Stand Up For California!
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www.standupca.org

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February 25, 2014

VIA OVERNIGHT DELIVERY

Amy Dutschke
Regional Director, Pacific Region
DEPARTMENT OF THE INTERIOR
2800 Cottage Way
Sacramento, California 95825

Re: ***Draft Conformity Determination Comments, North Fork Hotel/Casino Project***

Dear Ms. Dutschke:

Stand Up for California is a statewide organization with a focus on gambling issues affecting California, including tribal gaming. We have the following comments on the Draft Conformity Determination. Under 40 C.F.R. §93.154, BIA "must consider comments from any interested parties." Accordingly, we request that you consider these comments and include them in the administrative record for this matter.

1. The DCD uses outdated emission estimation techniques. The United States Environmental Protection Agency ("US EPA") regulations at 40 C.F.R. Part 93, Subpart B (§93.150 et seq.) require that the conformity analysis be based upon "the latest and most accurate emission estimation techniques available." 40 C.F.R. §93.159(b). For motor vehicle emissions, the most current version of the motor vehicle emissions model specified by the US EPA and available for use in preparation or revision of SIPs in that State must be used for the conformity analysis. 40 C.F.R. §93.159(b)(1). The most current version of the motor vehicle emissions model specified by the US EPA and available for use in preparation or revision of SIPs in California is EMFAC2011, which was approved by the US EPA in March, 2013. *See* 78 Fed. Reg. 14533 (March 6, 2013). The DCD is based upon an earlier version of EMFAC, EMFAC2007, which was approved by the US EPA on January 18, 2008. *See* 73 Fed. Reg. 3464.

2. The DCD fails to address emissions in all required years. Under the US EPA conformity regulations, the analyses must be based on the total of direct and indirect emissions from the action and must reflect emission scenarios that are expected to occur under each of the following cases: (1) The attainment year specified in the SIP, or if the SIP does not specify an

attainment year, the latest attainment year possible under the Act; or (2) The last year for which emissions are projected in the maintenance plan; (3) The year during which the total of direct and indirect emissions from the action is expected to be the greatest on an annual basis; *and* (4) Any year for which the applicable SIP specifies an emissions budget. 40 C.F.R. §93.159(d). The DCD fails to comply with this requirement. The DCD evaluates the project's operational emissions in only a single year – 2012 – demonstrating again that the analysis is outdated. [DCD Attachment 1 at p. 17] Moreover, the State's most recent SIP revisions for the federal 8-hour ozone standard specifies emissions budgets for 2011, 2014, 2017, 2020, and 2023. [Exh. 1 (*see* p. Appendix A-4)] Thus, the DCD fails to address emissions in all required years.

3. The emissions estimate is based upon unsupported trip generation assumptions. The URBEMIS output file indicates that BIA used a trip rate of 3.0 trips per room for the hotel portion of the project. The URBEMIS default trip rate for hotels is 8.71 trips per room, and no explanation is offered. [Exh. 2 (*see* p. 15)]

4. The emissions estimate is based upon unsupported trip length assumptions. At the time the Final Environmental Impact Statement ("FEIS") was prepared, Madera County was designated by the US EPA as a "serious" nonattainment area for ozone. [FEIS §4.4.2 at p. 4.4-14 (AR 30161)] The applicable thresholds for purposes of conformity determinations were 50 tons per year ("tpy") nitrogen oxides ("NOx") and 50 tpy reactive organic gases ("ROG"). [40 C.F.R. §93.153(b)(1); FEIS §4.4.2 at p. 4.4-14 (AR 30161)] The initial applicability analysis conducted under 40 C.F.R. §93.153(c) determined that project operation would generate 22.99 tpy of ROG and 46.6 tpy of NOx – conspicuously close to, but less than the 50 tpy threshold. [40 C.F.R. §93.153(b)(1); FEIS §4.4.2 at p. 4.4-14 (AR 30161)] On that basis, the FEIS concluded that the project was exempt from the conformity determination. [FEIS §4.4.2 at p. 4.4-14 (AR 30161)]

To arrive at the 46.6 tpy of NOx emissions, however, the emissions model assumed an average trip length of only 12.6 miles for workers and patrons. [FEIS Appdx S, p. 17 (AR 34299)] The FEIS states that this trip length "was estimated using data from the Madera County Transportation Commission (MCTC) traffic model." [FEIS §4.4.1, at p. 4.4-1 (AR 30148)] Neither the FEIS nor the DCD nor any other materials in the record explain what data are being relied upon, or how data from the MCTC traffic model could be used as a reliable basis for estimating trip length to a non-existent casino. Moreover, the 12.6 mile trip length assumption is at odds with the project description, which identifies the project as a "destination resort," which will increase visitors to the County, stimulate the local tourist industry, and cause an influx of non-resident consumers. [Record of Decision, September, 2011, p. 52 (AR 40656)] As the DCD notes, the project site is more than 20 miles from the County line at Fresno. Thus, the 12.6 mile trip length assumption is unsupported, and appears to have been reverse-engineered to ensure the project would not trigger conformity determination thresholds.

