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VIA UNITED PARCEL SERVICE

Mr. Allen E. Lawson, Tribal Chairman
SAN PASQUAL BAND OF MISSION INDIANS
P.O. Box 365
Lake Wohlford Road, Valley Center, CA 92082

RE: Proposed Gaming Facility Construction Environmental Assessment
State Clearinghouse No. 2000071085

Dear Mr. Lawson:

This letter contains comments of the Attorney General of the State of California with respect to the San Pasqual Band of Mission Indians' Second Draft Environmental Assessment (the "Environmental Assessment") of its Proposed Gaming Facility Construction project (the "Project").

The Attorney General submits these comments pursuant to his independent authority to protect the public interest under the California Constitution, common law, and statutes. Along with other California agencies, the Attorney General has the power to protect the natural resources of the State from pollution, impairment, or destruction. (See Cal. Const., art. V, § 13; Cal. Gov. Code, §§ 12511, 12600-12; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14-15.) These comments are made on behalf of the Attorney General and not on behalf of any other California agency or office.

This letter focuses on some major concepts and concerns and is not an exhaustive discussion of all issues raised by the Environmental Assessment.

Comments

As a general matter, we are pleased that the San Pasqual Band of Mission Indians (the "Tribe") has conducted an environmental review of this Project. We believe this demonstrates that the Tribe intends to meet its responsibility under the Compact to comply with the policies and purposes of the National Environmental Policy Act (42 U.S.C. § 4321 et seq.) ("NEPA") and the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) ("CEQA"). (Compact, § 10.8.1.) The comments that are provided below are intended to assist the Tribe in meeting these obligations.

A. The Environmental Assessment Must Also Comply With CEQA

Under the Tribal-State Class III Gaming Compact (the "Compact") executed between the State of California (the "State") and the Tribe, the Tribe must make a good faith effort to incorporate the policies and purposes of both NEPA and CEQA in its Environmental Ordinance and, accordingly, in its environmental review. (Compact, § 10.8.1.) However, section C of the Environmental Assessment states only that the purpose of the document is to "satisfy the environmental review process of NEPA," and "recognizes" only a duty to comply with federal environmental statutory and regulatory requirements. (Environmental Assessment, p. 5.) The Environmental Assessment contains no recognition of CEQA obligations whatsoever. Consequently, it is at least implied that the Tribe is not considering its obligations under CEQA.

While NEPA and CEQA certainly have similar purposes, there are important distinctions between the statutes that bear consideration. In the context of this Environmental Assessment, perhaps the most significant difference, although not the only difference, is that CEQA places a relatively higher value on environmental protection as opposed to economic growth than does NEPA. This was expressed by the First District Court of Appeal in *San Francisco Ecology Center v. City and County of San Francisco* (1974) 48 Cal.App.3d 584, as follows:

> The needs of economic growth are expressly recognized in the congressional declaration of policy under the National Environmental Policy Act. The federal government is directed to "fulfill the social, economic, and other requirements of present and future generations of Americans" as well as environmental goals. . . . The federal government is required only to give "appropriate consideration" to environmental values . . . . The state statute, on the other hand, suggests that environmental protection is of paramount concern. A sense of urgency is conveyed in several provisions of the statute. . . . Public Resources Code section 21000, subdivision (d), requires the state to "take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated

> actions necessary to prevent such thresholds being reached." Subdivision (g) emphasizes that activities should be regulated "so that major consideration is given to preventing environmental damage." [] Section 21001, subdivision (d), declares that "the long-term protection of the environment shall be the guiding criterion in public decisions." The legislative history of the [CEQA] also supports the view that environmental values are to be assigned greater weight than the needs of economic growth. . . . The act thus requires decision-makers to assign greater priorities to environmental values than to economic needs.

(*San Francisco Ecology Center, supra*, 48 Cal.App.3d, 590-91.) The greater weight CEQA places on environmental concerns is most obviously manifest in CEQA's "substantive mandate" that public agencies refrain from approving projects that will cause significant environmental impacts if "there are feasible alternatives or mitigation measures" that would substantially lessen or avoid such adverse effects. (*Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 134.) In other words, "CEQA compels government first to identify the [significant] environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives." (*Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1233.) In contrast, NEPA is often characterized as merely a "procedural" statute, containing no substantive mandate. (See *eg. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* (1978) 435 U.S. 519, 558.) While a governmental agency must evaluate all reasonable alternatives and suggest appropriate mitigation measures, it has no duty to act on them; even if they are feasible. (40 C.F.R. § 1502.14; *Robertson v. Methow Valley Citizens Council* (1989) 490 U.S. 332, 350.) To the extent that this distinction between environmental review under NEPA and CEQA has not been incorporated in the Environmental Assessment, it does not satisfy the Tribe's obligations under the Compact.

