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November 14, 2000

Cheryl Schmidt, Co-Director
STAND UP FOR CALIFORNIA
P. O. Box 355
Penryn, CA 95663

RE: **Tribal Casino EA Comments**

Dear Cheryl:

Pursuant to your request please find enclosed the Attorney General's comments regarding the following tribal casino construction projects:

1. Augustine Band of Cahuilla Mission Indians;
2. Rincon San Luiseño Band of Mission Indians;
3. San Manuel Band of Mission Indians;
4. Tuolumne Band of Me-Wuk Indians:
5. United Auburn Rancheria; and
6. San Pasqual Band of Mission Indians

If you should have any questions regarding the above, please do not hesitate to contact me.

Sincerely,

MARC A. LE FORESTIER
Deputy Attorney General

For BILL LOCKYER
Attorney General

Encl:

BILL LOCKYER
Attorney General

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DEPARTMENT OF JUSTICE

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October 30, 2000

VIA FACSIMILE & U.S. MAIL

Karen Kupcha, Tribal Administrator
Augustine Band of Cahuilla Mission Indians
84481 Avenue 54
Coachella, CA 92286

RE: **Draft Environmental Evaluation for the Eagle Flower Garden Resort & Casino**
State Clearinghouse No. 2000101071

Dear Ms. Kupcha:

This letter contains the comments of the Attorney General of the State of California regarding the Augustine Band of Cahuilla Mission Indians' Draft Environmental Evaluation for the Eagle Flower Garden Resort and Casino (the "Draft Evaluation").[1]

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 Draft Evaluation.

[1] In preparing these comments, we have assumed that the Draft Evaluation is intended by the Tribe to serve the same purposes as an "initial study" under the California Environmental Quality Act ("CEQA") (CEQA Guidelines, §§ 15063, 15365) or an "environmental assessment" under the National Environmental Policy Act ("NEPA") (40 C.F.R. §§ 1501.3, 1508.9). In other words, the Draft Evaluation is a preliminary analysis that, under CEQA, would "[p]rovide documentation of the factual basis" for determining whether to prepare a negative declaration or an environmental impact report. (CEQA Guidelines, § 15063.)

Comments

As the Draft Evaluation acknowledges, the Augustine Band of Cahuilla Mission Indians (the "Tribe") has agreed to conduct an environmental review of its proposed casino development (the "Project")[2] under the provisions of its Tribal-State class III gaming compact with the State (the "Compact") in a manner consistent with the policies and purposes of both the National Environmental Policy Act (42 U.S.C. § 4321 et seq.; 40 C.F.R. §§ 1500-1508) ("NEPA") and the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) ("CEQA") consistent with the Tribe's governmental interests. (Draft Evaluation, § 1.1.) These comments are intended to assist the Tribe with meeting this commitment in the context of the Draft Evaluation and the Tribe's building plans.

A. The Draft Evaluation must encompass the whole Project

We believe the Draft Evaluation is inadequate because it is limited to consideration of the proposed temporary casino, and does not consider the impacts of the permanent facility that is planned to replace it. (Draft Evaluation, § 3.0.) Under CEQA, a project must be viewed broadly in order to ensure that all reasonably foreseeable environmental impacts that may result are analyzed. Generally, a document such as the Draft Evaluation must encompass the whole project, including planned, future building projects. (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.) There is no stated rationale for excluding consideration of the permanent facility in the Draft Evaluation.

The meaning and significance of the Tribe's "temporary casino project" 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 linchpin upon which turns the Tribe's environmental compliance obligations under the Compact.

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[2] The proposed Project is described in the Draft Evaluation as consisting of two development phases. Phase I will include a "temporary casino project" consisting of a 50,000 square foot one-story building that will house 700 slot machines, 31 gaming tables, a kitchen, a 125-seat restaurant, a 250-seat cabaret, a 50-seat sports book area, 2 bars, administration offices, a gift shop, and security and information areas. (Draft Evaluation, § 3.0.) Although this correspondence is intended to address the environmental issues presented by the Project, we would be remiss if we failed to mention that sports wagering is illegal under federal law. (See 28 U.S.C. § 3701 et seq.)

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, § 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[3] *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 Highschool 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 be appropriate under some circumstances to adopt a tiering approach to review of a project. (*Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1143.) Here, the Draft Evaluation does not address any aspect of the Tribe's building plans beyond the construction and operation of the temporary casino. By taking this piecemeal approach to the environmental review process, significant environmental impacts may not be detected. Accordingly, the Draft Evaluation should be revised or retracted after consideration of the project as a whole, through completion of the last phase of the Tribe's permanent gaming facility. This will require reevaluating all potential environmental impacts of the project.

Consideration of the temporary casino in isolation from the rest of the project would also violate the National Environmental Protection Act. Under NEPA, segmentation of a project to avoid consideration of cumulative environmental effects is improper. (*Thomas v. Peterson* (9th Cir. 1985) 753 F.2d 754, 760.) While it is true that administrative agencies must be given considerable discretion in defining the scope of environmental documents, there are situations in which an agency is required to consider several related actions in a single environmental impact statement. (See *Kleppe v. Sierra Club* (1976) 427 U.S. 390, 409-10, 412-15.) Otherwise, a single project could be divided into multiple "actions," each of which may have an insignificant environmental impact, but which collectively may have a substantial impact. (See *Alpine Lakes Protection Society v. Schlapfer* (9th Cir. 1975) 518 F.2d 1089, 1090.) Since the Supreme Court's *Kleppe* decision, the President's Council on Environmental Quality ("CEQ") has issued federal

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[3] 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."

regulations that define the circumstances under which multiple related actions must be covered by a single environmental document.[4] "Connected actions" are defined as follows:

> (1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:
>
> (i) Automatically trigger other actions which may require environmental impact statements.
>
> (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
>
> (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(40 C.F.R. § 1508.25, subd. (a).) The Tribe's casino construction plans appear to implicate all three prongs of this CEQ regulation. (Draft Evaluation, §§ 1.0, and 3.0.)

