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November 9, 2009

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

Re: Proposed Gregory Canyon Landfill Application for Certification under Section 401 of the Federal Clean Water Act (No. R9-2009C-073)

Dear Mr. Robertus:

These additional comments are provided on behalf of the Pala Band of Mission Indians in response to (1) the agenda item for the Regional Board's Meeting dated November 18, 2009, addressing the Section 401 certification for the proposed Gregory Canyon Landfill, (2) the last-minute posting of the draft Section 401 certification and other "relevant" documents, and (3) portions of the draft certification itself. These comments supplement previous comments provided on the incomplete and "complete" Section 401 applications.

At the outset we note that the draft Section 401 certification was not posted on the Regional Board's website until November 9, 2009. At that time, the website stated that comments on the draft certification also were due on November 9, 2009, a nearly impossible task. The Regional Board website also added two studies on November 3, 2009, that were approximately 400 pages in length. The relationship of these studies (and numerous other lengthy documents included on the website) to the Section 401 application were never identified in the Section 401 application or by the Regional Board making comment on them also difficult at best. The last-minute additions of the draft certification and these report effectively has precluded the possibility of open public comment. The Regional Board's attempt to make public comment on this Section 401 certification as difficult as possible during this process is troubling.

More troubling is the Regional Board's position that there is a bridge "project" that is somehow distinct from the actual project, which is the proposed landfill. The draft Section 401 certification even goes so far as to opine that the certification "is for a bridge to connect State Route 76 with the area (Gregory Canyon) that *may* become a landfill." While the intent of the language is not entirely clear, it seems to indicate that the Regional Board actually may believe that the bridge would be built even if the proposed landfill was not constructed. If the applicant

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has identified another reason for the bridge to be built across the river, we request that the Regional Board divulge that information to the public. As it is, the land on the south side of the river is zoned for a solid waste facility and that use can only be changed by a vote of the people. The point is that the bridge will not be constructed unless the proposed landfill is approved.

That fact is made clear in the Revised Final Environmental Impact Report (“RFEIR”) for the proposed landfill, which clearly indicates that the sole reason for the bridge is to provide access to the proposed landfill. Even so, the agenda item states that the Regional Board will “hear testimony on the bridge component of the Gregory Canyon Landfill” and that “[c]omments and testimony will be limited to the impacts of certification of the bridge” and that the Board “is not considering and will not accept testimony on Waste Discharge Requirements for the landfill.” Because the agenda item admits that the sole purpose for the bridge would be to provide access to the proposed landfill footprint, testimony regarding “the impacts of the certification of the bridge” logically must include a discussion of the impacts of the entire proposed landfill. Those impacts are directly related to the Regional Board’s consideration of the approval of the bridge.

Moreover, as our previous comments pointed out, the process of certification under Section 401 must address “activities” not merely “discharges.” (*PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994) 511 U.S. 700, 712). In the PUD case, the Supreme Court held that the state could require a dam operator to maintain minimum stream flows as part of its Section 401 certification for the construction of a hydroelectric dam. The Court found that restrictions could be placed on the activity as a whole under Section 401, not merely on the placement of the fill to build the dam. Clearly, the “activity” at issue here is not merely the discharge of fill to construct the bridge, but the entire landfill project that would be made possible only if the bridge were to be approved. Under Section 401, it is improper for the Regional Board to segment the bridge from the overall activity being considered.

1. Processing the Certification as Proposed Would Violate CEQA.

As a number of other commentators have pointed out, segmenting the bridge from the proposed landfill project also violates the California Environmental Quality Act (CEQA). There is no argument that the “project” under CEQA is the entire landfill project. (CEQA Guidelines § 15378(a) (a “project” is the “whole of an action”). CEQA specifically states that “no *public agency* shall approve or carry out a *project* for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the *project* is approved or carried out” unless the agency makes specific written findings. Public Resources Code § 21081. Those findings must address “each of those significant effects, accompanied by a brief explanation of the rationale for each finding.” (CEQA Guidelines § 15091; *Resource Defense Fund v. Local Agency Formation Commission of Santa Cruz County* (1987) 191 Cal. App. 3d 886, 897). The references to the “project” clearly prohibit an agency

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from segmenting (or “piecemealing”) its consideration of the environmental effects of a project as the Regional Board is attempting to do here.

