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13 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
14 BEFORE THE ENVIRONMENTAL APPEALS BOARD

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

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

20 **MOTION REQUESTING**
21 **ENVIRONMENTAL APPEALS**
22 **BOARD TO STAY EPA'S**
23 **ISSUANCE OF NOTICE TO**
24 **PROCEED**

25 **INTRODUCTION**

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

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

¹ 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") § 106.² 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."³

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 ² Appx. 1, at pp. 1-2.

28 ³ 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.⁴ 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."⁵ (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.⁶ 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.⁷

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").⁸
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 _____
26 ⁶ Appendix 1, at pp. 1-2.

27 ⁷ *Id.* at p. 2.

28 ⁸ Although Petitioner *AMADOR COUNTY* did not raise *NHPA* issues in its petition for review, other
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.⁹ 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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28 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.¹⁰

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).¹¹

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.

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

¹¹ <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.”¹²

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.¹³

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

25 ¹³ 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)."*¹⁴

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.¹⁵
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.
1.) The Agua Caliente Band permit states that the receiving waters are Whitewater Creek *and a number of*
28 *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.

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.¹⁶ 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.¹⁷ 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."¹⁸

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27 ¹⁶ Petitioner Amador County's Petition for Review, at p. 7.

28 ¹⁷ *Id.*

¹⁸ 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.

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13 Dated: July 15, 2011

NIELSEN MERKSAMER PARRINELLO
GROSS & LEONI, LLP

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15
16 By: 
17 Cathy Christian, attorney for petitioner
AMADOR COUNTY

APPENDIX 1



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

July 5, 2011

Sent via electronic and overnight mail

U.S. Environmental Protection Agency
Eurika Durr
Clerk of the Board
Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, DC 20005

Re: Buena Vista Rancheria Wastewater Treatment Plant, NPDES Appeal Nos. 10-05 - 10-07 & 10-13

Dear Ms. Durr:

Pending before the Environmental Appeals Board (Board) are four petitions filed in the above-referenced matter seeking review of a Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit issued by U.S. EPA Region 9 (Region) to the Buena Vista Rancheria of Me-Wuk Indians (Tribe) for a proposed casino project (proposed project) in Amador County, California. By this letter, the Region respectfully informs the Board of developments relating to the proposed project that have occurred subsequent to filing of the Petitions and the Region's Response to Petitions for Review.¹

National Historic Preservation Act Memorandum of Agreement

Two of the petitions pending before the Board challenge elements of the Region's compliance with the procedural requirements of Section 106 of the National Historic Preservation Act (NHPA). As explained in the Response to Petitions for Review, the Region determined that issuance of the federal NPDES permit was a federal undertaking subject to NHPA Section 106. Accordingly, as required by that statute, the Region engaged in a consultation process that included the California State Historic Preservation Office (SHPO), the Army Corps of Engineers (Corps), the Tribe, and all of the Petitioners. At the conclusion of this process, the Region entered into a Memorandum of Agreement (MOA) with the SHPO, the

¹ The four petitions were filed by Glenn Villa, Jr. (No. 10-05); County of Amador (No. 10-06); Friends of Amador County (No. 10-07); and Ione Band of Miwok Indians (No. 10-13).

Corps and the Tribe to resolve adverse effects on historic properties that were identified during the consultation. Under the NHPA Section 106 implementing regulations, such an MOA governs the undertaking, and the federal agency must ensure that the undertaking is carried out in accordance with the MOA. 36 C.F.R. § 800.6(c).

Under the NHPA MOA, the parties agreed to a variety of provisions relating to the Tribe's construction of the proposed project. Of relevance here, the parties established a process for EPA to issue Notices to Proceed (NTP) with construction of segments of the proposed project upon the occurrence of one or more specified conditions. These conditions were largely established as an additional safeguard to ensure that previously unevaluated historic properties did not exist at the site of, or would not be adversely affected by, construction of the project segment at issue.²

On December 10, 2010, the Tribe submitted to the Region the completed fieldwork phase of the Archaeological Testing Program established under the NHPA MOA and its related Historic Properties Treatment Plan. The Region has consulted with the SHPO and the Corps and believes that the Archaeological Testing Program's findings are acceptable, thus satisfying Section IV.C of the governing MOA and establishing a clear basis for issuance of a NTP.