In conclusion, under either NEPA or CEQA, the Draft Evaluation is inadequate, and must be withdrawn until such time as the environmental impacts of the entire project have been considered.

B. The Draft Evaluation lacks evidentiary support for many conclusions

As we have mentioned above, an "initial study" under CEQA (CEQA Guidelines, §§ 15063, 15365) or an "environmental assessment" under NEPA (40 C.F.R. §§ 1501.3, 1508.9) generally involves "documentation of the factual basis" for the conclusions contained in the environmental document (CEQA Guidelines, § 15063). The Draft Evaluation lacks any substantial evidentiary support for its conclusions that there will be no significant environmental impact on biological resources, land use and planning, traffic and circulation, or that projected significant impacts of air quality, hydrology and water quality, and public services will be mitigated. 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, 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 Draft Evaluations. An initial study leading to a negative Draft Evaluation should provide the basis for concluding that the project will not have a significant effect on the environment.

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[4] These regulations are made binding on federal administrative agencies by Executive Order. See Exec. Order No. 11991, 3 C.F.R., 1977 Comp. 123 (1978); *Andrus v. Sierra Club* (1979) 442 U.S. 347, 357-58.

> Without a properly prepared initial study, the record may prove inadequate to permit judicial review of the agency decision.

(*Id.* at 1347-48.)

1. *Biological Resources*: The Draft Evaluation contains no discussion of the potential for impacts on biological resources. Because Coachella is home to listed plant and wildlife species, a biological survey must be conducted in order to consider whether the Project might cause significant off-reservation impacts on biological resources.

2. *Traffic and Circulation*: At least two potential traffic impacts of the Project are not discussed in the Draft Evaluation. First, there is no discussion of the impact increased traffic volumes will have on the condition of roads in the cities of Coachella, Indio, and La Quinta, and the County of Riverside, which have never before borne traffic volumes of this magnitude. (Draft Evaluation, § 4.5.) In addition, the Draft Evaluation indicates that approximately 56 percent of the Tribe's casino patrons will arrive at the casino after passing over one of seven nearby level railway crossings. (Draft Evaluation, § 4.5, Figure 5.) Adding thousands of additional trips over the railway lines will increase the risk of automobile and train accidents. This risk is also likely to be elevated by virtue of the fact that alcohol will be offered at the casino. (Draft Evaluation, § 4.4.) However, no discussion on these potential impacts is included in the Draft Evaluation and, accordingly, no mitigation is offered.

3. *Air Quality*: The Draft Evaluation contains no reference to air quality monitoring, which would be useful in assessing the likely impacts of the Project on air quality in its vicinity. Additionally, while the Draft Evaluation recognizes that mitigation measures are likely necessary to avoid significant impacts on air quality, there is no evidence or explanation to support the conclusion that the suggested mitigation measures will be effective, or if so, to what extent.[5] (Draft Evaluation, §§ 4.1, 5.0). Without this information, there is little basis for meaningful public comment.

4. *Hydrology & Water Quality*: A critical concern is the proposed use of a septic tank and leach field to treat waste water for a Project of this magnitude.[6] No evidence or substantive discussion is provided to support the notion that this method of wastewater treatment will not cause significant impacts. For example, two key factors in determining whether a septic system will be effective and unlikely to fail – the percolation rate of the soil underlying the septic

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[5] In particular, further discussion of bus charter promotion, staggered work scheduling and car pool encouragement should be included to provide insight into what these proposals mean, and how effective they are likely to be.

[6] The Draft Evaluation indicates that the proposal is for a "temporary septic tank and leach field" and provides no indication of how waste water will be treated once the permanent facility is in operation. (Draft Evaluation, § 4.2.)

field and the maximum discharge rate of the proposed casino -- are not discussed. The Draft Evaluation should be revised to address these issues.

5. *Public Services*: The Draft Evaluation contains no reference to consultation with local agencies or any other form of study regarding the potential for significant impacts on policing and law enforcement, fire protection, or emergency services. We view this lack of substantive evaluation as particularly inappropriate given the proximity of at least ten level railway crossings over which 56 percent of the casino's patrons will travel to and from the Project site. (Draft Evaluation, § 2.0, Figure 2.)

C. Other Concerns

1. *Cumulative Impacts*: The Draft Evaluation gives no consideration to the potential for cumulative off-Reservation impacts that the Project might have. 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).) Here, the Project may be growth inducing in the sense that others may propose developments to serve the thousands of casino patrons the Tribe anticipates at the facility (Draft Evaluation, §§ 4.1, 4.5), such as restaurants, hotels, stores, or gas stations. It is possible, perhaps even likely, that in the aggregate such cumulative impacts would be positive. However, without analysis, there is no basis for an understanding of the potential for such impacts, or for related public comment. Accordingly, express consideration must be given to whether the Project might cause off-Reservation development, with cumulative impacts on, among other things, air quality, water quality, traffic, aesthetics, listed species, or employment. (See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 575.)

