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SUPERVISOR, THIRD DISTRICT
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2009 OCT -6 P 1:25

October 2, 2009

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- Torrey Pines*

John Robertus
Executive Officer
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4353

Re: Water Quality Certification 09C-073 for the Proposed Gregory Canyon Landfill

Dear Mr. Robertus:

I am writing to register my strongest opposition to certification of the proposed Gregory Canyon landfill.

The Regional Water Quality Control Board's application for certification, which is required for construction of the proposed landfill, in my view violates the Board's obligation under the Clean Water Act - and state law - to preserve and protect waters in the state.

Approving certification means Gregory Canyon has met all requirements to protect state waters.

Yet at the same time as applying for certification, the applicant is still seeking Section 401 certification for construction of the bridge needed to access the proposed landfill. Under that application process, the Army Corps of Engineers is in the process of determining whether a Clean Water Act Section 404 permit also will be required to place fill in the creek in Gregory Canyon itself.

Because the Army Corps has not resolved that issue – which involves protecting state water – I cannot fathom why the Regional Board is even considering the Section 401 application at this time.

Even if it was determined that a Section 404 fill permit was the only permit needed to construct the bridge, that should not limit the scope of the Regional Board's review of the project.

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The fact is that without the bridge, the proposed landfill could not be constructed. This means that the Regional Board has both the authority and the obligation under Section 401 to consider the water quality impacts of the entire project, not merely the impacts of the construction of the bridge.

The Regional Board previously was scheduled to consider the Section 401 certification as part of its consideration of Tentative Order No. R9-2009-0004 during a regularly scheduled Board meeting. Hundreds of members of the public submitted comments opposing the Tentative Order and the Section 4021 certification, and were prepared to attend the Regional Board meeting to express their concerns in person. Those comments showed that there is significant and broad opposition to this highly controversial project.

Allowing bridge construction has much greater implications:

It allows access to a landfill that once under operation will threaten critical drinking water sources and the San Luis Rey River itself.

It will cause significant impacts to important habitat for the endangered species that are present on the site.

The proposed landfill will desecrate sacred Indian sites, including Gregory Mountain and Medicine Rock.

The Regional Board cannot simply ignore the religious and spiritual beliefs and interests of Native American tribes. To do so would directly conflict with the Regional Board's continuing obligation to consider environmental justice issues when during the permitting process.

The Regional Board must deny the certification because the project will threaten the San Luis Rey River and other important sources of drinking water, will negatively impact endangered species, and will desecrate sacred Native American sites.

If the Regional Board decides to consider the Section 401 application further, it should both extend the comment period on the certification to allow the public an opportunity to consider a completed application, and speak to the issues mentioned in this letter. The Regional Board properly made the decision to address the issue at a previous public meeting and it should not reverse itself now due to the lobbying efforts of the project proponents.

Gregory Canyon is the wrong place for a landfill. This Regional Board has not allowed a landfill to be built immediately adjacent to a river, and it should not do so now.

I strongly urge the Regional Board to not let a bad decision on the proposed landfill be its legacy.

Sincerely,



PAM SLATER-PRICE
Vice Chairwoman
San Diego County Board of Supervisors

PSP/jw

cc: Senator Dianne Feinstein
Senator Barbara Boxer
Congressman Darrell Issa, 49th District
Congressman Brian Bilbray, 50th District
Congressman Bob Filner, 51st District
Congressman Duncan Hunter, Jr., 52nd District
Congresswoman Susan Davis, 35th District
State Senator Christine Kehoe, 39th District
Assemblyman Pedro Nava, 35th District
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Robert Smith, Tribal Chairman, Pala Band of Mission Indians
Lenore Lamb, Pala Band of Mission Indians
Joel Reynolds, Natural Resources Defense Council
Damon Nagami, Natural Resources Defense Council
Todd Cardiff, Surfrider Foundation, SD Chapter

Scott Harrison, Surfrider Foundation, SD Chapter
Johnny Pappas, Surfrider Foundation, SD Chapter
Stefanie Seckich, Surfrider Foundation, SD Chapter
Edward Kimura, Sierra Club, SD Chapter
Bruce Resnick, San Diego Coastkeeper
Gabriel Solmer, San Diego Coastkeeper
Dan Silver, Endangered Habitate League
Mark Schlosberg, Food & Water Watch
Marco Gonzalez, Coastal Environmental Rights Foundation
Serge Dedina, Wildcoast

Mike Porter - Cmnt ltr GLC Bridge 401 certification

From: "Ed Kimura" <emkimura@earthlink.net>
To: "John Robertus" <JRobertus@waterboards.ca.gov>, <mporter@waterboards.ca.gov>
Date: 10/6/2009 10:53
Subject: Cmnt ltr GLC Bridge 401 certification
Attachments: ltr RWQCB 401 GCL brdg-1.pdf

Dear John Robertus:

Attached is the Sierra Club San Diego Chapter letter on the GLC 401 application for water quality certification

Ed Kimura



Phone: (858) -569-6005
Fax: (858)-569-0968
Email: creiff@sierraclubsandiego.org
www.sierraclubsandiego.org

San Diego Chapter
Serving the Environment in San Diego and Imperial Counties
8304 Clairemont Mesa Boulevard, #101
San Diego, California 92111

October 6, 2009

John H. Robertus, Executive Officer
Attention: Mike Porter, Engineering Geologist
California Regional Water Quality Control Board
San Diego Region 9174 Sky Park Court Suite 100
San Diego, CA 92123-4340

Subject: Gregory Canyon Ltd. LLC Application for CWA Section 401 Water Quality Certification
For Proposed Bridge over the San Luis Rey River to Connect the Proposed Landfill to State
Route 76

Dear Mr. Robertus:

On behalf for Sierra Club San Diego Chapter, I welcome this opportunity to comment on the Gregory Canyon Ltd LLC application for the CWA Section 401 Water Quality Certification for the proposed bridge across the San Luis Rey River.

As you are aware, the Sierra Club along with seven other environmental organizations submitted a joint letter on September 16, 2009 to the U.S. Army Corp of Engineers¹ (USACE) strongly opposing the issuance of the nation wide permit for the landfill. The National Resources Defense Council (NRDC) in their September 10 letter² to the USACOE argued that the Corp has jurisdiction over the stream in Gregory Canyon. Because that the proposed landfill poses significant environmental impacts NRDC concludes that using the nationwide permit (NWP) for the proposed bridge over the San Luis Rey River is inappropriate to address the water quality impacts from the proposed landfill. We concur with NRDC that the water quality impacts for the entire landfill project must be reviewed.

The Board staff has deemed the water quality 401 application for the Gregory Canyon Bridge³ as incomplete. I note that there are significant omissions in the application that require water quality impacts due to the landfill project such as stream velocity, sediment loading, and cumulative pollutants from the garbage trucks traveling over the bridge (oil leaks, fuel, trash, etc). The storm water pollution plan was not submitted with the application, It must be approved prior to construction and include pollution controls at the construction staging areas for bridge building material, maintenance and repair of heavy construction equipment. Fuel, hydraulic fluids, lubricant

¹ Letter 16 Sept 09 to Col. Thomas H. Magness, IV, 58th Commander, Los Angeles District USACE from Sierra Club, Surfrider Foundation, Coastal Environmental Rights Foundation, San Diego Coastkeeper, NRDC, WILDCOAST, EHL and Food & Water Watch

² Letter 10 Sept 09 to Col. Magness, IV, USACE from NRDC, Re: pending application NWP for San Luis Rey Bridge

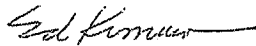
³ Letter RWQCB to Gregory Canyon Ltd. LLC, 28 Sept 09: Application for water quality certification Gregory Canyon Bridge re: 22794: mporter

oils and other and other petrochemical must not be stored within the 100 year floodplain and have secondary containment for spills. Appropriate spill cleanup equipment must be on site at all times during construction.

The proposed Gregory Canyon Bridge is an essential part of the Gregory Canyon Landfill project. As such Regional Board action to approve the application of 401 water quality certification for the proposed bridge separately from the water quality impacts from the landfill project amounts to piecemeal review of the cumulative effects of the project and is not allowed by CEQA⁴. CEQA requires cumulative water quality impacts of the individual effects of the entire proposed landfill project including the construction, operation and post closure phases. Accordingly the water quality requirement for the Gregory Canyon Bridge must be incorporated into the Gregory Canyon Landfill waste discharge requirements and not separately under the NWP. Full disclosure of the cumulative water quality impacts of the entire Gregory Canyon Landfill project must available for public review and comment in advance of the time when the Board convenes the public hearing for this project.

Thank you for this opportunity to provide these comments.

Sincerely,



Edward Kimura
Chair, Water Committee
Sierra Club, San Diego Chapter

⁴ CEQA Section 15355. Cumulative Impacts "Cumulative impacts" refers to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.
(a) The individual effects may be changes resulting from a single project or a number of separate projects.
(b) The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.



San Diego County Water Authority

4677 Overland Avenue • San Diego, California 92123-1233
(858) 522-6600 FAX (858) 522-6568 www.sdcwa.org

SAN DIEGO REGIONAL
COURT HOUSE

2009 OCT 13 P 2: 35

October 7, 2009

Mr. Mike Porter
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

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Municipal Water District

**OTHER
REPRESENTATIVE**

County of San Diego

Re: Gregory Canyon Bridge, Water Quality Certification File Number 09C-073

Dear Mr. Porter:

The San Diego County Water Authority (Water Authority) has reviewed the application materials submitted by Gregory Canyon Limited, LLC for a Water Quality Certification under Section 401 of the Clean Water Act for the Gregory Canyon Bridge. As noted in your September 28, 2009 response letter, the application has appropriately been classified as incomplete due to the omission of a complete project description.

As this bridge is a critical component of a much larger proposed Gregory Canyon Landfill Project, the Water Authority is concerned that the Regional Board is considering action on this individual structure separate from the larger proposed landfill project. Separately evaluating and approving smaller components of a much larger project can underestimate the cumulative effects of the entire project by masking incremental effects. The Water Authority notes that Tentative Waste Discharge Requirement (Tentative Order R9-2009-004) for the Gregory Canyon Landfill Project will serve as the Clean Water Act Section 401 certification (Certification Order No. 05C-095) for project discharges. Given this intent, the Water Authority encourages the Regional Board to avoid issuing individual certifications for single elements of the larger project.