In fact, Paragraph 3 of the draft certification clearly misstates this clear statutory mandate. Instead, that paragraph of the draft certification takes the indefensible position that the “bridge project” can be separated from the CEQA project (the proposed landfill), claiming (with emphasis added) that the Regional Board has no obligation under CEQA “to make findings under 14 CCR section 15091 with respects to impacts to surface water quality associated with the *bridge project*.”

Even if the Regional Board is considered a “responsible agency” under CEQA, the statute requires that it reach “its own conclusions on whether and how to approve the *project* involved.” (CEQA Guidelines § 15096(a) (emphasis added)). A responsible agency also must make findings “for each significant effect of the *project*.” (CEQA Guidelines § 15096(h) (emphasis added)). CEQA also is clear that a responsible agency must make findings “for each significant effect of the *project*.” (CEQA Guidelines § 15096(h)). In addition, “whenever an agency approves a project despite adverse environmental effects, it must prepare a statement of overriding considerations.” (*Resource Defense Fund, supra*, 191 Cal.App.3d at 897).

Under CEQA then the Regional Board must (1) consider the entire project and not merely a “bridge project” with no independent utility, (2) make specific findings, and (3) issue a statement of overriding considerations if needed. But instead, the draft certification admits that the “RFEIR identifies mitigation to avoid or lessen the environmental effects of the bridge project” and that the Regional Board is only making findings as to the bridge project. That sole focus on the bridge is improper piecemealing done in an effort to limit public comment.

The draft certification also admits that the Regional Board only considered alternatives to the proposed location of the bridge (and never mentions mitigation measures) in violation of CEQA’s requirements. Again, there is no “bridge” project, but only a single landfill project. The Regional Board’s total misinterpretation of CEQA is further exemplified by its Response to Comment #3, which posits that “the Regional Board as a responsible agency under CEQA is only required to consider the impacts to water quality, not impacts caused by or operation of the proposed landfill.”

Because the Regional Board’s approval of the certification would be the project’s first approval, the Regional Board would become the “lead agency” for the project. Under CEQA, the “lead agency” is the public agency “with the greatest responsibility for supervising or approving the project as a whole.” (CEQA Guidelines § 15051(b)). Here, the rules governing landfill construction and operation are divided equally between the State Water Resources Control Board and the Integrated Waste Management Board, and given the critical importance of the water quality and the authority of the Regional Board to require mitigation for the impacts of the proposed landfill, the Regional Board arguably has primary responsibility for the project. Where

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more than one public agency meets the criteria for being a lead agency, “the agency which will act first on the project in question shall be the lead agency.” (CEQA Guidelines § 15051(c); *Sohio v. Board of Harbor Commissioners of the Port of Long Beach* (1979) 23 Cal. 3d. 812, 813). That is another reason why the Board’s consideration of the Section 401 certification should be delayed.

These CEQA problems could be avoided by simply delaying consideration of the Section 401 certification until the draft waste discharge requirements are prepared. Given that there is no valid Section 404 application or jurisdictional delineation of the site, we remain confused as to why the Regional Board is making such Herculean efforts to process a Section 401 application on a highly controversial and complicated project where the application was only deemed complete on October 13, 2009. (And that decision was improper as well.) Clearly, the complexity of the project, the lack of a jurisdictional delineation and the issue of compliance with CEQA all are valid reasons for the Army Corps to extend any 60-day deadline that the Regional Board believes it is obligated to meet. (33 C.F.R. § 325.2(b)(ii)). Whatever reasons the Regional Board cites do not justify its potential violations of CEQA, which unfortunately would result in litigation.

2. The Draft Certification Admits That More Information is Needed to Process the Application.

In reviewing the draft certification, it is obvious that previous comments submitted on the incomplete and the complete applications were simply ignored. Comments questioning the presence of internally inconsistent information and lack of information in the Section 401 applications were not resolved. Those comments are not repeated here, but one specific and one general comment are in order.

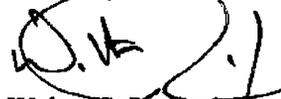
First, one critical issue, whether construction of the bridge can be conducted during the rainy season, exemplifies the problems with the applications/draft certification. Whereas the original application stated that construction of the bridge would begin in November of 2009, the URS October 8, 2009, letter stated that construction only would occur between May 31 and October 1. But rather than resolving this internal contradiction by requiring that a new and complete application be submitted, the Regional Board issued a draft certification which merely states that “Construction BMPs must include” among other provisions, “[a]voidance of construction activities during the rainy and monsoon seasons.” While the intent of that provision appears to be to prohibit construction during the rainy and monsoon seasons period, that would be much clearer if the certification stated that “No construction may occur during the rainy and monsoon seasons.” There are other examples where the ambiguous language of the draft certification provides sufficient wiggle room for the applicant and raises questions about whether the certification will sufficiently protect water quality.