2. *Water and Energy Conservation*: The Draft Evaluation includes no discussion of water or energy conservation measures that the Tribe may intend to undertake. Water and energy conservation should be an important component of the facility's operations and should be addressed in subsequent documentation.

3. *The Tribe's Environmental Ordinance*: Attached as Appendix A to the Draft Evaluation is a copy of Title IV of the Tribe's Code of Laws, the Tribe's Environmental Ordinance (the "Ordinance"). As the Draft Evaluation recognizes, the Tribe has agreed to adopt an environmental ordinance in which the Tribe has made a good faith effort to incorporate the policies and purposes of both NEPA and CEQA. (Draft Evaluation, § 1.1.) However, language included in the in the Draft Evaluation and the Ordinance is of concern. First, the contention that "[t]he Compact does not require that the Tribe adhere to the procedural requirements of either NEPA or CEQA" is puzzling to us. Although there is no requirement that the Tribe's procedure be identical to the procedures followed under either statute, Compact section 10.8.1 requires a good faith effort to incorporate the policies and purposes of both Acts. NEPA has been labeled by the Supreme Court as "essentially procedural." (See *Vermont Yankee Nuclear Power Corp. v.*

Natural Resources Defense Council (1978) 435 U.S. 519, 558.) Accordingly, the assertion that the Tribe has not agreed to any "procedural requirements," if true, would render the Compact's environmental protection provisions virtually meaningless.

Section 702, subdivision (a) of the Ordinance provides only that feasible mitigation measures will be considered, rather than implemented. A fundamental CEQA policy is commonly referred to as its "substantive mandate," which requires public agencies to refrain from approving projects with significant environmental impacts unless "feasible alternatives or mitigation measures" can substantially lessen or avoid those effects. (See *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 134.) To the extent that the Ordinance's reference to consideration is understood to include this obligation, we agree that consideration of feasible alternatives meets the test of good faith. Any suggestion that mitigation will *only* be considered, rather than implemented would, however, be inconsistent with the Tribe's promise to adopt an environmental ordinance that incorporates the policies and purposes of CEQA.

Finally, the Draft Evaluation suggests that the Compact language "consistent with the Tribe's governmental interests" limits the Tribe's obligation to incorporate the policies and purposes of NEPA and CEQA. This is not our understanding of this phrase, which was intended to underscore that incorporating the policies and purposes of NEPA and CEQA is consistent with the Tribe's governmental interests.

4. *Public Comment Periods*: Perhaps no policy or principle is more firmly entrenched in CEQA than a public agency's responsibility to allow meaningful public comment. According to the CEQA Guidelines, "[p]ublic participation is an essential part of the CEQA process. Each public agency should include provisions in its CEQA procedures for wide public involvement, formal and informal, consistent with its existing activities and procedures, in order to receive and evaluate public reactions to environmental issues related to the agency's activities." (CEQA Guidelines, §§ 15201, 15202, subd. (j).) The importance of meaningful comment is difficult to overstate. "Public review provides the dual purpose of bolstering the public's confidence in the agency's decision and providing the agency with information from a variety of experts and sources." (*Schoen v. California Dept. of Forestry and Fire Protection* (1997) 58 Cal.App.4th 556, 574.) Unfortunately, it is likely that the short time frames the Tribe has provided for participation in its public hearing (one week), and for commenting on the Draft Evaluation (two weeks) do not provide sufficient time to allow all interested parties an opportunity to provide meaningful input. Furthermore, that the Draft Evaluation was not available for review prior to the public meeting held on October 13, 2000, also reduced the public's opportunity for meaningful participation.

Conclusion

Thank you for this opportunity to review the Draft Evaluation. We hope that the comments contained in this correspondence are helpful to your development efforts, and to efforts to meet your commitments under the Compact. We look forward to reviewing a second Draft Evaluation or another appropriate environmental document that addresses the concerns stated here and by other comment providers. Should you have any questions or concerns regarding the above, please do not hesitate to contact me at your convenience.

Sincerely,

MARC A. LE FORESTIER
Deputy Attorney General

For BILL LOCKYER
Attorney General

cc. Scott Morgan
State Clearinghouse

Christine Nagel
National Indian Gaming Commission

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July 21, 2000

William Graham
KEA Environmental, Inc.
1420 Kettner Boulevard, Suite 620
San Diego, CA 92101-2434

RE: **Rincon Casino Interim Facility: Draft Environmental Evaluation**
State Clearinghouse No. 2000061097

Dear Mr. Graham:

This letter contains the comments of the Attorney General of the State of California regarding the Rincon San Luiseño Band of Mission Indians' Draft Environmental Evaluation (the "Draft Evaluation").[1]

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.3d1, 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 Draft Evaluation.

[1] In preparing these comments, we have assumed that the Draft Evaluation is intended by the Tribe to serve the same purposes as an "initial study" under CEQA (CEQA Guidelines, §§ 15063, 15365) or an "environmental assessment" under NEPA (40 C.F.R. §§ 1501.3, 1508.9). In other words, the Draft Evaluation 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.)

Comments

As a general matter, we are pleased that the Tribe has conducted an environmental assessment of its Casino building 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 Evaluation Must Encompass The Whole Project

We believe the evaluation is inadequate because it is limited to consideration of the Rincon Casino Interim Facility (the "Interim Facility") which is defined in the Draft Evaluation as "the first phase in the development of a permanent Class III Gaming Facility . . . on approximately 40 acres of tribal trust land." (Draft Evaluation, p. 3.) 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 Draft Evaluation must encompass the whole project, including future expansion or improvements.. (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, section 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, section 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[2] *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 be appropriate to adopt a tiering approach to review of this project. (*Chaparral Greens v. City of Chula Vista*H (1996) 50 Cal.App.4th 1134, 1143.) Here, the Draft Evaluation 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 Draft Evaluation should be revised to include consideration of the project as a whole, through completion of the last phase of the Class III Gaming Facility (the "Permanent Facility"). This will require reevaluating all potential environmental impacts of the project.