The Water Authority is surprised by the Regional Board's change in position regarding CEQA compliance for the landfill project. In a June 1, 2009 letter to Mr. Gary Erbeck at the County of San Diego, the Regional Board stated that the Gregory Canyon Project Final Certified EIR was "incomplete and inaccurate" due to a change in project description related to water supply. The letter further stated that the Regional Board would not be able to take action on the waste discharge requirements (and presumably any other authorization) until the CEQA process is complete. The Water Authority is unaware of any resolution on the issue of securing an appropriate

A public agency providing a safe and reliable water supply to the San Diego region

Doc Scanned On: 10.14.09
R.J. Stewart Time: 1043

Mr. Mike Porter
California Regional Water Quality Control Board
San Diego Region
October 7, 2009
Page 2

and sufficient water supply for landfill development and operation. Given current water supply constraints, it is very likely that additional CEQA compliance on a new proposed water supply will be required to provide an adequate and defensible EIR for Regional Board action. On May 13, 2009, the County of San Diego, as CEQA Lead Agency, stated that "the operator will therefore have to identify another source or sources of water, and the County will have to complete any necessary CEQA analysis concerning those sources". Yet your September 28, 2009 letter to Gregory Canyon Ltd., LLC, indicated the Regional Board considers CEQA complete as of November 2008. The Water Authority encourages the Regional Board to review the adequacy and completeness of CEQA compliance prior to considering any actions on this project.

The Gregory Canyon Landfill Project, including its component bridge across the San Luis Rey River, poses substantial risk to Water Authority pipeline facilities unless appropriate protective measures are implemented. The Water Authority First Aqueduct, consisting of two existing (and one approved, but not yet constructed) high capacity pipelines, is immediately adjacent to the landfill footprint and upstream of the proposed bridge. A significant concern regarding this project is possible exposure of pipelines along the riverbed due to the cumulative effects of streambed alteration from construction of the access road, bridge, and the realignment of SR-76. These landfill project actions, either individually or cumulatively, may aggravate siltation along the river, cause an imbalance in river morphology, or increase erosion that could jeopardize the integrity of the Water Authority pipelines crossing the riverbed. The Water Authority encourages the Regional Board to avoid segmenting actions on various landfill components. Because of the proximity of critical regional water delivery facilities to the proposed bridge structure, the Water Authority requests the Regional Board require the applicant to prepare a detailed scour study to ensure that nearby Water Authority facilities will not be adversely affected by the project.

The Water Authority appreciates the opportunity to provide comments on the pending certification request. The Regional Board must carefully consider the impacts of the proposed bridge in light of the larger landfill project and impose conditions that ensure the integrity of Water Authority facilities. In light of the water supply uncertainty, the Water Authority encourages the Regional Board to defer action on water quality certifications related to the Gregory Canyon Landfill Project until all remaining issues have been resolved and the entire project can be considered. The Water Authority would also appreciate being directly notified of any future water quality certification applications for landfill component projects. If you have any

Mr. Mike Porter
California Regional Water Quality Control Board
San Diego Region
Page 3

questions or wish to discuss these comments in greater detail, please contact Larry
Purcell, Water Resources Manager at (858) 522-6752.

Sincerely,



FOR Ken Weinberg
Director of Water Resources

cc: John Robertus, RWQCB

Porter ✓

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LA JOLLA BAND OF LUISEÑO INDIANS

22000 Hwy 76 * Pauma Valley, CA 92061

(760) 742-3771 * Fax (760) 742-3771

SAN DIEGO REGIONAL
WATER QUALITY
CONTROL BOARD
2009 OCT 19 AM 10:00

John Robertus
Executive Officer
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4353

October 8, 2009

Dear Mr. Robertus:

The La Jolla Band of Luiseño Indians, in a letter dated June 25, 2009 and addressed to Dr. Richard Wright, Board Chairman for the San Diego Regional Water Quality Control Board, submitted comments opposing the permitting and construction of the proposed Gregory Canyon landfill along the San Luis Rey River in northern San Diego County.

Today, the La Jolla Band of Luiseño Indians again submits to you our strong opposition to the application for certification of the proposed Gregory Canyon landfill under Section 401 of the Clean Water Act. The Regional Board's certification, which is required for construction of the proposed landfill, would violate the Board's obligation under the Clean Water Act and state law to preserve and protect waters in the state. Allowing the proposed landfill to be built not only would threaten critical drinking water sources and the San Luis Rey River itself, but would cause significant impacts to important habitat for the numerous species of flora and fauna that are present on the site.

We also strongly oppose the proposed landfill because it would desecrate sacred Indian sites, including Gregory Mountain and Medicine Rock. This site and the surrounding area are sacred to the Luiseño Indian Tribes and to all Native Americans. While the Board is focused on considering the water quality aspects of the application it cannot simply ignore the religious and spiritual beliefs and interests of Native American Tribes in considering whether this proposed landfill should be constructed. Such an action would directly conflict with the Regional Board's continuing obligation to consider environmental justice issues when it takes permitting actions.



LA JOLLA BAND OF LUISEÑO INDIANS

22000 Hwy 76 * Pauma Valley, CA. 92061

(760) 742-3771 * Fax (760) 742-3771

We understand that the applicant is seeking Section 401 certification only for construction of the bridge needed to access the proposed landfill. However, we also understand that the Army Corps of Engineers is in the process of determining whether a Clean Water Act Section 404 permit also will be required to place fill in the creek in Gregory Canyon itself. Because the Army Corps has not resolved that issue, we feel it is improper for the Regional Board to issue an opinion regarding the Section 401 application at this time. We also feel that the project should not be broken down into small pieces and that the impacts of the entire project should be considered as a whole. When a project is piecemealed each piece seems to have a small impact while when they are considered as a whole the impact is very significant. This tactic should not be allowed.

While our position is that the Regional Board should deny the certification due to the significant negative impacts of the proposed project on water quality in the San Luis Rey Watershed, if the Regional Board decides to consider the Section 401 application further it should both extend the comment period on the certification to allow the public an opportunity to consider a complete application, and consider the certification at a regularly scheduled meeting of the entire Regional Board. The Regional Board properly made the decision to address the issue at a public meeting previously, and it should not reverse itself now due to the lobbying efforts of the project proponents.

A previous report issued by the Regional Board states that the proposed landfill would "...present a significant threat to water quality in the San Luis Rey River". The proposed site is within the 100-year floodplain and siting the landfill in this location would be in violation of the standards outlined in the California Code of Regulations, Title 27, Division 2, Subdivision 1, Chapter 3, Subchapter 2, Article 3, which give very specific siting requirements that the proposed location does not meet. 1. Section 20260 of the above referenced code, SWRCB -- Class III: Landfills for Nonhazardous Waste, specifies that MSW landfills "shall be sited where soil characteristics, distance from waste to groundwater, and other factors will ensure no impairment of beneficial uses of surface water or groundwater beneath or adjacent to the landfill".



LA JOLLA BAND OF LUISEÑO INDIANS

22000 Hwy 76 * Pauma Valley, CA. 92061

(760) 742-3771 * Fax (760) 742-3771

Section (c) specifies that a landfill shall be "designed, constructed, operated, and maintained to prevent inundation or washout due to floods with a 100-year return period". This location cannot assure that this will not happen and for this reason alone the Board should deny the certification. Section (d) specifies not siting landfills on a known Holocene fault and the proximity of this site to the Lake Elsinore fault is cause for great concern.

Gregory Canyon is simply the wrong place for a landfill.

Sincerely,


Lariann Musick - Tribal Chairperson

10-8-09

CALIFORNIA INDIAN LEGAL SERVICES

Escondido Office

609 South Escondido Boulevard, Escondido, CA 92025 γ Phone 760/746-8941 γ Fax 760/746-1815
www.calindian.org γ contactCILS@calindian.org

EUREKA
ESCONDIDO

Mark A. Vezzola, Staff Attorney
760/746-8941, Ext. 121
mvezzola@calindian.org

BISHOP
SACRAMENTO

October 8, 2009

John Robertus
Executive Officer
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4353

Re: *Water Quality Certification 09C-073 for the Proposed Gregory Canyon Landfill*

Dear Mr. Robertus:

These comments are submitted by California Indian Legal Services on behalf of the San Luis Rey Band of Luiseño Mission Indians ("San Luis Rey Band" or "Tribe"), regarding the proposed Gregory Canyon Landfill Project. The San Luis Rey Band is a San Diego County Tribe whose traditional territory includes the current cities of Oceanside, Carlsbad, Vista, Escondido and Bonsall, among others. The San Luis Rey Band is concerned about the preservation of cultural, archaeological and historical sites within the area affected by the proposed Project.

The San Luis Rey Band also strongly opposes the application for certification of the proposed Gregory Canyon land under Section 401 of the Clean Water Act because it would desecrate sacred Indian sites, including Gregory Mountain and Medicine Rock. The Band is also concerned about the proper and lawful treatment of Native American human remains and sacred items likely to be uncovered in the course of project development. The Assessment Plan does not discuss cultural resources, even though it does briefly mention the historical use of the area by Native Americans. As such, the Plan fails to address what, if any impacts the project will have on cultural resources.

To ensure the proper treatment of any cultural resources or Native American human remains that are uncovered during the course the development, the San Luis Rey Band formally requests that Fish & Game agree to return these items to the Tribe if any are discovered. Any plans to curate any such items would disregard the respect due to these cultural resources. Instead, any such items or remains should be returned to the San Luis Rey Band. This project is located within the traditional and aboriginal territory of the Band.

The Regional Board cannot simply ignore the religious and spiritual beliefs and interests of Native American tribes in considering whether this proposed landfill should be constructed. Such an action would directly conflict with the Regional Board's continuing obligation to consider environmental justice issues when it takes permitting actions.