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Second, there also are numerous references in the Responses to Comments attached to the draft certification where Regional Board staff admits that it either has been provided additional information that it needs to evaluate before the certification can be issued, or that it needs additional information to assess water quality issues. (*See, e.g.*, Responses to Comments #11, #14 and #16). Amazingly, Response #16 actually states that the “certification will not be issued until the Regional Board staff has received sufficient information to determine whether the proposed project [*i.e.*, bridge] will negatively impact water quality.” If sufficient information has not been provided and considered yet, why is a draft certification pending before the Board? If there is not sufficient information to resolve all these issues, how can the Board proceed and still ensure that it is meeting its legal obligations to protect water quality?

For all these reasons and for those provided in previous comments, the Regional Board should deny the water quality certification. If it chooses not to deny, it should delay action on the certification until it receives sufficient information to know the scope of any certification and to properly assess the impacts to water quality.

Sincerely,



Walter E. Rusinek

WER:mrt

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. Therese O'Rourke, United States Army Corps of Engineers
Representative Bob Filner, 51st Congressional District
Representative Susan Davis, 53rd Congressional District
Assemblymember Diane Harkey, 73rd Assembly District
Assemblymember Lori Saldafia, 76th Assembly District
San Diego County Board of Supervisors
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 Stapleton, 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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Native American Environmental Professional Coalition
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

Mike Porter - Pala Comment Letter dated November 9, 2009

From: "Kozlak, Mary K." <mkk@procopio.com>
To: "Mike Porter" <mporter@waterboards.ca.gov>, "John H. Robertus" <jrobertus@waterboards.ca.gov>
Date: 11/9/2009 18:22
Subject: Pala Comment Letter dated November 9, 2009
CC: "Rusinek, Walter E." <wer@procopio.com>
Attachments: Pala Comment Letter dated 11-9-09.pdf

Hello Mr. Porter and Mr. Robertus,

Attached please find a copy of the Pala Band of Mission Indians comment letter dated November 9, 2009. A hard copy will be sent via U.S. mail tomorrow. Thank you.

Mary K. Kozlak
Legal Secretary

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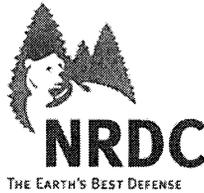
Please consider the environment before printing this email. 

mailgw01.procopio.com made the following annotations

Mon Nov 09 2009 18:21:14

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NATURAL RESOURCES DEFENSE COUNCIL

November 9, 2009

Via Email (mporter@waterboards.ca.gov) and FedEx

Mr. John Robertus, Executive Officer
Attention: Mike Porter, Engineering Geologist
California Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Re: Water Quality Certification for the Gregory Canyon Bridge (File No. 09C-073)

Dear Mr. Robertus:

On behalf of the Natural Resources Defense Council (NRDC) and its more than 1.3 million members and activists, over 250,000 of whom live in California, we strongly object to the Regional Board's recent attempts to prevent meaningful public participation in the issuance of a Clean Water Act Section 401 Water Quality Certification ("401 certification") for the proposed Gregory Canyon Landfill and the proposed bridge to be constructed over the San Luis Rey River.

Our main objection is that the public did not have nearly enough time to review the draft 401 certification and provide thoughtful comments on the document before today's deadline. The agenda for the November 18, 2009 Regional Board meeting states that "[w]ritten material submitted after 5:00 P.M. on Monday, November 9, 2009 will not be provided to the Regional Board members and may not be considered by the Regional Board." However, most interested parties will have had less than a day to review the draft 401 certification before this deadline. Although an unconfirmed report from a Regional Board staff member claims that the draft 401 certification was posted on the Regional Board's Web site last Thursday, November 5, the vast majority of interested parties were not notified that the draft 401 certification was available for viewing until this morning, when the Regional Board sent a message by way of its automatic email notification system. In any event, it is more than a little troubling that the Regional Board saw fit to give the public at best two business days -- and in most cases, no more than a few hours -- to review the 55-page document and submit meaningful comments.