B. Potential Impacts on the San Luis Rey River

The proposed Interim Facility is, according to the Draft Evaluation, "located on predominately flat land adjacent to, and within the floodplain of the San Luis Rey River." (Draft Evaluation, p.3.) The Permanent Facility will also, apparently, be located adjacent to, and within the San Luis Rey River floodplain; the Draft Evaluation states that the Interim Facility will eventually be demolished and "the area amalgamated into the Permanent Facility parking lot. (Draft Evaluation, p. 7.) Accordingly, the project as a whole would appear to have potential impacts upon the San Luis Rey River. However, there is no discussion whatsoever regarding this issue in the Draft Evaluation.

Potential impacts on the river could include water contamination related to construction near the river, hydrology changes, and increases in the levels of erosion and sedimentation downstream from the site. Once construction is complete and the casino is operational, the Tribe may have to

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[2] 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."

collect and treat deposited pollutants from non-point sources, like parked automobiles, and prevent them from entering the river. These potential impacts must be addressed with evidentiary support. (CEQA Guidelines, § 15063, subd. (d)(3).)

C. Cumulative Effects

The Draft Evaluation does not give any consideration to the cumulative off-Reservation impacts that the proposed class III gaming facility at this location might have. Although there are already housing developments on the north and south side of the Tribe's land, consideration must also be given to whether the facility might cause other, off-Reservation development, with cumulative impacts on, among other things, air quality, water quality, traffic, aesthetics, and listed species. (*See Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 cal.3d 553, 575.) For example, the casino may be growth inducing in the sense that others may propose projects to serve casino patrons. Restaurants, gas stations, hotels, and convenience stores would all be likely to appear in the wake of a class III gaming facility.

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 effects of the Tribe's casino building project should include consideration of the impact caused by construction of the Bingo Hall in 1984 and of the Permanent Facility that the Tribe intends to construct. Under these circumstances, it is likely that the Tribe *must* issue a finding of "significant impact on the environment" and require the preparation of a full Environmental Impact Report. (*See Environmental Council of Sacramento v. Superior Court* (1982) 135 Cal.App.3d 428, 438.)

D. Air Quality

Air quality has been addressed. However, several crucial issues related to the project's impact on air quality are not discussed. The Draft Evaluation must discuss the following and include or reference the evidentiary support for any "no adverse effect" conclusions it makes. (CEQA Guidelines, § 15063, subd. (d)(3).)

1. *Existing Conditions*: The Draft Evaluation 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).

2. *Other/Cumulative Impacts*: Carbon monoxide is a major component of automobile exhaust. This is potentially significant because the Draft Evaluation indicates that the site, though disturbed, has not been in use as a bingo hall since 1985 (Draft Evaluation, p. 3), and that the existing 358 space parking lot will be expanded to approximately 1,000 spaces to accommodate the casino's guests. (Draft Evaluation, p. 7.) Obviously, there will be a significant increase in the number of automobiles in the project's vicinity. This should be evaluated in the larger context of the air basin, with reference to whether the casino will cause a net increase in the number trips in the locality as a whole. (*See Leonoff v. Monteray County Board of Supervisors* (1990) 222 Cal.App.3d 1337, 1353 (stating that air quality, like traffic, is more of an area wide concern that a site specific one).) The evaluation concedes that CO emissions will result in CO "hot spots" that will exceed acceptable levels. (Draft Evaluation, p. 24-25.) The Draft Evaluation should include a screening level analysis of the potential impacts of these hot spots.

The Draft Evaluation acknowledges that the San Diego County Air Pollution Control District's Air Quality Standards (RAQS) are designed to mitigate air quality impacts regionally. However, the Draft Evaluation includes no consideration of whether the RAQS were based on predictions by the San Diego Association of Governments that included this gaming facility. The Draft Evaluation must consider how the project might impact the RAQS.

The Draft Evaluation's air quality analysis does not 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. The evaluation must also include discussion of potential impacts due to construction activities, such as fugitive dust emissions, and include evidentiary support. (CEQA Guidelines, § 15063, subd. (d)(3).)

E. Water Supply, Water Quality and Sewage

1. *Water Use/Supply*: The Draft Evaluation contains no substantive discussion related to the project's projected water use or the available water supply. The Draft Evaluation states only that "[t]he proposed Rincon Casino Interim Facility will cause no adverse effects to groundwater supplies." (Draft Evaluation, Exhibit B, p. 6.) However, there is no discussion regarding how this conclusion was reached. Accordingly, we are unable to identify the assumptions that were used to reach the conclusion that the project would have no adverse effect. The Draft Evaluation must identify and explain the assumptions the Tribe has made and provide for its "no adverse effect" finding. (CEQA Guidelines, § 15063, subd. (d)(3).)