Comment Letter to John Robertus

Re: Water Quality Certification re: Gregory Canyon

October 8, 2009

Page 2

The Band also opposes the application on environmental grounds pertaining to our most precious resource – water. The Regional Board’s certification, which is required for construction of the proposed landfill, would violate the Board’s obligation under the Clean Water Act and state law to preserve and protect waters in the state. Allowing the proposed landfill to be built not only would threaten critical drinking water sources and the San Luis Rey River itself, but would cause significant impacts to important habitat for the endangered and other species present on the site.

We understand that the applicant is seeking Section 401 certification only for construction of the bridge needed to access the proposed landfill. However, we also understand that the Army Corps of Engineers is in the process of determining whether a Clean Water Act Section 404 permit also will be required to place fill in the creek in Gregory Canyon itself. Because the Army Corps has not resolved that issue, we question why the Regional Board is even considering the Section 401 application at this time. Even if it was determined that a Section 404 fill permit only was needed to construct the bridge, that should not limit the scope of the Regional Board’s review of the project. Without that bridge, the proposed landfill could not be constructed so the Regional Board has both the authority and the obligation under Section 401 to consider the water quality impacts of the entire project, not merely the impacts of the construction of the bridge.

Again, our position is that the Regional Board should deny the certification because the project would threaten the San Luis Rey River and other important sources of drinking water, would impact endangered species, and would desecrate sacred Native American sites. But, if the Regional Board decides to consider the Section 401 application further, it should both extend the comment period on the certification to allow the public an opportunity to consider a completed application, and consider the certification at a regularly scheduled meeting of the entire Regional Board. The Regional Board properly made the decision to address the issue at a public meeting previously, and it should not reverse itself now due to the lobbying efforts of the project proponents.

Simply put, Gregory Canyon is simply the wrong place for a landfill, as evidenced by the many difficult issues that various agencies have been forced to address. This Regional Board has not allowed a landfill to be built immediately adjacent to a river, and it should not do so now. We urge the Regional Board to not let a bad decision on the proposed landfill be its legacy.

Sincerely,

CALIFORNIA INDIAN LEGAL SERVICES

Mark A. Vezzola
Attorneys for the San Luis Rey Band

MAV:tle

cc: Melvin Vernon, Tribal Captain
Carmen Mojado, Secretary of Government Relations

Back Country Coalition

Post Office Box 70 • Santa Ysabel, CA 92070 • 760-765-2132

October 7, 2009

Via Electronic Mail

ctamaki@waterboards.ca.gov

John H. Robertus, Executive Officer
California Regional Water Quality Control Board
San Diego Region 9174
Sky Park Court Suite 100
San Diego, CA 92123-4340

Subject: Gregory Canyon Ltd. LLC Application for CWA Section 401 Water Quality Certification For Proposed Bridge over the San Luis Rey River to Connect the Proposed Landfill to State Route 76

Dear Mr. Robertus:

The Back Country Coalition (BCC) is an organization dedicated to the protection of natural, cultural and scenic resources, promotion of responsible land use planning practices, and enhancement of quality of life throughout San Diego County.

BCC has been following the events surrounding the progress/regress of the Gregory Canyon Landfill (GCL) project over many years. We believe your Board should be aware that the project's latest maneuver to gain approval for the construction of a bridge over a stream that flows directly to the San Luis Rey River separately from the original project is inconsistent with the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA). The proposed bridge, by CEQA and NEPA standards, is part of the original project. The significant negative environmental direct and indirect impacts of the bridge to the stream, the river and the surrounding environment must be considered at the same time with those of the whole project.

The bridge must be constructed to enable access to the Gregory Canyon landfill. There is no function for the bridge other than to provide ingress and egress to and from the dump site. The CRWQCB examination of an application for only the bridge construction, rather than considering it together with the original 100 million ton landfill it will serve, violates the following CEQA statutes.

Under CEQA, environmental review must be prepared "as early as feasible in the planning process to enable environmental considerations to influence project program and design." CEQA Guidelines Section 15004, subd. (b). The early preparation requirement is designed to avoid piecemeal review leading to the "environmental considerations becoming submerged by chopping a large project into many little ones - each with a minimal potential impact on the environment." *Bozung v. Local Agency Formation Co.*, (1975) 13 Cal.3d 263, 283-284.

CEQA Guidelines define a project as “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. . .” (CEQA Guidelines, Section 15378(a)). “Project’ is given a broad interpretation in order to maximize protection of the environment.” (*McQueen v. Board of Directors of the Midpeninsula Regional Open Space District* (1988) 202 Cal.App.3d 1136, 1143 [249 Cal.Rptr. 439]).

This is to assure that a lead agency will fully analyze each project in a single environmental document so “that environmental considerations do not become submerged by chopping a large project into many little ones, each with potential impact on the environment, which cumulatively may have disastrous consequences.” (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592 [284 CalRptr.498]).

The bridge segment of the GCL project must be included in yet another revision to the project’s EIR, because without fully analyzing the significant impacts of the bridge together with the rest of the project, the EIR is incomplete and inadequate. The need for a bridge was well known at the beginning of the review process for the GCL project. Therefore, the requirement for including the bridge’s significant environmental impacts with the WHOLE OF THE PROJECT is necessary to comply with CEQA.

CEQA disfavors deliberate misrepresentation, inaccurate and incomplete information in environmental review documents. The CEQA Guidelines (p. 414) state: “The project description must be accurate and consistent throughout the EIR. An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR. *County of Inyo v. City of Los Angeles* 3d Dist. 1977) 71 Cal. App. 3d 185, 193 [139 Cal. Rptr. 396] (*County of Inyo*).”

The application for a water quality certificate from your RWQC Board is inappropriate as the project proponents attempt to bypass State law in an end run to gain approval for the bridge. This is a blatant misrepresentation of the significance of overall project environmental impacts, as the proponents attempt to piecemeal the project into smaller segments to avoid review of overall impacts.

The CEQA Guidelines (p. 91) describes “*Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal. 3d 376, 396 [253 Cal. Rptr. 426] (Laurel Heights), the court declared that ‘an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable *consequence* of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effect.’” (Italics added.)

And, "In the authors' view, the most significant aspect of their formulation is the element of *causation* implicit in it." **The bridge has been a necessary part of the entire GCL project since its inception.**

We attach a letter from the National Resources Defense Council (NRDC) dated September 10, 2009 to Colonel Thomas H. Magness, IV, U.S. Army Corps of Engineers, regarding the proposed GCL project. Especially noted on Pages 5 and 6 are NEPA case laws and arguments pertaining to "the fact that the waters will be affected, and further, whether the waters must be affected to fulfill the projects goals."

The NRDC letter noted above is relevant to the application for a water quality certification insofar as it proves inadequate analysis has been conducted by the project proponents and responsible agencies with jurisdiction over its approval or denial.

Moreover, the Council on Environmental Quality's implementing regulations for NEPA indicates that: "Actions are connected if they cannot or will not proceed unless other actions are taken previously or simultaneously (40 CFR 1508.24(a)(I)(ii))."

Clearly, the proposed bridge segment of the GCL project is part of the larger project to provide access to and from the project site. Without the bridge, the GCL could not function. It is obvious that construction and use of a bridge would cause lasting significant, negative environmental impacts to the waters of the San Luis Rey River as well as the riparian area ecosystems surrounding the bridge, along with significant impacts inherent in its future use, and must be considered along with those of the entire project.

The request for a water quality certification is inappropriate, untimely and fraudulently misleading. The project must go back to the drawing boards and provide complete analysis of the bridge segment with the entire GCL project in a revised EIR, along with all the other significant, negative environmental impacts the project will cause.

CEQA and NEPA statutes are clear. Your Board must deny the application for a clean water permit for GCL or find itself in collusion with noncompliance with state and federal statutes.

Thank you for your consideration of this crucial information.

Sincerely,

George Courser

BCC Director

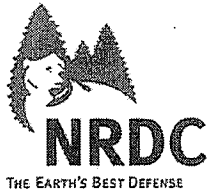
gcourser@hotmail.com

Bonnie Gendron

BCC Coordinator

bgendron@nethere.com

Attachment: NRDC Letter 9.10.09



NATURAL RESOURCES DEFENSE COUNCIL

September 10, 2009

Colonel Thomas H. Magness, IV
58th Commander, Los Angeles District
U.S. Army Corps of Engineers
915 Wilshire Blvd., Suite 1101
Los Angeles, CA 90017

Mr. David J. Castanon
Chief, Regulatory Branch
U.S. Army Corps of Engineers
Los Angeles District
Box 532711
Los Angeles, CA 90053-2325

Dear Col. Magness and Mr. Castanon:

The Natural Resources Defense Council ("NRDC"), a national, non-profit environmental organization with over 250,000 members and activists in California, provides this letter to express the concerns of its members about a pending application for a nationwide permit ("NWP") under Section 404 of the Clean Water Act ("CWA") for the proposed Gregory Canyon Landfill ("Landfill") in northern San Diego County. The NWP would allow the applicant, Gregory Canyon Ltd. ("GCL"), to construct a bridge across the San Luis Rey River for the sole purpose of providing access to Gregory Canyon where 30 million tons of garbage is proposed to be dumped.

NRDC's position is that issuance of a NWP to allow construction of the bridge and the Landfill would be wrong because the Army Corps of Engineers ("Army Corps" or "Corps") (1) has improperly concluded that it does not have jurisdiction under the CWA over the blue-line stream in Gregory Canyon, (2) has ignored its legal obligations under the National Environmental Policy Act ("NEPA") to take a hard look at the impacts of the entire Landfill project, and (3) has failed to comply with the consultation requirements of Section 106 of the National Historic Preservation Act ("NHPA").

I. Background

Briefly, the applicant proposes to construct a 308-acre Landfill footprint in Gregory Canyon adjacent to the San Luis Rey River. The area along the river is designated as critical habitat for the endangered least Bell's vireo and the southwestern willow flycatcher, and provides important habitat for the endangered southwestern arroyo toad and the threatened coastal California gnatcatcher. Golden eagles have been identified on

Gregory Mountain, which borders the east side of the canyon. Gregory Canyon itself contains coastal sage scrub and live oak woodland habitat that supports numerous species. The Landfill would significantly impact this habitat.