Another difference between these two statutes that may be relevant to this review, is that CEQA is "more focused on physical changes than is NEPA." (Discussion following CEQA Guidelines, § 15358.) This distinction is reflected in each statute's regulatory framework. (*Compare* 40 C.F.R. § 1508.8 (defining "effects" under NEPA as "economic, social, or health" effects) with CEQA Guidelines, § 15378, subd. (a) (defining "project" under CEQA as an action having "a potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment . . .").) In enacting CEQA, the California Legislature avoided the use of the term "human environment" and defined "environment" as "the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, noise, objects of historical or aesthetic significance." Accordingly, to the extent that this Environmental Assessment has failed to give sufficient consideration to the physical impacts of the project due to its NEPA orientation, it does not satisfy the Tribe's obligations under the Compact.

B. The Environmental Assessment Must Encompass The Whole Project

We also believe that the Environmental Assessment is inadequate because it does not appear to consider the impacts of the entire project as a whole. First, only passing reference is made to the development plans including a 30,000 square foot "expansion area." (Environmental Assessment, p. 39.) However, the document contains no discussion of when such a build out is planned or what additional impacts it is anticipated to have on the environment.

Perhaps more significant, the project is described in Appendix B as an "Interim Casino," a description that is consistent with recent press reports of the Tribe's building plans. (See Chet Barfied, *Conference, study to look at surge of tribal casinos*, San Diego Union-Tribune, August 3, 2000 (stating San Pasqual's intention to open a "temporary casino[] while building [a] large resort"). The Environmental Assessment acknowledges that future plans include the development of a resort on a separate 500 acre parcel of the reservation that would include "an expanded gaming facility with a hotel, equestrian trails, and a possible golf course." (Environmental Assessment, p. 49.) It is contended that this aspect of the Tribe's building plans need not be included in this Environmental Assessment because it would involve "speculative or indefinite" impacts because its development is contingent upon the success of the interim facility. To the contrary, the description of these developments suggests a clear nexus between them and that they are actually more properly characterized as phases in a single development project. Under CEQA, a project must be viewed broadly in order to ensure that all reasonably foreseeable environmental impacts that may result are analyzed, and so the Environmental Assessment must encompass the whole project, including all project phases. (See *McQueen v. Board of Directors of the Midpeninsula Regional Open Space District* (1988) 202 Cal.App.3d 1136, 1143; *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376.)

The meaning of the Tribe's gaming development as a "Project" under the Compact must be interpreted with reference to its context within the Public and Workplace Health, Safety, and Liability provisions, which include a general prohibition against the conduct of class III gaming in a manner that "endangers the public health, safety, or welfare." (Compact, § 10.1.) As you are aware, section 10.8 of the Compact protects public health and safety by regulating "off-Reservation environmental impacts" of tribal gaming activities. Significantly, section 10.8 requires the Tribe to adopt an environmental protection ordinance that will govern the Tribe's consideration of off-Reservation environmental impacts caused by "any and all *Projects* commenced on or after the effective date of th[e] Compact." (Compact, § 10.8.1, emphasis added.) The term "Project" is a lynchpin upon which turns the Tribe's environmental compliance obligations under the Compact.

The term "Project" is also a significant term of art under CEQA, the policies and purposes of which the Tribe must make a good faith effort to incorporate in the ordinance. (Compact, section 10.8.1.) Under CEQA, a proposed activity is deemed to be a "project" subject to CEQA regulation only if, taken as a whole, the activity has a "potential for resulting in a direct physical change in the environment[1] *or a reasonably foreseeable indirect physical change in the environment*." (Pub. Resources Code § 21065; 14 Cal. Code Regs. § 15378 subd. (a), emphasis added.) CEQA requires that when examining an activity to determine whether it could affect the environment, the whole activity must be considered, including its potential cumulative impacts. (See *Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ.* (1982) 32 Cal.3d 779, 795; 14 Cal. Code Regs. § 15378 subds.(a), (c)-(d).)

In general, the lead agency must fully analyze each "project" in a single environmental review document. This is an approach that is designed to ensure "that environmental considerations do not become submerged by chopping a large project into many little ones, each with a potential impact, which cumulatively may have disastrous consequences." (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 223 Cal.App.3d 577, 592.) It may, however, be appropriate to adopt a tiering approach to review of this project. (See *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1143.) Here, the Environmental Assessment does not address any aspect of the Tribe's gaming facility project beyond the interim facility. By taking this piecemeal approach to the environmental review process, significant environmental impacts may not be detected. Accordingly, the Environmental Assessment should be revised to include consideration of the project as a whole, from the establishment of the interim casino facility, through completion of the last phase of the Tribe's planned resort. This will require reevaluating all potential environmental impacts of the project.

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[1] The term "environment" is defined in California Administrative Code, title 14 , section 15360, as "the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance."