2. *Water Quality & Sewage*: As has been mentioned above, the Draft Evaluation does not adequately address the impacts the project may have upon the San Luis Rey River. Furthermore, no substantive discussion is provided regarding the quantity of waste water effluent that the facility is anticipated to produce, what the anticipated capacity of the upgraded septic field will be, or whether the septic field placed in close proximity to the San Luis Rey Rive presents a water quality problem. (Draft Evaluation, Exhibit B, p. 10.) It would appear that a septic system would be inadequate for a facility of the size proposed. We would be interested in any the Tribe's plans to implement a more sophisticated waste water treatment facility. Additionally, the Draft Evaluation must include evidentiary support for any "no adverse effect" conclusion its reaches on these issues. (CEQA Guidelines, § 15063, subd. (d)(3).)

F. Solid Waste

The Draft Evaluation contains no discussion regarding the amount of solid waste that the facility is anticipated to produce or the capacity of the Sycamore Canyon Landfill to accommodate the facility's waste over either the short or long term. (Draft Evaluation, Exhibit B, p. 10.) This issue must be addressed with evidentiary support. (CEQA Guidelines, § 15063, subd. (d)(3).)

G. Biological Resources

The Draft Evaluation anticipates "[n]o off-Reservation habitat modifications or impacts" as a result of the Interim Facility. (Draft Evaluation, Exhibit B, p. 3.) However, there is no indication that a biological survey has been conducted to support this conclusion. According to the California Natural Diversity Database (the "CNDDB")[3] maintained by the California Department of Fish and Game, San Diego County is home to scores of plant and animal species that are listed by the Federal Environmental Protection Agency and/or the California Department of Fish and Game as threatened, endangered, or as species of concern. The Draft Evaluation must provide support for the conclusion that the project will not adversely impact listed species. (CEQA Guidelines, § 15063, subd. (d)(3).)

H. Lack of Evidentiary Support

A significant theme in these comments, and those of the County of San Diego's Department of Planning and Land Use, which has been reviewed by this office, is that the Draft Evaluation lacks

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[3] The CNDDB may be accessed on the Internet at the following Uniform Resource Locator (URL): http://www.dfg.ca.gov/whdab/cnddb.htm. Enclosed for your information is the CNDDB for San Diego County, revised April 6, 1999.

evidentiary support for the numerous findings of "no adverse effect" contained within it. 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, as follows:

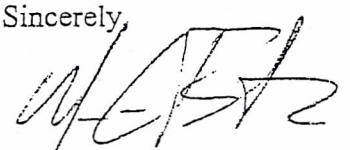
> No general formula can be stated for measuring the adequacy of an initial study. Initial studies that call for further studies and EIRs may not need to be as thorough as those that contemplate no further studies and negative declarations. An initial study leading to a negative declaration should provide 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 decisionmaking [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 Draft Evaluation must include evidentiary support for its "no adverse effect" findings.

Conclusion

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

Sincerely,



MARC A. LE FORESTIER
Deputy Attorney General

For BILL LOCKYER
Attorney General

Encl.

cc. Christine Nagel
National Indian Gaming Commission

Dawn Dickman
County of San Diego Department of Planning and Land Use

BILL LOCKYER
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September 20, 2000

VIA FACSIMILE AND U.S. MAIL

Chairperson Deron Marquez
San Manuel Band of Mission Indians
1482 East Enterprise Drive
Building 466
San Bernardino, CA 92408-0161

RE: **San Manuel Band of Mission Indians' Casino Expansion**
Draft Mitigated Negative Declaration
State Clearinghouse No. 2000091019

Dear Chairperson Marquez:

This letter contains the comments of the Attorney General of the State of California regarding the Draft Mitigated Negative Declaration (the "Declaration") for the proposed casino expansion project (the "Project") about which the San Manuel Band of Mission Indians (the "Tribe") has issued a Notice of Intent to Adopt.

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 Declaration.[1]

[1] In preparing these comments, we have assumed that the Declaration is intended by the Tribe to serve the same general purposes as a "mitigated negative declaration" under CEQA (Pub. Resources Code, § 21064.5).

Comments

As you are aware, the Tribe has agreed to conduct an environmental review of this Project under the provisions of its Tribal-State class III gaming compact with the State (the "Compact"). Under the Compact, the Tribe has committed to conducting an environmental review in a manner consistent with the policies and purposes of both the National Environmental Policy Act (42 U.S.C. § 4321 et seq.; 40 C.F.R. §§ 1500-1508) ("NEPA") and the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) ("CEQA"). (Compact, § 10.8.1.) These comments are intended to provide the Tribe with our understanding of what these commitments mean in the context of the Declaration and the Tribe's casino expansion plans.

A. The Declaration Should Encompass The Whole Project

We believe the Declaration is inadequate because it is limited to consideration of an "interim expansion," without any consideration of the permanent expansion that impliedly will follow. (Declaration, section II.) Under CEQA, a project must be viewed broadly in order to ensure that all reasonably foreseeable environmental impacts that may result are analyzed. The Declaration should encompass the whole project, including future building projects that are currently anticipated. (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 significance of the Tribe's casino expansion activities must be understood with reference to the term "Project" under the Compact's 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 therefore a linchpin upon which turns the Tribe's environmental compliance obligations under the Compact.

The term "project" is also a significant term of art under CEQA, which provides that 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[2] *or a reasonably foreseeable indirect physical change in the environment.*" (Pub. Resources

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[2] 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."

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 be appropriate under some circumstances to adopt a tiering approach to review of a project. (*Chaparral Greens* v. *City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1143.) Here, the Declaration does not address any aspect of the Tribe's permanent expansion plans. By taking this piecemeal approach to the environmental review process, significant environmental impacts may not be detected. Accordingly, the Declaration should be revised or retracted after consideration of the project as a whole, through expected completion of the last phase of the Tribe's class III gaming facility expansion. This will require reevaluating all potential environmental impacts of the project.