The Landfill also would threaten important sources of drinking water. The San Diego Aqueduct, two pipelines that supply most of the drinking water used in San Diego County, bisects the site. In addition, the Pala Basin aquifer and other connected downstream aquifers that underlie the San Luis Rey River provide critical drinking water sources for thousands of residents and businesses throughout the region.

Finally, the proposed Landfill also would desecrate sites considered sacred by the Pala Band of Mission Indians ("Pala Band") and other Luiseños. These sites include Gregory Mountain, a residence of the powerful spiritual being Taakwic and a site considered to be a source of spiritual power and healing, and Medicine Rock, a spiritual site with ancestral rock art figures that is located just outside the footprint of the proposed Landfill.

II. Because The Corps Has Jurisdiction Over The Stream In Gregory Canyon, An Individual Section 404 Permit Is Required.

The Corps' position regarding its jurisdiction over fill activities in Gregory Canyon has changed over the years. Based on a jurisdictional delineation completed by GCL's consultant, Helix Environmental Planning, Inc., the original Section 404 permit application submitted in 1998 identified impacts to 7.3 acres of jurisdictional waters from construction of the bridge, the Landfill footprint, and a proposed 65-acre borrow pit. These included wetlands and other waters identified by the presence of an ordinary high water mark ("OHWM"). Even after the project design was modified, on May 1, 2001, the Corps determined that the footprint of the proposed Landfill contained approximately 1.03 acres of waters of the United States. That conclusion was based on the presence of an OHWM in the Gregory Canyon stream, an updated 2000 Jurisdictional Report by Helix, and site visits by Mr. Terry Dean of the Corps.

At that time, however, the Corps' jurisdiction was in question because of the ruling in *Resource Investments, Inc. v. U.S. Army Corps of Engineers*, 151 F.3d 1162 (9th Cir. 1998), that there was no jurisdiction under the CWA over solid waste landfills if a permit for the landfill had been issued under the Resource Conservation and Recovery Act ("RCRA") or a state-law equivalent. In response to that case, the Corps and EPA issued new rules confirming CWA jurisdiction over fill activities at landfills. 67 Fed. Reg. 31,129 (May 9, 2002). In a letter to GCL dated January 17, 2003, the Corps acknowledged that it had withdrawn GCL's previous Section 404 permit application, and indicated that any new Section 404 permit application would need to address fill activities in Gregory Canyon itself.

Because the new rule confirmed that the Corps could regulate fill activities in Gregory Canyon, GCL maneuvered the Corps into making a complete about-face regarding its jurisdiction. In October of 2003, representatives of GCL and their consultant, former

Corps employee David Barrows, met with Mr. Durham and Mr. Castanon regarding the project, and Mr. Barrows claimed that there was no OHWM in Gregory Canyon. In response to the Corps' request, in May of 2004, Mr. Barrows submitted a new jurisdictional report prepared by URS Corporation ("URS Report").

The URS Report dismissed the previous delineation by Helix, and claimed that there were no "waters of the United States" in Gregory Canyon. URS supported that conclusion primarily with hydrological modeling data, which URS argued showed that regular water flows in the canyon did not create an OHWM. Based on the URS Report, the Corps reversed its position, and in a letter dated October 28, 2004, agreed that there were no longer any "waters of the United States" in Gregory Canyon. This decision limited the Corps' jurisdiction to the bridge crossing of the San Luis Rey River.¹

The Corps maintained that position even though the Pala Band provided a critique of the URS modeling in May of 2005, and photographs of significant water flows in Gregory Canyon from January of that year. While the San Diego County Flood Control District determined that the flows in the photographs were from a two-to-five year storm event, URS claimed that the flows were representative of 10-37 year flows based on their previous modeling (*i.e.*, the 14.1-inch annual rainfall modeling). The Corps agreed with URS as indicated in its letter to the Pala Band dated November 9, 2005.

The Pala Band rejected the Corps' position in a letter dated March 10, 2006. We have reviewed that letter and agree with its conclusions.

First, the Corps' theory that the OHWM disappeared due to "erosion and accretion" is not supported by any evidence. The Corps had theorized that the OHWM had disappeared as the result of small to moderate storm events that caused surface flow to spread out over the valley floor, depositing sediment, eliminating physical evidence of the stream channels, and leaving only marginal evidence of surface flow. However, the Corps offered no evidentiary basis for this novel theory. In fact, the Corps has admitted that this would be a "fairly unusual" situation for an ephemeral stream, because the typical dry land river/stream system does not usually exhibit this type of erosion/accretion process.

Second, NRDC rejects the Corps' position that its jurisdiction is limited to those areas impacted by five-year or smaller flow events. The definition of an OHWM focuses on the presence of *physical evidence* -- such as a "clear, natural line impressed on the bank," the "presence of litter and debris," or "other appropriate means that consider the characteristics of the surrounding areas." 33 C.F.R. § 328.3(e). Contrary to the Corps' position, nothing in the regulations limits the Corps' jurisdiction to those areas of a streambed impacted by five-year or smaller flood events.

¹ We note that the URS modeling was based on a median annual rainfall of 14.1 inches. In recent revisions to the Environmental Impact Report for the Landfill, however, GCL used an annual average rainfall of 25 inches to calculate the "safe yield" from groundwater monitoring wells on the site. If the annual average rainfall is actually 25 inches, the URS modeling cannot be used to support the argument that there is no OHWM in the canyon.

In addition, the Corps' decision on its jurisdiction must be revisited based on the Supreme Court's ruling in *Rapanos v. United States*, 547 U.S. 715 (2006), and guidance issued by the Corps and EPA in response to that decision. While the stream in Gregory Canyon may be a non-navigable and not relatively permanent tributary, it clearly has a significant nexus to the San Luis Rey River, a traditionally navigable water ("TNW"). The fact that the stream in Gregory Canyon has the ability to carry pollutants to a TNW, provides significant habitat for numerous species, and serves as a transitional area between upland areas and the river are all factors the guidance points out as being evidence of a significant nexus.

An accurate determination of the Corps' jurisdiction is critical to ensuring that permitted projects do not frustrate the CWA's stated objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Corps cannot simply ignore past evidence of an OHWM, and GCL's use of a low annual rainfall amount, to claim no jurisdiction exists. The Corps also cannot limit its jurisdiction over areas with an OHWM created by five-year-or-less storm events, and must revisit its jurisdictional determination based on *Rapanos*.

III. A Nationwide Permit Is Inappropriate For A Project With Such Significant Environmental Impacts.

Even if the Corps did not have jurisdiction over the stream in Gregory Canyon (which we believe it does), authorizing the proposed Landfill by issuing a NWP for construction of the bridge necessary to access the Landfill would be wrong. NWPs were intended for activities that have only "minimal" adverse effects on the environment, such as maintenance activities, minor alterations to existing projects, and minor discharges. 33 U.S.C. § 1344(e); 33 C.F.R. § 330.1(b); 72 Fed. Reg. 11,092 (Mar. 12, 2007). The Corps' rules specifically state that if the "proposed activity would have more than minimal individual or cumulative net adverse effects on the environment or otherwise may be contrary to the public interest," the Corps "shall" modify the NWP "to reduce or eliminate those adverse effects" or require an individual permit. 33 C.F.R. § 330.1(d).

NRDC believes that the Corps must require an individual permit for the Landfill because landfills are not the type of projects that fit any preapproved NWP category of minimally harmful activities. *See* 33 U.S.C. § 1344(e). A NWP also would provide no opportunity for public participation, which is critical for a project with such a large ecological footprint. NWPs are for "minor activities that are usually not controversial and would result in little or no public or resource agency comment if they were reviewed through the standard permit process." 67 Fed. Reg. 2020, 2022 (Jan. 15, 2002). While NRDC disagrees strongly with the Corps' abdication of its CWA jurisdiction, it also opposes the use of an NWP to allow the project to proceed.

IV. A Nationwide Permit Is Inappropriate Given The Significant Impacts The Proposed Landfill Would Have On Sacred Gregory Mountain.

As you are aware, the proposed Landfill would result in the disposal of millions of tons of garbage on the side of Gregory Mountain, a site eligible for listing on the National Register of Historic Places. By rule, a NWP cannot be issued for any “activity which may affect properties listed or properties eligible for listing in the National Register of Historic Places . . . until the [District Engineer] has complied with the provisions of 33 CFR part 325, appendix C.” 33 C.F.R. § 330.4(g) (emphasis added). An activity “may affect” a historic resource if it causes the “[i]ntroduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting” or if it “may diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.” 33 C.F.R. Part 325, App. C.15. All of these “adverse effects” would occur if 30 million tons of garbage was buried on this sacred mountain.

The rules also prohibit a non-federal permittee from beginning a proposed activity until the Corps notifies the permittee “that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized.” 33 C.F.R. § 330.4(g)(2). Critically, if activities within the “permit area” will adversely affect a historic property, the Corps may properly require an individual permit. *Id.* at (g)(2)(ii). A “permit area” includes “uplands directly affected as a result of authorizing the work or structures,” and upland areas are considered “permit areas” if the activity (1) “would not occur but for the authorization of the work or structures within the waters of the United States,” (2) is “integrally related to the work or structures to be authorized,” and (3) is “directly associated (first order impact) with the work or structures to be authorized.” 33 C.F.R. Part 325, App. C.1.g. Because the bridge would provide the only means of access to the Landfill footprint (and would provide access only to the Landfill footprint), the “permit area” includes Gregory Mountain, and an individual permit application should be required.²

V. NEPA Requires The Corps To Assess The Environmental Impacts Of The Entire Landfill Project And Evaluate A Range Of Alternatives.

Case law is clear that the scope of analysis under NEPA may extend well beyond the “waters that provide the initial jurisdictional trigger,” and if a development cannot proceed without a Federal permit, the Federal involvement is “sufficient to grant ‘Federal control and responsibility’ over the project” under NEPA. *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1039-40 (9th Cir. 2009); *see also* 33 C.F.R. Part 325, App. B §§ 7.b(1), 7.b(2)(iv)A. Thus, the fact that the area proposed to be filled under the NWP would be small is irrelevant. As the court in *White Tanks* stated, “[i]t is

² As a threshold matter, issuance of any permit by the Army Corps would be premature. First, consultation under Section 106 of the NHPA, which is a prerequisite to issuance, has not yet occurred. In addition, the California Regional Water Quality Control Board has not issued a certification for the project under Section 401 of the CWA.

not the quantity of the water that matters, but the fact that the waters will be affected, and further, whether the waters must be affected to fulfill the project's goals." 563 F.3d at 1041.

