. Edward Kimura, Sierra Club, San Diego Chapter
Ms. Joy Williams, Environmental Health Coalition
Mr. Dan Silver, Endangered Habitats League
Mr. Bruce Reznik, San Diego Coastkeeper
Mr. Mark Schlosberg, Food & Water Watch
Mr. Marco Gonzalez, Coastal Environmental Rights Foundation
Mr. Serge Dedina, Wildcoast