By letter dated May 26, 2011, the Tribe requested that the Region issue a NTP as soon as possible. (Enclosure 1, Letter from Arnold D. Samuel, General Counsel, Buena Vista Rancheria Me-Wuk Indians, to Alexis Strauss, Director, Water Division, U.S. EPA, Region 9). As explained in this letter and in the attached supporting correspondence from the bank assisting the Tribe with its financing, the proposed project requires financing from a volatile high-yield bond market which "risks closing at any time," thus posing a risk to the "ultimate viability of the project." Enclosure 1 at pp. 1 and 2. Given these potential risks to the Tribe's financing – and

² AR at 1025-1035 (MOA at 3-4). Specifically, Section IV of the MOA provides:

IV. NOTICES TO PROCEED WITH CONSTRUCTION

EPA may issue Notices to Proceed (NTP) under any of the conditions listed below. Issuance of a NTP by the EPA does not constitute and shall not be interpreted to be authorization to discharge dredged and/or fill material pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344.

- A. EPA, in consultation with SHPO, determines that there are no unevaluated historic properties within the APE for a particular construction segment; or
- B. EPA, in consultation with SHPO, determines that there are no historic properties within the APE for a particular construction segment; or
- C. EPA, in consultation with SHPO and signatories, determines that for a particular construction segment: (1) the fieldwork phase of the "Archaeological Testing Program," provision of the HPTP has been completed; and (2) EPA has accepted a summary of the fieldwork performed and a reporting schedule for that work.
- D. EPA, in consultation with SHPO and signatories, determines that conditions resulting in the issuance of a "Stop Work," under the HPTP have been resolved.

thus to the proposed project as a whole – the Tribe urged the Region to issue the NTP, which is the only barrier to commencement of construction of the proposed project, as soon as possible.

Because the Tribe has satisfied the condition at Section IV.C of the NHPA MOA, the Region believes the Tribe is eligible for a NTP as contemplated by the governing MOA. In addition, in light of the information contained in the Tribe's letter, the Region believes it is appropriate to issue the NTP expeditiously. Following issuance of the NTP, the Tribe would be able to commence construction of the proposed project consistent with the terms of the NHPA MOA.³ The Region by this letter informs the Board that we intend to issue a NTP to the Tribe no sooner than 21 days from the date of this letter.

Federal Court Litigation Re: the Buena Vista Rancheria

In addition, as a courtesy, the Region would like to bring to the Board's attention a recent decision in a federal court litigation currently ongoing between the County of Amador (County), one of the Petitioners before the Board, and the U.S. Department of the Interior (DOI). *Amador County v. Salazar*, No.10-5240 (D.C. Cir. May 6, 2011) (Enclosure 2). We note that the Region had been unaware of this litigation until very recently when the Tribe and its project developer informed the Region of the D.C. Circuit's decision.

Amador County involves a challenge by the County to DOI's approval through inaction of an amendment to the Tribe's gaming compact with the State of California. The County challenged the Compact Amendment on the basis that, as alleged by the County, the Buena Vista Rancheria fails to qualify as "Indian land" as required under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701, *et seq.* *Amador County*, slip op. at 6. The district court had dismissed the County's case without addressing the merits of the "Indian land" issue, finding that DOI's approval of the gaming compact was unreviewable. *Amador County v. Kempthorne*, 592 F. Supp.2d 101, 106-07 (D. D.C. 2009). The D.C. Circuit reversed and remanded for consideration of the merits, holding that judicial review of DOI's action was available consistent with both IGRA and the Administrative Procedure Act. *Amador County*, slip op. at 11-17, 20.

We note that in its Petition for Review of the instant NPDES permit and in certain related filings with the Board, the County asserts an argument that the Buena Vista Rancheria is not Indian country for purposes of the Region's NPDES permitting authority. The Region addressed this argument in its Response to Petitions for Review as well as in responding to the County's related submissions. Because the federal district and circuit court decisions in *Amador County* address solely jurisdictional and judicial reviewability issues – and do not reach the merits of the "Indian land" issue – they do not affect the Region's position regarding the land status of the Buena Vista Rancheria and the Region's authority to issue the NPDES permit for the proposed project. In particular, it continues to be EPA's position that the Rancheria is an Indian reservation, and thus Indian country, for purposes of federal NPDES permitting authority. The Region notes that this position is entirely consistent with that of the United States as a whole

³ The Region notes that the CWA does not prohibit the commencement of construction of a facility prior to final issuance of an NPDES permit for discharges of wastewater from the constructed facility. *Natural Resources Defense Council, Inc. v. U.S. EPA*, 822 F.2d 104, 128 (D.C. Cir. 1987).

regarding the Rancheria's land status, as evidenced by the U.S. Department of Justice's filings in the *Amador County* case.

Respectfully submitted,



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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.



BRENDA WISE