There is no argument that "but for" the Corps' approval, a bridge could not be built. Likewise, there is no argument that without the bridge, the proposed Landfill could not be constructed and operated. In other words, as in *White Tanks*, "the developers have told the Corps that, without the permit, the project as they conceive it, could not proceed." 563 F.3d at 1041-42. Because the bridge has no "independent utility" and is required to achieve the "project's goals," the impacts of the entire Landfill project must be analyzed under NEPA.

It is also important to emphasize that the NEPA review for the Landfill must include a full and comprehensive evaluation of alternatives. 42 U.S.C. § 4332(2)(C)(iii). This is especially critical here, because no such consideration has ever been done for this project. Not only has there been no fair-minded consideration of a full range of alternative approaches (e.g., increased waste diversion, utilizing existing landfill capacity more efficiently, movement of waste by rail, etc.), but remarkably no objective, robust evaluation of alternative sites has ever been conducted to determine whether there might actually be a more appropriate location for a landfill than the applicant's own San Luis Rey River-adjacent parcel in Gregory Canyon. In fact, when the County, at the outset, reviewed a range of potential landfill sites, it actually *rejected* Gregory Canyon as a viable site, because the location failed seven out of eight County landfill siting criteria. However, in 1994, the Landfill proponents performed an end-run around the County's siting process and employed a controversial ballot initiative to authorize a landfill on the site, thus circumventing a rigorous alternatives analysis at that time.

While the environmental impact analysis prepared under the California Environmental Quality Act ("CEQA") purported to address several sites, it did so in only a cursory way, looking at two potential alternative sites in the region and then rejecting them summarily based on purported infeasibility. Final EIR at 6-37 to 6-55. Specifically, the EIR concluded that the two alternative sites were infeasible because they weren't owned by the Landfill proponents, GCL, or for sale, and were not zoned for a landfill. *Id.* at 6-46, 6-54 to 6-55. Thus, according to the EIR, the Gregory Canyon site is a superior choice solely because it is available and because its proponents were able to obtain re-zoning by way of a deceptive ballot initiative.

This self-serving, limited, and post-hoc analysis is worse than no analysis at all, because it is intended only to give an impression of fair review when, in fact, the applicant's sole purpose was to compel the selection of its own site. As such, it falls far short of what is required either as a matter of law or as a matter of common sense when, as here, the applicant has selected a previously rejected site literally on the banks of a major water source in a drought-afflicted region like north San Diego County – a site that, "coincidentally," the applicant happens to own. Such an analysis makes a mockery of the common-sense requirements in CEQA and NEPA that a reasoned and fair assessment of

all reasonable alternatives be prepared, circulated for public review and comment, and considered by the decision-maker *before* any permitting decisions are made.

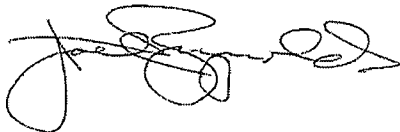
And these obligations exist independently under state and federal law. Thus, however one assesses the adequacy of the CEQA review of this Landfill project, there can be no question that a comprehensive NEPA analysis, including an analysis of alternatives, is vital and legally required.

VI. Conclusion

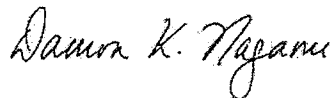
The proposed Landfill presents a real and substantial threat to the region's precious drinking water supplies. It threatens to destroy hundreds of acres of pristine open space and wildlife habitat. It will encroach upon sacred Native American lands. The Corps must not adhere to its erroneous jurisdictional determination and let this project proceed without adequate scrutiny. NRDC strongly urges the Corps to restore its initial jurisdictional determination that Gregory Canyon contains "waters of the United States" and require an individual permit for the proposed project. The Corps also must comply with the NHPA and NEPA. Only in that manner can the Corps ensure that this ecologically valuable watershed is protected to the fullest extent our environmental laws allow.

Thank you for your attention to this important matter.

Very truly yours,



Joel Reynolds
Senior Attorney
Director, Urban Program



Damon Nagami
Staff Attorney

Cc: Mr. Robert Smith, Tribal Chairman, Pala Band of Mission Indians
Ms. Lenore Lamb, Pala Band of Mission Indians
Walter E. Rusinek, Esq., Procopio, Cory, Hargreaves & Savitch LLP
Ted J. Griswold, Esq., Procopio, Cory, Hargreaves & Savitch LLP
Representative Bob Filner, 51st Congressional District
Representative Susan Davis, 53rd Congressional District
Assemblymember Lori Saldaña, 76th Assembly District
Supervisor Pam Slater-Price, San Diego County Board of Supervisors
Supervisor Greg Cox, San Diego County Board of Supervisors
Supervisor Dianne Jacob, San Diego County Board of Supervisors
Supervisor Ron Roberts, San Diego County Board of Supervisors

Col. Thomas H. Magness, IV
September 10, 2009
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Supervisor Bill Horn, San Diego County Board of Supervisors
Councilmember Sherri Lightner, San Diego City Council
Council President Pro Tem Kevin Faulconer, San Diego City Council
Councilmember Todd Gloria, San Diego City Council
Councilmember Tony Young, San Diego City Council
Councilmember Carl DeMaio, San Diego City Council
Councilmember Donna Frye, San Diego City Council
Councilmember Marti Emerald, San Diego City Council
Council President Ben Hueso, San Diego City Council
Mr. David Smith, U.S. Environmental Protection Agency
Mr. John Robertus, San Diego Regional Water Quality Control Board
Mr. James J. Fletcher, Bureau of Indian Affairs
Mr. Jim Bartel, U.S. Fish and Wildlife Service
Mr. Hershell Price, San Diego County Water Authority
Olivenhain Municipal Water District
Fallbrook Public Utility District
San Luis Rey Municipal Water District

Mike Porter - Water Quality Certification 09C-073 Gregory Canyon Landfill

From: "Angela Veltrano" <AVeltrano@RinconTribe.org>
To: <mporter@waterboards.ca.gov>
Date: 10/9/2009 13:17
Subject: Water Quality Certification 09C-073 Gregory Canyon Landfill

California Regional Water Quality Control Board
Mike Porter

Dear Mr. Porter:

I attended the meeting held at the local Army Corps of Engineers office on September 29, 2009 ago concerning the process to allow the construction of a bridge across the San Luis Rey River.

There are so many objections to the landfill project: the party that is proposing the landfill has an incomplete E.I.R., an obsolete "nationwide permit" and the strenuous objections to this landfill project from various environmental groups.

If this proposed landfill proceeds through the various agencies and lines of authority it will be devastating to the quality of water in the area by the death of one of the last running bodies of water in San Diego County.

In addition, the local Indian tribes have fought for years to have Gregory Mountain and Indian Rock (Chokla) protected and preserved. Chokla is a major sacred and ceremonial site to Luiseno and neighboring tribes. To have it destroyed by development is a shame.

The Rincon Band of Luiseno Indians, a federally recognized tribe, through its Rincon Culture Committee objects to the desecration of a sacred and ceremonial site that would occur should a bridge be built over the San Luis Rey River that would accommodate the Gregory Canyon landfill project.

*Angela Veltrano, Chairman
Rincon Culture Committee*



Procopio, Cory, Hargreaves & Savitch LLP

Walter E. Rusinek
Direct Dial: (619) 525-3812
E-mail: wer@procopio.com

October 9, 2009

John Robertus
Executive Officer
Attn: Mike Porter, Engineering Geologist
Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Re: Comments on the Application for Certification Under Section 401 of the
Federal Clean Water Act Submitted by Gregory Canyon, Ltd. - File No.
09C-073.

Dear Mr. Robertus:

These comments are respectfully provided on behalf of the Pala Band of Mission Indians in response to the Section 401 application described above for the proposed Gregory Canyon landfill. We note that these comments are provided on the application even though the Regional Board itself notified Gregory Canyon, Ltd. ("Applicant") in a letter dated September 28, 2009, that the Section 401 application was incomplete.

Given that a complete application has not yet been submitted, the Pala Band requests that the Regional Board allow additional comments to be provided on the application once the Regional Board acknowledges that a complete application has been submitted. The Regional Board's own guidance states that public comments "will be accepted on a pending 401 application until an action is taken." That guidance also states that the certification will not be approved "within the 21-day comment period unless the project is an emergency and time is of the essence." Neither of those considerations applies here.

As you know, the Regional Board previously was scheduled to consider the Section 401 certification as part of its consideration of Tentative Order No. R9-2009-

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0004, which also included the draft Waste Discharge Requirements for the proposed landfill. Consideration of the Order was to occur during a regularly scheduled Regional Board meeting. Numerous public comments were submitted opposing issuance of the Order.

The Regional Board properly chose to address the WDRs and the Section 401 certification at a public hearing, and it should not reverse its position on that issue now. Other than denying the Section 401 certification because there is no valid Section 404 permit application (as discussed below) or for any other reason, any action on the Section 401 certification should not occur until the application is considered at a regularly scheduled meeting of the Regional Board. A public hearing on the issue would be proper given the historic and widespread opposition to the proposed landfill.

I. It is Premature for the Regional Board to Consider the Section 401 Application.

A. No Valid Section 404 Application is Pending.

The first problem with the Section 401 application is that there is no valid application pending for a Section 404 permit under the Clean Water Act. The Regional Board's obligations under Section 401 arise only if there is a valid permit application under Section 404.

The Regional Board's website indicates that the "pending" Section 404 application for a Nationwide Permit ("NWP") for the proposed project is dated September 21, 2005. That being the case, the 2005 application was based on NWPs issued by the Army Corps of Engineers ("Corps") on January 15, 2002.

