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November 4, 2009

Mr. Mike Porter
San Diego Regional Water Quality Control Board
9175 Sky Park Court, Suite 100
San Diego, CA 92123

Re: Gregory Canyon Landfill – Section 401 Water Quality Certification

Dear Mr. Porter:

This firm represents Gregory Canyon Ltd. (GCL), whose application for a Section 401 Water Quality Certification is on the agenda for consideration at the November 18, 2009 RWQCB meeting.

We have had the opportunity to review various comments letters submitted in opposition to the grant of the 401 certification. A common theme in those letters is a request to delay action based on speculation as to what determinations the U.S. Army Corps of Engineers (USACE) might make with respect to the underlying application for verification of coverage under Nationwide Permits (NWP's) 25 and 33, submitted in accordance with Section 404 of the Clean Water Act. Some commenters even go so far as to suggest that RWQCB defer any action on the 401 certification until USACE has taken action on the underlying application under Section 404.

In order to complete its review, USACE requires a number of predicate actions, one of which is the 401 certification. As a result, USACE cannot issue an effective 404 permit until the 401 certification is either issued or deemed waived. Asking RWQCB to defer action on the 401 certification until USACE takes an action on GCL's application under Section 404 evidences a complete misunderstanding of the process.

Moreover, the matter before the RWQCB is to consider a complete application filed by GCL for a 401 certification. Speculation over what determinations or actions USACE might take with respect to the underlying application under Section 404 is completely irrelevant to the matter before the RWQCB, and should not be part of its consideration.

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We also wanted to take this opportunity to respond to an allegation made by the Procopio law firm in comment letters to RWQCB dated October 9, 2009 and October 23, 2009, to the effect that there is no application currently pending for verification of coverage under NWP's pursuant to Section 404.

There is no dispute that an application for verification of coverage under NWP's 25 and 33 was submitted by GCL to USACE on September 21, 2005. Rather, Procopio makes the astonishing claim that because the overall federal program for NWP's expired but was reissued in 2007, this and every other pending application for verification of coverage with a NWP filed prior to that date was by inference voided. This claim is a matter within the purview of USACE, and not directly relevant to the RWQCB's consideration of the 401 certification application. Moreover, it is completely incorrect.

Not surprisingly, Procopio cites no authority to support its assertion. Its cited regulation goes to the status of projects that have been "authorized" prior to the expiration of a NWP, and the cases it cites simply stand for the proposition that a project cannot be authorized under an expired NWP. Neither stand for the proposition that a pending NWP application must be resubmitted upon reissuance of an expired NWP.

When USACE makes a decision to authorize a proposed NWP activity, it is making that decision in accordance with the NWP program in effect at the time that it makes its "authorizing" decision. There is nothing in the statute, rules or guidance documents that limit its decision to a consideration of the particular NWP applied for by the applicant. Indeed, the regulations require USACE to review all individual permit applications "for possible eligibility under regional general permits or NWPs. If the activity complies with the terms and conditions of one or more NWP, [the District Engineer] should verify the authorization and so notify the applicant." 33 C.F.R. Section 330.2(f). Thus, it is up to USACE to decide whether a proposed discharge qualifies for NWP authorization. It is not constrained by the form or timing of the NWP coverage requested by the applicant.

Aside from the lack of any supporting legal authority, Procopio's view of the rules does not make sense and creates an absurd result. Contrary to the USACE's NWP program, it would effectively create a bar to the consideration of any NWP applications for at least a couple of months prior to the expiration of the NWP program every five years.

In California, that effective bar could run to many months given that most NWP authorizations cannot issue until individual 401 certifications are granted by a RWQCB, and for some, until a required Section 7 consultation has been completed, or in the case of coastal zone projects, until CZMA determinations are made by the Coastal Commission. This is the result of USACE's regulations that give it 30 days to determine whether a NWP application is complete, an additional 45 days to respond to the applicant, and up to a year (or more) for USACE to know whether the required 401 Certification, Section 7 Biological Opinion, and CZMA consistency determination will issue or not. If it takes 2-

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12 months (or more) to process a NWP application, all that time would be lost if the applicant had to start over again upon USACE's reissuance of its NWPs.

Thank you for the opportunity to present this additional information. Please do not hesitate to call if you have questions, or require further information.

Sincerely,

A handwritten signature in cursive script that reads "E. William Hutton".

E. William Hutton

cc: Mr. James Simmons