Consideration of the "interim expansion" project in isolation from the rest of the Tribe's expansion plans would also be inconsistent with the policies and purposes of the National Environmental Protection Act. Under NEPA, segmentation of a project to avoid consideration of cumulative environmental effects is improper. (*Thomas* v. *Peterson* (9th Cir. 1985) 753 F.2d 754, 760.) While it is true that administrative agencies are generally given considerable discretion in defining the scope of environmental documents, under circumstances such as those presented here, an agency is required to consider several related actions in a single environmental impact statement. (See *Kleppe* v. *Sierra Club* (1976) 427 U.S. 390, 409-10, 412-15.) Otherwise, a single project could be divided into multiple "actions," each of which may have an insignificant environmental impact, but which collectively may have a substantial impact. (See *Alpine Lakes Protection Society* v. *Schlapfer* (9th Cir. 1975) 518 F.2d 1089, 1090.) Since the Supreme Court's *Kleppe* decision, the President's Council on Environmental Quality ("CEQ") has issued federal regulations that define the circumstances under which multiple related actions must be covered by a single environmental document.[3] "Connected actions" are defined as follows:

> (1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:
>
> (i) Automatically trigger other actions which may require environmental impact statements.

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[3] These regulations are made binding on federal administrative agencies by Executive Order. (See Exec. Order No. 11991, 3 C.F.R., 1977 Comp. 123 (1978); *Andrus* v. *Sierra Club* (1979) 442 U.S. 347, 357-58.)

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(40 C.F.R. § 1508.25, subd. (a).) The interim expansion project, *by definition*, implies further expansion activities and thus appears to implicate all three prongs of this CEQ regulation. (Declaration, section II.) In conclusion, under either NEPA or CEQA, the Declaration is inadequate, and should be withdrawn until such time as the environmental impacts of the entire project have been considered.

B. The Declaration is not accompanied by an adequate initial study and is lacking in evidentiary support for its conclusions

The Declaration does not include an adequate initial study of even the interim expansion.[4] Under CEQA, the initial study must be circulated for public review as part of any proposed mitigated negative declaration. (*See* Pub. Resources Code, §§ 21064.5, 21080, subd. (c)(2); CEQA Guidelines, § 15071, subd. (d).) Specifically, the Declaration lacks evidentiary support for its conclusions that the expansion will either cause no significant impacts or that significant impacts can be mitigated. 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, 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 decisionmaking [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.]

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[4] In fact, the Declaration is not accompanied by any document comparable to an "initial study" or "environmental assessment." The only documents that have apparently been prepared are the Notice of Declaration, a three page Declaration, one map, two floor plans, six photographs, and a nine page form checklist. Under CEQA, an 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, emphasis added.) NEPA also requires the preparation of an environmental assessment as a basis for issuing a Finding of No Significant Impact ("FONSI"). (40 C.F.R. § 1508.9.)

In order to provide an adequate record of the Tribe's decision making, the Declaration should include an initial study that incorporates evidentiary support for its findings of "no significant impact" or of adequate mitigation. Otherwise, there will be no adequate basis for substantive comment, as is the case with the present Declaration.

C. Comments on the Declaration's Specific Conclusions

1. *Air Quality*: The Declaration concludes, without any apparent factual support or attempt to establish patronage levels, that the interim expansion project is "envisioned to provide gaming opportunities for current casino clientele, and is not expected to attract any new casino visitors." (Declaration, Section II.) This statement seems inconsistent with the notion of an "expansion," which presumably would be intended to attract more customers to the casino, with attendant potential impacts on, among other things, traffic and air quality. Yet, the Checklist anticipates "no impact" on air quality. (Checklist, Section III.) With respect to the potential for vehicle-related pollution, the checklist states simply that "the project is not expected to draw additional traffic," without any explanation of the factual basis for this conclusion. (Checklist, Section III.) Similarly, the Declaration concludes that there will be "no impact" on air quality from construction activities on the basis of the undefined "use of emission control devices and dust control measures." (Checklist, Section III.) In order to provide a meaningful opportunity for comment, the factual basis for these "no impact" conclusions, including a clear description of proposed mitigation measures, should be included in the initial study.

2. *Water Quality*: The Declaration concludes without explanation that the project "will not violate any water quality standards or waste discharge requirements, and no groundwater impacts are expected to occur as a result of this project." (Checklist, Section IV.) No factual basis is provided for this conclusion. For example, no apparent consideration has been given to whether there is a potential for runoff from the site during construction into the "City of San Bernardino drainage berm [that] runs along the eastern edge of the project site." (Checklist, Section III.) Such impacts could include water contamination related to construction near the drainage berm, hydrology changes, and increases in the levels of erosion and sedimentation downstream from the site.

3. *Transportation/Traffic*: As has been discussed above, there is no explanation given for the anomalous conclusion that the expansion of the facility "is not expected to attract any new casino visitors." (Checklist, Section XV.) The likely results that increased patronage of the casino would have must be examined in a manner that considers transportation impacts.

4. *Cumulative Impacts*: The Declaration does not give any consideration to the cumulative off-Reservation impacts that the casino expansion project might have. Again, this concept is related to the possibility that an expansion of the casino will lead to increased patronage. Express consideration must also be given to whether the expansion might cause other, off-Reservation development, with cumulative impacts on, among other things, air quality, water quality, traffic, aesthetics, and listed species. (See *Citizens of Goleta Valley* v. *Board of*

Supervisors (1990) 52 Cal.3d 553, 575.) For example, the casino expansion project may be growth inducing in the sense that others may propose projects to serve any increase in the numbers of casino patrons.