But, the 2002 NWPs expired on March 18, 2007. The Corps' rules require that an NWP be reissued within five years or it "automatically expires and becomes null and void." When that time period expires, activities "which have commenced (i.e., are under construction) or are under contract to commence in reliance upon an NWP will remain authorized provided the activity is completed within twelve months of the date of an NWP's expiration, modification, or revocation." 33 C.F.R. § 330.6(b). Accordingly, the Corps stated in its notice titled "Reissuance of the Nationwide Permits" that "activities authorized by the current NWPs issued on January 15, 2002 that have commenced or are under contract to commence by March 18, 2007, will have until March 18, 2008, to complete the activity under the terms and conditions of the current NWPs." 72 Fed. Reg. 11092 (March 12, 2007).

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This means that, even if the Applicant had obtained an NWP for the proposed landfill prior to the date the 2002 NWPs expired, it would have had to complete the work authorized by the NWP by March 18, 2008. The fact is that the Applicant did not receive an NWP, but merely had filed an application for coverage under the 2002 NWPs. Because those 2002 NWPs no longer exist, the current 2005 application is invalid. Until the Applicant files a new Section 404 permit, the Regional Board has no obligation or authority to consider a request for certification under Section 401.

B. There is No Existing Jurisdictional Determination for the Proposed Project.

Even if the application was not void, it still would be premature for the Regional Board to consider certification. The Regional Board's September 28, 2009, letter finding the application incomplete states that the Applicant is seeking Section 401 certification only for the proposed bridge over the San Luis Rey River. That bridge is needed to construct and operate the proposed landfill. The Section 401 application is limited to an NWP for the bridge because in October of 2004 the Corps reversed its previous decision and concluded that the creek in Gregory Canyon was not a "water of the United States." Based on that determination, a Section 404 permit was not required to construct the proposed landfill footprint itself.

But the Corps' determination that the creek in Gregory Canyon is not a "water of the United States" expired on October 6, 2009. The Corps now must complete a new jurisdictional determination. Until that jurisdictional determination is completed, the Regional Board cannot act on the Section 401 certification. A determination that the creek in Gregory Canyon is a water of the United States would require the Applicant to obtain an individual permit under Section 404 for the entire project, including the bridge. Processing a Section 401 certification now for construction of the bridge alone is unnecessary and premature.

C. The Section 404 Permit Application Contains Erroneous Information.

Even if the 2005 Section 404 permit application had not expired, the application itself contains erroneous information that makes it invalid and consideration of Section 401 certification premature. Specifically, under General Condition 12, the Section 404 application claims that the "project will not affect such historic properties." General Condition 12 prohibits any activity which may affect a historic property "listed, or eligible for listing, in the National Register of Historic Places" until the Corps' district

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engineer "has complied with the provisions of 33 CFR. part 325, Appendix C." That is a reference to the Corps' regulation implementing the National Historic Preservation Act ("NHPA").

There is no argument that Gregory Mountain, which forms the east flank of Gregory Canyon, is eligible for listing in the National Register of Historic Places. The California State Historic Preservation Office has made that determination, and the listing currently is being processed by the federal government. There also is no argument that the Corps has not conducted consultation on the proposed under Section 106 of the NHPA as required by that law and the Corps' rules.

The basis for the Applicant's claim that no historic properties will be impacted is unknown. But the Applicant either is being intentionally misleading or is misapplying the law by arguing that only impacts on historic properties caused by the actual fill activity related to the proposed construction of the bridge need to be considered. That is not the way the Corps' rules address the issue.

The Corps' rules state that an NWP cannot be issued for an any "activity which may affect properties listed or properties eligible for listing in the National Register of Historic Places . . . until the [District Engineer] has complied with the provisions of 33 C.F.R. Part 325, Appendix C." 33 C.F.R. Part 330.4(g) (emphasis added). The rules also state that an activity "may affect" a historic resource if the activity causes the "introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting" or if the activity "may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." 33 C.F.R. Part 325, App. C, No.15. All of these "adverse effects" would occur if 30 million tons of garbage was buried on the side of sacred Gregory Mountain.

Critically, the Corps' rules define the "permit area" under the NWP program to include "uplands directly affected as a result of authorizing the work or structures." 33 C.F.R. Part 325, App. C.1.g. These upland areas are considered to be part of the "permit area" if the activity in the upland area (1) "would not occur but for the authorization of the work or structures within the waters of the United States," (2) is "integrally related to the work or structures to be authorized," and (3) is "directly associated (first order impact) with the work or structures to be authorized." *Id.* Because the proposed bridge would provide the only means of access to the proposed landfill footprint (and would provide access only to the proposed landfill footprint), the "permit area" under the Clean Water Act includes Gregory Canyon and Gregory Mountain.

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Given this situation, the Applicant's claim that no historic properties will be affected is false. Consultation under the NHPA must involve the entire impact area, including Gregory Mountain.

In addition, under the Corps' rules, if an activity within the "permit area" will adversely affect a historic property, the Corps may properly require an individual permit. 33 C.F.R 330.4(g)(2)(ii). The fact that the proposed landfill would cause unmitigable impacts to sacred Gregory Mountain is another reason why the Corps should require an individual Section 404 permit.

II. The Application Does Not Provide Sufficient Information for the Issuance of Section 401 Water Quality Certification Requirements.

Even if these factors did not make consideration of the Section 401 certification application premature, the missing information identified by the Regional Board in its September 28, 2009, letter would. But even that list of significant deficiencies misses some of the major problems with the application.

For example, Item 4 of the Regional Board's letter requests a better description of the "type of drilling that will be done, potential sources of pollutants from that drilling method, seasonal staging of the drilling operation and pier construction relative to the rainy or monsoon season, and if coffering will be used." However, the information provided in the sections of the 401 application titled "Description of Activity", the "Avoidance and Minimization of Impacts" and the "Protection of Water Quality" does not fully describe any of the methods that will be used for drilling let alone for all of the bridge construction. For the application to be complete, an applicant is required to provide detailed descriptions of all of the listed activities and citations to specific page numbers in any documents referenced in the application (for example, the Joint Technical Document ("JTD") or the Final Environmental Impact Report ("FEIR")). Because the Applicant has failed to provide the required information, it is impossible to provide proper comments on the application.

The application also fails to describe the various stages of the proposed construction activity so that associated water quality impacts can be evaluated. The application should clearly explain how the Applicant would avoid exceeding Basin Plan limits for total dissolved and suspended solids, turbidity, inorganic chemicals, and oil and grease. There currently is not sufficient information to assess that issue because there is no time frame provided for when each phase of the proposed construction would occur (during the rainy season etc.) and how potential impacts to water quality during each

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phase would be limited. That is the minimum information that must be provided. The Applicant also does not identify where construction staging areas would be located or indicate how the south side of the river would be accessed prior to construction of the bridge.

We agree with the Regional Board's rejection of the Applicant's proposal that it provide a construction Storm Water Pollution Prevention Plan ("SWPPP") to the Regional Board "at the appropriate time." Now is the time for the Applicant to identify and the Regional Board to consider the potential impacts from the proposed construction activity to determine what necessary requirements must be imposed if a water quality certification were to be issued. Also, any existing construction-related SWPPP must be revised to address the new storm water standards recently adopted by the State Water Resources Control Board (Order No. 2009-0009-DWQ).

A. More Information is Needed Concerning the Proposed Use of the Low-Flow Crossing.

The Applicant and the Regional Board also refer to the existing "low-flow" crossing, which historically was located downstream of the location for the proposed bridge at Wild Road. The FEIR for the proposed landfill stated that construction equipment and construction deliveries would use this low-flow crossing to access the proposed landfill site prior to construction of the bridge, and apparently for construction of the bridge as well.

Our understanding, however, is that the low-flow crossing was damaged during storms in 2005. Subsequently, the Applicant notified the Corps that the Applicant intended to "repair" the crossing, and claimed that work in the river was exempt from Section 404 permitting requirements as an emergency repair. It is unknown if any repairs were made.

The claim that the repairs would have been exempt from Section 404 permitting as an emergency was wrong because there is no evidence that the original low-flow crossing structure (1) had been properly permitted under the Clean Water Act (or under state law through a Streambed Alteration Agreement ("SAA")), (2) that the new use of the low-flow crossing to allow construction of the proposed landfill was similar to the previous minor use of the crossing for farming, (3) that the "emergency" repairs had been begun within a reasonable time after the alleged damage occurred, or (4) that the proposed "repairs" would not significantly change the design of the previously existing crossing. Consequently, if any "repairs" were made to the crossing without a Section 404 permit,

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they should be considered to have been in violation of Section 404. In addition, such action would have violated Section 401 and the requirement to obtain a SAA.

We also note that the low-flow crossing is within federally designated "critical habitat" for the endangered southwestern arroyo toad, and the road on the south side of the river that it accesses also is in federally designated "critical habitat" for the arroyo toad and the endangered least Bell's vireo. If the low-flow crossing is to be used to allow construction of the bridge, the Section 401 application should identify any needed improvements to the crossing or the south-side road and how impacts to endangered species will be avoided or permitted. If the low-flow crossing will not be used, the application should describe how the south side of the river will be accessed.

III. The Section 401 Certification Must Consider the Impacts of the Activity Allowed, Not Simply the Fill Activity.

A Section 401 certification must "set forth any effluent limitations and other limitations and monitoring requirements necessary to ensure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations under Section 1311 or 1312 of this title ... and with any other appropriate requirement of state law set forth in such certification...." 33 U.S.C. § 1341(d). Under Section 401(d), the Regional Board can impose "'other limitations' on the project in general to assure compliance with the various provisions of the Clean Water Act and with 'any other appropriate requirement of state law,'" and "additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." *PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994) 511 U.S. 700, 711, 712. Under Section 401, "activities – not merely discharges – must comply with state water quality standards." *Id.* at 712.

For purposes of Section 401 certification, the State Water Resources Control Board defines the term "activity" as "any action, undertaking, or project – including, but not limited to, construction, operation, maintenance, repair, modification, and restoration – which may result in any discharge to waters of the United States in California." 23 C.C.R. § 3831(a). The "activity" that the Regional Board is certifying here is not simply the discharge of fill into the San Luis Rey River but, at the least, the construction *and operation* of the bridge.