We also are concerned that the Regional Board began quietly uploading several large documents to its Web site last week, without providing any indication as to how or whether the documents are relevant to, or were used to support, the draft 401 certification.

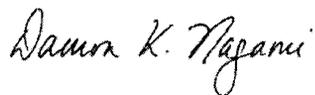
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This would appear to contravene the Regional Board's usual procedures requiring the use of pinpoint citations to any documents used in support of an application.

This is a high-profile, highly controversial project that has generated a great deal of public interest not only in northern San Diego County, but throughout the entire state. We strongly urge the Regional Board to extend the public comment deadline a reasonable amount of time to allow stakeholders sufficient time to read the draft 401 certification and provide meaningful comments. We also urge the Regional Board to post on its Web site, as soon as possible, all documents that were used to support the conclusions in the draft 401 certification, and to explain with precision how the documents were used to reach such conclusions.

Thank you for considering our views on this matter. If you have any questions, please feel free to contact me at (310) 434-2300.

Very truly yours,

A handwritten signature in cursive script that reads "Damon K. Nagami".

Damon Nagami
Staff Attorney

Mike Porter - gregory canyon project

From: "Robert Simmons" <rls@sandiego.edu>
To: <mporter@waterboards.ca.gov>
Date: 11/9/2009 16:10
Subject: gregory canyon project
CC: "George Pelyak" <pelyakg@hotmail.com>

Attn: John Robertus, Executive Officer
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Drive
San diego, CA

Subject: Section 401 Water Quality Certification for Gregory Canyon Landfill
File# 09C0973

Dear Mr. Robertus:

I write you today as an interested person in the matter of the long-delayed Gregory Canyon Landfill Project, located in North San Diego County along SR 76. I am a retired Professor of Law at USD and a former member of the San Diego Sierra Club Executive Committee. Further, I have actively practiced law in this region, emphasizing Environmental Law. Based on this experience, I feel fully qualified to comment on the environmental impacts and benefits of this project.

I strongly support this Gregory Canyon Landfill project. I have carefully reviewed the project's EIR and reported impacts in the light of the applicable law and come to these conclusions:

- a) The project and its EIR fully comply with the applicable law of California;
- b) Once build and under operation, the landfill will be environmentally safe;
- c) The landfill's protective liners will provide complete spill and leakage protection that exceeds legal requirements and provide assurance of private and public safety well into the indefinite future;
- d) The landfill is acutely needed to provide the only safe depository for garbage and other waste within the fast-growing North San Diego County region;
- e) Without the Gregory Canyon landfill, thousands of large waste trucks will have to drive South on both I-15 and I-5 to existing landfills in the Central and Southern county. The traffic safety, carbon, and congestion impacts will, in the aggregate, greatly exceed whatever impacts the Gregory Canyon landfill may cause--even should some unforeseen impact ensue.

In my opinion, the proposed Gregory Canyon bridge over the San Luis Rey river will have a negligible impact on adjacent water quality and the proposed mitigation measures will negate this in any event.

I strongly believe that the project developers have fulfilled the requirements for 401 certification and urge you to grant it. By delaying this approval, you will add further unjustified delay and costs to a public benefit that has been repeatedly, and crassly, delayed by casino gambling interests and litigation money.

Respectfully,

Robert L. Simmons: 619-464-0325; 7622 Lake adlon Drive, San diego, CA 92119: rls@sandiego.edu

Mike Porter - Gregory Canyon Bridge 401 Certification

From: "Purcell, Larry" <LPurcell@sdewa.org>
To: <jrobertus@waterboards.ca.gov>
Date: 11/9/2009 15:12
Subject: Gregory Canyon Bridge 401 Certification
CC: <MPorter@waterboards.ca.gov>

Mr. Robertus:

The Gregory Canyon Bridge 401 Water Quality Certification is listed for consideration as item 9 on the November 18, 2009 Regional Board agenda. On October 7, 2009, the Water Authority submitted a letter outlining concerns with Regional Board intention to proceed with the bridge certification separately from consideration of the landfill WDR. In that letter, the Water Authority identified a potential risk to two Water Authority pipelines (First San Diego Aqueduct) located immediately upstream of the proposed bridge, and requested the Regional Board require the applicant to prepare a detailed scour study to ensure the pipelines are not adversely affected by the bridge project.