C. The Environmental Assessment Must Include Evidentiary Support

A significant concern is that the Environmental Assessment lacks evidentiary support for its numerous findings that the project will have no significant adverse effect on the environment. In *Leonoff v. Monterey County Board of Supervisors* (1990) 222 Cal.App.3d 1337, the court outlined some general principles governing the preparation of an initial study,[2] as follows:

> No general formula can be stated for measuring the adequacy of an initial study. Initial studies that call for further studies and EIRs may not need to be as thorough as those that contemplate no further studies and negative declarations. An initial study leading to a negative declaration should provide the basis for concluding that the project will not have a significant effect on the environment. "Without a properly prepared initial study, the record may prove inadequate to permit judicial review of the agency decision." [Citation.] However, where the agency decision is based on more information than the initial study, the additional information may cure any defects in the initial study. (*Ibid.*) "The decision making [sic] body shall approve the negative declaration if it finds on the basis of the initial study and any comments received that there is no substantial evidence that the project will have a significant effect on the environment." [Citation.]

In order to provide an adequate record of the Tribe's decision making, the Environmental Assessment must include a reasonable evidentiary basis for "no adverse effect" findings. The areas where evidentiary support is particularly necessary are outlined below.

1. *Transportation Networks*

The Environmental Assessment acknowledges that the project will have a major impact on transportation networks in the vicinity. (Environmental Assessment, pp. 34-36, 43-44.) However little substantive analysis is provided to explain the nature or extent of such adverse effects, other than the conclusion that there will be a "35 percent increase to current level of service flows" on Wohlford Road. What this means in a practical sense is nowhere described. Nor is there any explanation regarding the extent to which the proposed mitigation measures will address the acknowledged adverse impacts. Accordingly, additional documentation is required. (CEQA Guidelines, § 15-63, subd. (d)(3).)

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[2] An "initial study" under CEQA (CEQA Guidelines, §§ 15063, 15365) serves the same purposes as an "environmental assessment" under NEPA (40 C.F.R. §§ 1501.3, 1508.9). In other words, the initial study is a preliminary analysis "[p]rovid[ing] documentation of the factual basis" for determining whether to prepare a negative declaration or an environmental impact report. (CEQA Guidelines, § 15063.)

2. *Cumulative Effects*

The Environmental Assessment gives little consideration to the cumulative off-Reservation impacts that the proposed class III gaming facility at this location might have. Although reference is made to the likelihood of "future growth" induced by the project, which might bring with it additional impacts on "traffic flow, changes in water drainage patterns, [and] impacts on municipal services" among other detrimental impacts, the Environmental Assessment contains no substantive analysis of the extent to which such cumulative effects are anticipated. (Environmental Assessment, pp. 47-49.) For example, comparison could be made to other existing class III gaming facilities in San Diego County to determine whether and to what extent restaurants, gas stations, hotels, convenience stores and other ancillary commercial developments might occur to serve casino patrons. Such cumulative effects must be considered. (*See Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 575.)

Taking into account cumulative effects will likely lead to a "mandatory finding of significance" under CEQA as a project that might cause a "cumulatively considerable" environmental effect. (CEQA Guidelines, § 15065, subd. (c); see *also* Pub. Resources Code, § 21083.) Under the CEQA Guidelines, the term "cumulatively considerable" means "that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." (CEQA Guidelines, § 15065, subd. (c).) Viewed under this rubric, the environmental review of the Tribe's casino building project should include consideration of the effects caused by construction of the interim facility, the proposed resort, and ancillary off-reservation developments. Under these circumstances, it is likely that a finding of "significant impact on the environment" must be issued and the preparation of a full Environmental Impact Report must be required. (See *Environmental Council of Sacramento v. Superior Court* (1982) 135 Cal.App.3d 428, 438.)

3. *Air Quality*

Air quality has been addressed. (Environmental Assessment, pp. 26-28, 41-42.) However, the Environmental Assessment fails to mention that the San Diego Air Basin is a carbon monoxide (CO) "maintenance area" under section 107(d) of the Clean Air Act (42 U.S.C. § 7407(d)). The Environmental Assessment acknowledges that it no study has yet been conducted to establish whether the project will result in emissions that would violate air quality standards or make a substantial contribution to existing or projected air quality violations. Nor does the Environmental Assessment include any discussion of potential impacts due to construction activities, such as fugitive dust emissions. These issues must be addressed with evidentiary support. (CEQA Guidelines, § 15063, subd. (d)(3).)

Conclusion

Thank you for this opportunity to review the Environmental Assessment. We hope that the comments contained in this correspondence are helpful, and we look forward to reviewing a Third Draft Environmental Assessment which addresses our concerns and those of other commenting parties. Should you have any questions or concerns regarding the above, please do not hesitate to contact me at your convenience.

Sincerely,

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For BILL LOCKYER
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