More appropriately, the "activity" at issue for purposes of Section 401 certification is the construction and operation of the proposed landfill itself because the bridge has no independent utility. That means that the Regional Board must impose requirements that

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would ensure the protection of the identified beneficial uses of the San Luis Rey River (agriculture, industrial, municipal and domestic, cold and warm freshwater habitat, contact and non-contact water recreation, and wildlife habitat). Those requirements cannot be determined without a more-complete description of the impacts of the construction and operation of the bridge and the proposed landfill itself.

The application also fails to provide sufficient information regarding "past/future impacts" which requires that information be provided on activities that "may impact the same water body." The application states, with emphasis added, there are no applicable projects "that would result in effects on the river *that would be related to the bridge.*" That is not the information that the application requires, and the answer provided is simply non-responsive. That is another reason why the application is incomplete.

IV. The Validity of the Revised FEIR Remains in Question.

The September 2009 letter from the Regional Board indicates that it considers there to be a certified Final Environmental Impact Report for the proposed landfill project under the California Environmental Quality Act ("CEQA"). While there technically is an RFEIR, the Regional Board should be aware of two facts.

First, an appeal is pending in the Fourth District Court of Appeals challenging the adequacy of the RFEIR. Among other claims, that appeal challenges the failure of the RFEIR to analyze the impacts to water quality caused by (1) the proposal to pump groundwater from point-of-compliance groundwater monitoring wells for daily use on the site, and (2) the fact that sampling data for on-site groundwater showed the presence of contaminants (methylene chloride and antimony) above their respective maximum contaminant levels. Both these issues involve matters directly within the Regional Board's area of expertise.

Second, the main source of water for the proposed landfill identified in the RFEIR was recycled water from the Olivenhain Water District ("OMWD"). Since the RFEIR was certified, however, OMWD has been ordered by the court to rescind its agreement to sell recycled water to the Applicant, and OMWD has notified the Applicant that it will not sell water for the project in the future. Consequently, there is no assured water supply for the project. Although the Applicant has identified some alternative sources of water for the proposed landfill, the environmental impacts of obtaining water from those sources has not been evaluated. That means that there is not an adequate FEIR on which the Regional Board can rely.

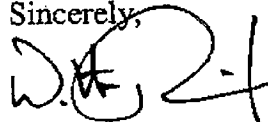
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V. Conclusion

The facts clearly show that the Regional Board cannot process the Section 401 application because there is no valid Section 404 permit application or valid jurisdictional delineation for the entire project. Until those two threshold issues are resolved, and the information in any application is complete enough for the Regional Board to properly assess the impacts of the proposed project, it is premature for the Regional Board to consider the Section 401 certification.

The Regional Board is considering a proposed project that would desecrate sites sacred to members of the Pala Band and numerous other Tribes, and threaten water quality at a time when water supplies are becoming scarcer. If approved, the proposed landfill would be the lasting legacy of this Regional Board. The Pala Band urges the Regional Board to reject any request for a Section 401 certification or for any other approval for the proposed landfill.

Sincerely,



Walter E. Rusinek

cc: Robert Smith, Chairman of the Pala Band of Mission Indians
Lenore Lamb, Director, Pala Environmental Services
Mr. James Fletcher, Superintendent, Bureau of Indian Affairs, Southern California Agency
Ms. Alexis Strauss, United States Environmental Protection Agency, Region IX
Mr. Jim Bartel, United States Fish & Wildlife Service
Mr. Darrin Thome, Deputy Assistant Director, Ecological Services Program, United States Fish & Wildlife Service
Ms. Michelle Moreno, United States Fish & Wildlife Service
Ms. Teresa O'Rourke, United States Army Corps of Engineers
Mr. Mark Leary, Executive Director, Integrated Waste Management Board
San Diego County Board of Supervisors
Gary Erbeck, Director, County of San Diego Department of Environmental Health
Mr. Jim Wood, Mayor, City of Oceanside
Mr. Bud Lewis, Mayor, City of Carlsbad
Ms. Maureen Stapelton, San Diego County Water Authority

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Dave Seymour, Rainbow Municipal Water District
Joel Reynolds, Natural Resources Defense Council
Native American Environmental Professional Coalition
Edward Kimura, Sierra Club, San Diego Chapter
Joy Williams, Environmental Health Coalition
Dan Silver, Endangered Habitats Coalition
Bruce Resnik, San Diego Coastkeeper
Surfrider Foundation, San Diego
Serge Dedina, Wildcoast
Farm Bureau San Diego
Everett L. DeLano, III, Esq.
Mr. Barry Martin

✓

Mona Sespe
P.O. Box 303
Pala, CA 92059

October 8, 2009

John Robertus, Executive Officer
Attn: Mike Porter, Engineering Geologist
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Dear Mr. Robertus and Mike Porter,

My name is Mona Sespe, I am a member of the Pala Band of Mission Indians and here I am again 25 years later still talking to you about Chokla (Gregory Mountain). Our people have continuously prayed and had ceremonies there since the beginning of time. My family has been the caretakers of this area and our Tribe still utilizes this area for ceremonial purposes as of today. Your predecessors before you understood the significance and the importance for our people to maintain our right of Freedom of Religion, which would be denied if you approve the application for Water Quality Certification for the proposed Gregory Canyon Bridge. About 20 years ago, Pala, Pauma, Pechanga, Soboba, Rincon, and La Jolla Tribes came together in support of the protection of our sacred mountain Chokla. Native people come to this area to ask for help. My Great Grandmother, her people before her, myself and members of my family have all come here for ceremony and prayer. The religious significance of Medicine Rock is evident by the paintings that represent puberty right ceremonies. The Native people are the caretakers of Mother Earth. It is our responsibility to our Creator and Mother Earth to protect and preserve all of the animal world, plant world and sacred places. Some of the animals that need our protection include the frog, mountain lion, kangaroo rat, and the Least Bells Vireo to name a few. Our culturally significant native plants needed for basketry include Willows, Oak, Cotton Wood, and numerous food plants.

Everyday people are talking about water and that we don't have enough and need to be rationing it. Yet you are willing to sacrifice our river by permitting a dump on top of it. Not only that but you are only permitting the bridge not the whole landfill. This threatens the Earth, the Ocean, the animal world and plant world. Our water supply needs to be protected from contamination. How do we do this? The other question is, are we expendable? If you approve the water quality certification for only the bridge and not the entire landfill you're giving Gregory Canyon Ltd. permission to commit Genocide. You will be denying our Freedom of Religion. I have heard people say that Pala doesn't want the dump because of the Casino. That is so far from the truth. We have stood

Mona Sespe
P.O. Box 303
Pala, CA 92059

together for 25 years to ask the County of San Diego to deny any and all projects from destroying our sacred mountain so that we may continue to practice our ways and traditions. This area is also registered with the State of California Native American Heritage Commission's Sacred Lands File. If you approve the application for Water Quality Certification for the Gregory Canyon Bridge you are telling all people that religious freedom does not matter. This is saying that the County of San Diego County Regional Water Quality Control Board condones taking any church and replacing it with a dump. This not only denies freedom of Religion, but commits Genocide on Native people and would be opening the door for your place of worship to be destroyed by a dump.

We are in the year 2009 and I am not ashamed to beg you to outright deny the application for the Gregory Canyon Bridge. You have the right to do this, and it is time to stop approving bad projects. I am begging you to please protect our right to Freedom of Religion.

Sincerely,



Mona Sespe
Pala Tribal Member

From: Adam Gomes <adam@unixgeek.net>
To: <mporter@waterboards.ca.gov>
Date: 10/20/09
Subject: Protect the San Luis Rey River and San Diego County's drinking water

Oct 20, 2009

John Robertus
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Dear Robertus,

I urge the Regional Board to reject water quality certification ("Section 401 certification") for the Gregory Canyon Landfill project in northern San Diego County. I also urge the board to hold a public hearing on this issue.

I am concerned that toxics leaching from the garbage dump could severely harm critical groundwater supplies in the San Luis Rey River Valley's aquifers. In the midst of a statewide drought and with the

very real threat of climate change looming, regional water supplies are scarcer and more important than ever. This region's drinking water sources must be protected and preserved at all costs.

I also am deeply concerned that the board would consider issuing a certification for this massive project without holding a public hearing. The public has the right to be fully informed of -- and

participate actively in -- each and every permitting step that concerns this 200-acre garbage dump that threatens drinking water sources, sacred Native American lands and wildlife habitat.

For these reasons, I urge the Regional Board NOT to grant Section 401 certification for the Gregory Canyon Landfill. In addition, a full public hearing should be held to allow citizens to weigh in on this important matter.

Sincerely,

Mr. Adam Gomes
29 Beech Bluff Rd
East Freetown, MA 02717-1324



Procopio, Cory, Hargreaves & Savitch LLP

SAN DIEGO REGIONAL
CONTROL BOARD

2009 OCT 27 P 3:04

Walter E. Rusinek
Direct Dial: (619) 525-3812
E-mail: wer@procopio.com

October 23, 2009

John Robertus
Executive Officer
Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Re: Comments on the Revised Application Dated September 28, 2009, for
Certification Under Section 401 of the Federal Clean Water Act

Dear Mr. Robertus:

These additional comments on the new application for state water quality certification under Section 401 of the Clean Water Act described above for the proposed Gregory Canyon landfill are submitted on behalf of the Pala Band of Mission Indians. These comments are in addition to comments previously submitted on an earlier application by Gregory Canyon Ltd. ("GCL") dated September 17, 2009. That September 17th application was deemed incomplete by the Regional Board as reflected in a letter to GCL dated September 28, 2009. GCL then submitted a new application dated September 28, 2009. A letter from the Regional Board dated October 13, 2009, deemed the September 17th application complete, even though an entirely new application had been submitted.