It may also be necessary to tie the consideration of cumulative effects to past development. 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 effects of the Tribe's casino expansion project should include consideration of the impact caused by construction of the existing casino and of the permanent expansion that the Tribe anticipates completing.

Conclusion

Thank you for this opportunity to review the Declaration. We hope that the comments contained in this correspondence are helpful, and we look forward to reviewing either a second Draft Declaration including an initial study that adequately addresses the concerns addressed above, or a document similar to a full CEQA environmental impact report. Should you have any questions or concerns regarding the contents of this correspondence, please do not hesitate to contact me at your convenience.

Sincerely,

MARC A. LE FORESTIER
Deputy Attorney General

For BILL LOCKYER
Attorney General

BILL LOCKYER
Attorney General

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October 20, 2000

VIA FACSIMILE & U.S. MAIL

Lester Lingo
Project Advisory Board
Tuolumne Rancheria Tribal Gaming Office
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Tuolomne, CA 95379

RE: **Draft Environmental Study for the Tuolumne Rancheria Entertainment Facility**
State Clearinghouse No. 2000082074

Dear Mr. Lingo:

This letter contains the comments of the Attorney General of the State of California regarding the Tuolomne Band of Me-Wuk Indians' Draft Environmental Study for the Tuolumne Rancheria Entertainment Facility (the "Draft Study").[1]

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 Draft Study.

[1] Although the document is described as a "full Environmental Study" (Draft Study, p. 1), in preparing these comments we have assumed, based on the document's nature and content, that the Draft Study is intended by the Tribe to serve the same general purposes as an "initial study" under the California Environmental Quality Act ("CEQA") (CEQA Guidelines, §§ 15063, 15365) or an "environmental assessment" under the National Environmental Policy Act ("NEPA") (40 C.F.R. §§ 1501.3, 1508.9). In other words, the Draft Study is a preliminary analysis that, under CEQA, would "[p]rovide documentation of the factual basis" for determining whether to prepare a negative declaration or an environmental impact report. (CEQA Guidelines, § 15063.)

Comments

As the Draft Study acknowledges, the Tuolumne Band of Me-Wuk Indians (the "Tribe") has agreed to conduct an environmental review of its proposed Entertainment Facility (the "Project")[2] under the provisions of its Tribal-State class III gaming compact with the State (the "Compact") in a manner consistent with the policies and purposes of both the National Environmental Policy Act (42 U.S.C. § 4321 et seq.; 40 C.F.R. §§ 1500-1508) ("NEPA") and the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) ("CEQA") consistent with the Tribe's governmental interests. (Draft Study, p. 14.) These comments are intended to assist the Tribe with meeting this commitment in the context of the Draft Study and the Tribe's Entertainment Facility building plans.

A. The Draft Study Must Encompass The Whole Project

Generally, it appears that the Draft Study addresses all aspects of the Project. However, on September 1, 2000, this Office directed correspondence to you related to the Tribe's Draft Mitigated Negative Declaration (the "Declaration") for its grading and clearing operations which were described in the Declaration as intended "for future uses."[3] In the September 1 correspondence, we contended that the environmental impacts of the grading operation should not be considered independent of the environmental impacts of the intended "future uses." It is now clear from both the Draft Study and the Declaration that the grading operations were intended for the proposed Entertainment Facility. (See Declaration, Site Plan/Grading Area; Draft Study, Figures 1.3, 1.4.) While we continue to believe that the effects of the grading operation should be considered together with the effects of the Project, it is not clear that this has been done. "Grading activities" are mentioned in the Draft Study in its discussion of land use mitigation measures and off-Reservation impacts to surface waters. (Draft Study, pp. 22, 26.) However, it appears that these references do not relate to the same grading activities that were the subject of the Declaration, but to other activities on the much larger project area considered by the Draft Study. Accordingly, the Draft Study should be revised to consider the impacts of the grading activities referenced in the Declaration.

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[2] The proposed Project is described in the Draft Study as consisting of two development phases. Phase I will include a 20,000 square foot building that will house 600 gaming devices, blackjack tables, a 2,000 square foot restaurant, a bar, "various other service and support areas," and a parking lot. Phase II will be a 128,000 square foot, two story entertainment complex, housing, among other things, 600 gaming devices, blackjack and other gaming tables, an entertainment lounge, a central bar, a fine dining restaurant, coffee shop, bakery, offices, a 24-lane bowling facility, a supervised child entertainment center, a video arcade, and a fast food restaurant. (Draft Study, p. 5.)

[3] We incorporate by reference the lengthy analysis contained in the September 1, 2000, correspondence that articulated the legal basis for our contention that the whole project must be assessed in a single review.

B. The Draft Study is lacking in evidentiary support

As we have mentioned above, an "initial study" under CEQA (CEQA Guidelines, §§ 15063, 15365) or an "environmental assessment" under NEPA (40 C.F.R. §§ 1501.3, 1508.9) generally involves "documentation of the factual basis" for the conclusions contained in the environmental document (CEQA Guidelines, § 15063). The Draft Study lacks any evidentiary support for its conclusions that there will be no significant environmental impact on surface waters and no cumulative impacts. 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, 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.

(*Leonoff*, 22 Cal.App.3d at 1347-48.)