On November 3, 2009, Mr. Michael Porter forwarded the following two reports for Water Authority review:

1. URS Corporation. August 26, 2008. "Gregory Canyon Landfill Wetlands Restoration", 152 pages
2. Chang, Howard. November 1999. "Fluvial Study and Bridge Scour Analysis for the Proposed Gregory Canyon Bridge on the San Luis Rey River", 210 pages

These reports contain detailed technical engineering analysis that require the use of specialized expert consultants to properly evaluate the methodology and conclusions. Given the report complexity and the intervening years since completion, there is insufficient time before the November 18 meeting to establish the continued validity of these reports. Therefore, the Water Authority is requesting that consideration of the Gregory Canyon Bridge 401 certification be postponed until the December 2009 meeting. In addition, we are requesting that this item be placed as late as possible on the December agenda so our consultant has adequate travel time to personally appear before the Board, present the evaluation results and any recommendations, and answer any questions the Board may have. Please let me know if this item will be rescheduled for December. Thank you.

Larry Purcell

Water Resources Manager

San Diego County Water Authority

4677 Overland Avenue

San Diego, CA 92123

Office: (858) 522-6752

Fax: (858) 268-7881

Mike Porter - Gregory Canyon

From: Lenore Lamb <llamb@palatribe.com>
To: "mporter@waterboards.ca.gov" <mporter@waterboards.ca.gov>, "JRobertus@waterboards.ca.gov" <JRobertus@waterboards.ca.gov>
Date: 11/9/2009 09:55
Subject: Gregory Canyon
CC: Johnny Pappas <sandiegojohnny@gmail.com>, Paul Macarro <pmacarro@pechanga-nsn.gov>, Anna Hoover <ahoover@pechanga-nsn.gov>, SyndiSmallwood <ssmallwood@pechanga-nsn.gov>, Lisa Haws <LHaws@viejas-nsn.gov>, Rob Roy <lajollagis@yahoo.com>, John Beresford <jdb92061@yahoo.com>, "bcalac@pauma-nsn.gov" <bcalac@pauma-nsn.gov>, "cviveros@rincontribe.org" <cviveros@rincontribe.org>, "n8tive_shedevil@yahoo.com" <n8tive_shedevil@yahoo.com>, "aveltrano@rincontribe.org" <aveltrano@rincontribe.org>, "jmajel@aol.com" <jmajel@aol.com>, "hedibogda@hotmail.com" <hedibogda@hotmail.com>, "jontiveros@soboba-nsn.gov" <jontiveros@soboba-nsn.gov>, "carrieg@soboba-nsn.gov" <carrieg@soboba-nsn.gov>, "korosco@RinconTribe.org" <korosco@RinconTribe.org>, Gary Arant <gary@vcmw.org>, Alex Hunter <ahunter@rincontribe.org>, Joel Reynolds <jreynolds@nrdc.org>, Damon Nagami <dnagami@nrdc.org>, Ted Griswold <tjg@procopio.com>, Walter Rusinek <wer@procopio.com>, Pam Slaterprice <pslater@mac.com>, Sachiko Kohatsu <Sachiko.Kohatsu@sdcountry.ca.gov>, John Weil <John.Weil@sdcountry.ca.gov>, Hershell Price <htprice@roadrunner.com>, "Michelle_Moreno@fws.gov" <Michelle_Moreno@fws.gov>, "Orourke, Therese SPL" <Therese.Orourke@usace.army.mil>, Barry Martin <theolderbear@att.net>, "rua@rjtranch.com" <rua@rjtranch.com>

John and Mike,

How can the Regional Board post the draft 401 certification for the Gregory Canyon project and expect to receive comments on the same day? You are asking people to comment on a 55 page document in ONE DAY! This seems ridiculous especially when your website says you have received 1694 comments AGAINST this project. It also denies the public a meaningful review process.

Last Thursday, the Regional Board started loading new documents--some very large (400+ pages)--on the website, without reference to how they are relevant to or used in the draft certification. It seems as though the RB is attempting to provide cover for a decision without true, meaningful public review of the basis for their decision. This is against their own protocol, which requires in their certification application to put pinpoint citations to any documents used in support of the applications. In this case, there are no citations to the references at all.

Also, the Army Corps of Engineers has not even made a decision about what the project area is!

It seems like this project is being piece mealed and pushed through as quickly as possible. I can't understand why the RB would do this, could you please explain?

Regards,

Lenore Lamb

Pala Band of Mission Indians

Director of Environmental Services

12196 Pala Mission Rd.

Pala, CA 92059

Phone: (760) 891-3515

Fax: (760) 742-3189