On May 5, 2010, the US EPA reclassified the San Joaquin Valley Air Basin as an "extreme" nonattainment area for the federal 8-hour ozone standard. As a result, the

applicable conformity thresholds for NOx and ROG were lowered from 50 tpy to 10 tpy. [DCD, p. 5] BIA appears to have abandoned its prior determination that the project is exempt from the conformity determination requirement. Nevertheless, BIA continued to rely upon an emissions estimate based upon the unsupported 12.6 mile trip length assumption. [DCD, Attachment 1 at p. 18]

As a result of its reliance on the unsupported 12.6 mile trip length assumption, BIA has significantly underestimated the project's air quality emissions, and failed to require the applicant to mitigate all impacts as required under 40 C.F.R. §§93.158(d) and 93.160.

5. The DCD fails to require sufficient emission offsets. BIA has chosen to require the applicant to purchase emission reduction credits ("ERCs") to demonstrate conformity. The DCD states that "[t]he proposed casino-resort complex would generate an estimated 42 tons of NOx and 21 tons of ROG. To mitigate these effects, the Tribe will purchase ERCs." [DCD at p. 7] Further, the DCD states that "enforceable ERCs will be purchased prior to the opening day of the casino-resort." [DCD at p. 7] These statements are incomplete and misleading in that the emissions model estimates the emissions in tons ***per year***. [DCD Attachment 1 at p. 2] To merely require the applicant to mitigate 42 tons of NOx and 21 tons of ROG on a one-time basis, as appears from the DCD, will leave subsequent years' emissions unmitigated. The US EPA's conformity regulations are clear that "[t]he emissions reductions from an offset or mitigation measure used to demonstrate conformity must occur during the same calendar year as the emission increases from the action. . . ." 40 C.F.R. §93.163(a). Only if the State approves emission reductions in years other than the year of emission may BIA allow it, and then by a ratio of 1.5:1 in extreme nonattainment areas such as the San Joaquin Valley Air Basin. 40 C.F.R. §93.163(b)(1)(i). The DCD does not indicate that BIA sought approval from the State for emission reductions in years other than the year of emissions.

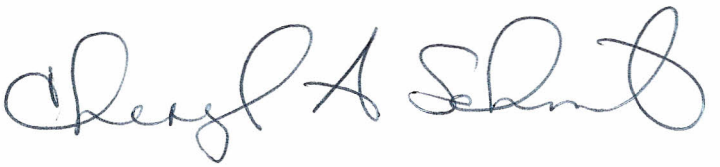
The US EPA regulations require that the mitigation be identified and the process for implementation and enforcement of such measures must be described, including an implementation schedule containing explicit timelines for implementation. 40 C.F.R. §93.160(a). Moreover, written commitments to mitigation measures must be obtained prior to a positive conformity determination, and such commitments must be fulfilled. 40 C.F.R. §93.160(f). The DCD makes no provision for any such process, schedule, or commitments. The applicant has adopted Resolution 11-26, but that resolution merely makes a vague and generic commitment to perform required mitigation. It provides no details as to what will be done, and when. [Exh. 3] Together, the DCD and the applicant's Resolution 11-26 fail to meet the US EPA's standards for demonstrating conformity.

6. Finally, the BIA's issuance of the Draft Conformity Determination does not comply with the procedures contained in the US EPA's regulations at 40 C.F.R. Part 93, Subpart B (§93.150 et seq.). The Notice of Availability ("NOA") issued by BIA's Pacific Regional Office, dated January 23, 2014, states that a copy of the Draft Conformity Determination is available at http://www.NorthForkEIS.com. The link on that website to "Draft Conformity Determination"

leads to an outdated Notice of Availability which states that comments must be received by June 6, ***2011***. [Exh. 4] Moreover, the link on that website to "Final Conformity Determination" reveals a copy of the Final General Conformity Determination for the North Fork Rancheria Casino/Hotel Resort Project." [Exh. 5] Thus, BIA is issuing the DCD after having already issued the Final Conformity Determination, contrary to the US EPA regulations, and contrary to its statement in the DCD – i.e., "The Final Conformity Determination on the proposed action will be issued no sooner than 30 days after the release of the DCD." To ensure compliance with the US EPA regulations, BIA must withdraw its prior Final Conformity Determination and the current DCD, prepare a current conformity analysis, issue a new DCD, and provide notice and opportunity to comment to the public under 40 C.F.R. §93.156(b), prior to adopting a Final Conformity Determination.

For all of these reasons, the BIA's efforts fail to comply with the Clean Air Act section 176 and the US EPA regulations.

Sincerely,



Cheryl A. Schmit, Executive Director
Stand Up For California