1. *Surface Water and Flooding*: According to the Draft Study, the Project area is located adjacent to Turnback Creek which, "[a]fter exiting the subject property . . . continues south and feeds a small lake to the west of the Town of Tuolumne . . . [and] exits the lake to the south until ultimately meeting Tuolumne River upstream of the New Don Pedro Reservoir." (Draft Study, p. 24.) It is anticipated that the conversion of land from open space to impervious surfaces will result in both "increased peak flow" and "increased total discharge" during rains, possibly resulting in increased erosion and contamination of waters with vehicle wastes located on the Project's parking lots. (Draft Study, pp. 24-26.) The Draft Study concludes that the impacts upon surface water will be less than significant, citing "relatively low volumes of peak runoff" and the implementation of "best management practices," designed to reduce storm water surface flow velocity and to trap and separate oil and grease. (Draft Study, p. 26.) However, there is no indication of what amounts of rain water the site can expect to receive or what mitigation measures are actually proposed. Accordingly, there is inadequate basis for meaningful public comment, thereby subverting a core principle of CEQA. (CEQA Guidelines, § 15201.)

2. *Cumulative Impacts*: The Draft Study gives virtually no consideration to cumulative off-Reservation impacts that the Project might have. 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).) Here, the Project may be growth inducing in the sense that others may propose

developments to serve the thousands of casino patrons the Tribe anticipates at the facility (Draft Study, pp. 39-40), such as restaurants, hotels, stores, or gas stations. Accordingly, express consideration must be given to whether the Project might cause off-Reservation development, with cumulative impacts on, among other things, air quality, water quality, traffic, aesthetics, and listed species. (See *Citizens of Goleta Valley* v. *Board of Supervisors* (1990) 52 Cal.3d 553, 575.)

3. *Water and Energy Conservation*: The Draft Study includes no discussion of water or energy conservation measures that the Tribe may intend to undertake. Water and energy conservation should be an important component of the facility's operations and should be addressed in subsequent documentation.

Conclusion

Thank you for this opportunity to review the Draft Study. We hope that the comments contained in this correspondence are helpful to your development efforts, and we look forward to reviewing a second Draft Study that addresses the concerns stated here and by other comment providers. Should you have any questions or concerns regarding the above, please do not hesitate to contact me at your convenience.

Sincerely,

MARC A. LE FORESTIER
Deputy Attorney General

For BILL LOCKYER
Attorney General

cc. Scott Morgan
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August 7, 2000

Ronald M. Jaeger
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Bureau of Indian Affairs
Pacific Regional Offices
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RE: **Auburn Rancheria 49-Acre Fee-to-Trust Transfer Project Environmental Assessment**
State Clearinghouse No. 2000062111

Dear Mr. Jaeger:

This letter contains comments of the Attorney General of the State of California with respect to the United Auburn Indian Community of the Auburn Rancheria Environmental Assessment (the "Environmental Assessment") of its proposed 49-Acre Fee-to-Trust Transfer Project, including the construction of a class III gaming facility in an unincorporated section of Placer County, California (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 you are aware, the United Auburn Indian Community of the Auburn Rancheria (the "Auburn Rancheria" or "Tribe") has a responsibility to conduct an environmental review of this

Project not only under the National Environmental Policy Act (42 U.S.C. § 4321 et seq.; 40 C.F.R. §§ 1500-1508) ("NEPA"), but also under the provisions of its Tribal-State class III gaming compact with the State (the "Compact"). The Compact requires the Tribe to comply with the policies and purposes of both NEPA and the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) ("CEQA"). (Compact, § 10.8.1.) Accordingly, these comments are provided to assist the Tribe in meeting its obligations under both federal and state substantive environmental law.

A. The Environmental Assessment Must Also Comply With CEQA

Under the Compact executed between the State of California 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 1.1 of the Environmental Assessment states only that the purpose of the document is to with NEPA. (Environmental Assessment, p. 1-1.) 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 at 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. In order to increase the likelihood that this project will comply with this aspect of CEQA, the Tribe must ensure that all the mitigation measures identified in the Environmental Assessment are actually implemented.

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.

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,

MARC A. LE FORESTIER
Deputy Attorney General

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September 8, 2000

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RE: **San Pascual Band of Mission Indians Draft Environmental Assessment**
State Clearinghouse No. 2000071085

Dear Mr. Feldman:

Thank you for your correspondence of August 30, 2000, providing your personal assurance that the San Pasqual Band has complied with its obligations under the Compact. Respectfully, we stand by our interpretation of the Compact as articulated in my correspondence to Chairman Allen of August 4, 2000.

In the event that there is some misunderstanding, it may be helpful to clarify that it is not our intent to imply that the California Environmental Quality Act ("CEQA") applies directly to the Tribes, or that Compact section 10.8.1 may be used as a basis to extend general jurisdiction onto tribal land. That being stated, however, it is clear that under section 10.8.1, the San Pasqual Band has agreed to assume CEQA, or "CEQA-like," obligations--otherwise no reference to CEQA's "policies and purposes" would have been included. It is our view that the August 4 comments directed to Chairman Allen relate only to aspects of the Draft Environmental Assessment that were inconsistent with core policies and purposes of CEQA.

It remains our hope that the Tribe will revise its Environmental Assessment or otherwise provide a substantive response to our comments consistent, again, with its undertaking to conform its environmental review with the policies and purposes of both NEPA and CEQA. Please ask the Tribe to send us a copy of all documents prepared to do so. Thank you for your attention.

Sincerely,

MARC A. LE FORESTIER
Deputy Attorney General

For BILL LOCKYER
Attorney General

cc. Christine Nagel
National Indian Gaming Commission