A number of comments were provided to the Regional Board by the Pala Band and other interested parties identifying problems with the September 17th application and approval of the project in general. Those comments addressed the September 17th application because that was the only application posted on the Regional Board website. Even today, the website states that comments on the September 17th application must be submitted "21 days from the date" the application was posted on the website. The clear indication is that time for commenting on the new Section 401 application expired in early October. That misstates the fact that the regional Board must accept comments until action is taken on the certification. It also indicates that the

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- a. Regional Board has failed to provide adequate public notice on the new September 28th application.¹

The Regional Board also appears to be taking the position that the operable application is the September 17th application, even though that application was submitted on the wrong form and was deemed incomplete. The fact that the Regional Board now has deemed the second application complete indicates that it believes the new application included information not included in the September 17th application. If that is the case, it is the new September 28th application that the Regional Board is processing, and a proper notice must make clear that comments should be provided on the new application.

A. The Regional Board Should Not Process the New Application Because There is No Valid Section 404 Permit Application.

As noted in previous comments, we remain puzzled as to why the Regional Board has chosen to use its limited resources to process this Section 401 application given that there is no valid application pending for a Section 404 permit under the Clean Water Act. As you know, the Regional Board's legal duties under Section 401 arise only if there is a valid permit application under Section 404. As discussed below, there is no valid application.

The September 28th Section 401 application confirmed that the Section 404 application for a nationwide permit ("NWP") is dated September 28, 2005. As pointed out in previous comments, the NWP that GCL was seeking with that 2005 application expired on March 18, 2007. Those previous comments provided specific quotes from the rules of the Army Corps of Engineers ("Corps") stating that when an NWP expires, all authorizations under that NWP also expire within one year. (See 33 C.F.R. §§ 330.1(g) and 330.6(b).) Given that activities authorized by an NWP had to be completed by 2008, a mere application for an expired NWP clearly is no longer valid. As one court recently has stated regarding expired NWPs, "[t]he Corps can no longer authorize any activity under that permit and indeed no activities authorized by that permit continue to be or even can be in operation at this time because the twelve-month extension period has run." (*Ohio Valley Environmental Coalition v. Hurst*, 604 F.Supp.2d 860 (S.D.W.Va. 2009); see also *Kentuckians for the Commonweath, Inc. v. Rivenburgh*, 269 F.Supp.2d 710, 715-16 (S.D.W.Va. 2003).) Until GCL files a valid Section 404 permit, the Regional Board should not consider an application for Section 401 certification.

The Regional Board's rush to process this invalid application is even more puzzling given that the existing jurisdictional determination ("JD") for the proposed Gregory Canyon landfill expires on October 28, 2009. While the new Section 401 application only seeks

¹ The comments submitted previously by the Pala Band and all other comments are hereby incorporated into and made part of these additional comments.

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certification under Section 401 for the bridge to the proposed landfill, the new JD could conclude that the stream in Gregory Canyon where the proposed landfill would be located is a “water of the United States.” Such a finding would require GCL to obtain an individual Section 404 permit for the entire landfill project, including the bridge. The rules of the Corps are clear that, if an individual permit was needed for the proposed landfill, the bridge could not be permitted using a separate NWP because it has no “independent utility.” (33 C.F.R. § 330.6(d).) The Regional Board cannot simply ignore the fact that the JD will expire and that a new JD could require an individual permit for the entire landfill and continue to process an application for the bridge alone.

B. The New Application is Internally Inconsistent and Still Does Not Provide Sufficient Information for the Issuance of a Section 401 Water Quality Certification.

Even if these factors did not make consideration of the new Section 401 certification application premature, the new application remains incomplete for the following reasons.

1. Item 4 of the Regional Board’s September 28th letter indicating that the September 17th application was incomplete requested a description of the “type of drilling that will be done, potential sources of pollutants from that drilling method, seasonal staging of the drilling operation and pier construction relative to the rainy or monsoon season, and if coffering will be used.” But the September 28th application contains no information that addresses those issues, and the section entitled “Description of Activity” was barely changed.

It appears that GCL’s consultant URS attempted to address the issues raised by the Regional Board by providing a letter to the Regional Board dated October 8, 2009, describing borehole drilling methods and best management practices (“BMPs”) for that drilling. The URS letter is not referred to or incorporated in the September 28th application, so it is not entirely clear that it is part of the application. However, statements in the URS letter directly contradict statements in the September 28th application. Specifically, the URS letter states the following on page 3:

- EC-1 -- “Construction will be conducted outside of the rainy season between May 31 and October 1.”
- NS-5 -- “Coffer dams will not be required because higher flows which would necessitate this technology are not anticipated during summer months.”

But the new Section 401 application states on page 4 under “Description of Activity” that “[p]ending issuance of required permits, construction of the bridge is currently anticipated to occur starting November 2009 with completion in December 2010” and on page 6 under “Protection of Water Quality” that “[c]onstruction activities in surface water will be conducted

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outside of periods of high water flow in the San Luis Rey River." The application does not indicate what would constitute a "period of high water flow."

If construction is proposed to begin in November of 2009 or at any time during the rainy season, the applicant has not provided any information on or analysis of proposed BMPs for wet-weather construction activities in the San Luis Rey River, and the water quality impacts of the project have not been evaluated. If construction activities would only be conducted in the summer months as represented in the URS letter, then the Section 401 application is incomplete and misleading. In either case, that direct conflict must be rectified before the new application can be deemed complete.

2. The URS letter claims that the BMPs for the installation of the bridge piers are shown on a map included as Attachment B to its letter. But the map at Attachment B only shows what are termed "clearwater diversion" BMPs, which are described in the URS letter at "NS-5" as being applicable only during summertime construction. Again, this conflicts with the text of the new application itself.

3. The URS letter also states in "EC-2" that "[v]egetation located in the bridge access/work area boundary [Attachment A] will not be permanently removed and will be permitted to naturally revegetate" However "Attachment A" does not identify where this vegetation is located, and even if URS actually meant to refer to Attachment B, that drawing does not identify the area of vegetation that would be impacted either.

4. There is no information in the URS letter or in the September 28th application to indicate where "vehicle and equipment cleaning" (NS-8 in the letter) will be conducted and what BMPs would be used. The URS letter claims that if vehicle maintenance and equipment cleaning is conducted on site "technologies and practices described in the BMP fact sheet will be employed." (NS-10 of the letter). The letter states that these "BMP fact sheets" are provided in Attachment Q of the Storm Water Pollution Prevention Plan (SWPPP). Of course, if one goes to Attachment Q of the SWPPP included on the Regional Board's website, that Attachment is blank – there are no "fact sheets."

This failure to either refer to a source with no information or to refer generically to an outside source of information was a problem with the earlier application and is a problem with the new application. The Regional Board's own rules require a complete application to provide detailed descriptions of all of the listed activities and citations to specific page numbers in any documents referenced in the application. While the URS letter here refers to a specific section of the SWPPP (where there is no information), the new application like the old application refers generically to the EIR or the Joint Technical Document, but does not provide required citations to specific sections of those large documents. Without that information, the new application is incomplete as was the earlier application.

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5. The URS letter also provides conflicting descriptions as to how drilling spoils and excess concrete will be managed. First, on page 3, the URS letter states that “[d]rilling spoils and excess concrete will be removed from the site and disposed of in an upland area.” The upland area where this disposal will occur is not identified, and there is no discussion of the permits that would be obtained to dispose of this solid waste (and possibly hazardous waste) in these unspecified “upland areas.”

But further down the page, the letter claims that “[d]rilling spoils will be stored offsite in an upland area where appropriate stockpile management technologies will be implemented.” (WM-3). Given the previous statements, there is no assurance that “offsite” means off the Gregory Canyon site on some undefined upland area or merely away from the river in some undefined upland area of the site. In either case, clarification must be provided. If the drilling spoils and excess concrete remain on the site, the application must provide some discussion of where the materials will be placed and the BMPs that will be implemented to protect water quality. If those materials are to be disposed of on the site or elsewhere, appropriate permits must be obtained.

6. Neither the application nor the URS letter specifically state how drilling spoils or slurry or concrete will be collected to prevent them from discharging to the San Luis Rey River bed, even if there is no water flowing at the time. Item Number 4 of the Regional Board’s “incomplete” letter of September 28th also required that information. Page 6 of the application refers in passing to the fact that BMPs “may include” temporary storage of materials in the riverbed on geotextile materials. That is not an adequate description for the Regional Board to assess whether that potential BMP would prevent the discharge of those materials into the riverbed and protect water quality from the materials themselves or their residues. Without that description the new application is not complete.

7. Although the URS letter provides some information on drilling activities (although the information still is inadequate), neither the letter nor the new application discuss the other facets of the bridge construction to determine what methods are required to prevent impacts to water quality. The construction will take place in and over the riverbed and spills, metal shavings or grindings, lubricating oils and other materials could end up in the river bed. None of that is discussed as part of the activity of constructing the bridge. GCL also fails to identify where construction staging areas would be located or how the south side of the river would be accessed prior to construction of the bridge. For these reasons as well, the application is not complete.

8. The new application also claims that the existing “low-flow” crossing would be abandoned and the culverts and “cover” removed. But there is no discussion of BMPs for that activity if it were to occur. In addition, the claim on page 4 of the new application that removing the crossing would “improve the hydrogeomorphological performance of the river by improving downstream water flow the location of the existing low flow crossing” is pure speculation

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because there has been no analysis done of the effect of the crossing on the river to allow such a comparison. Some photographic evidence of the condition of the low-flow crossing also should be provided.

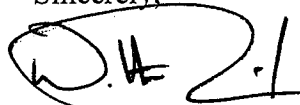
9. Page three of the new application indicates water velocities and shear for the existing river, but does not provide that information with the bridge in place. The Regional Board's September 28th letter finding the application incomplete required that this information be provided for "pre- and post-construction conditions." That has not been done and so the application is not complete.

10. The new application still fails to provide any information on "past/future impacts" of other activities that "may impact the same water body." The new application still states there are no applicable projects "that would result in effects on the river *that would be related to the bridge.*" That is not the information that is required, and the answer provided is simply non-responsive. That is another reason why, notwithstanding the Regional Boards October 13th letter, the new application also is incomplete.

Conclusion

A number of the comments included in this letter showing why the September 28th application was incomplete were submitted previously on October 9th in comments on the September 17th application. A number of other comments identifying inadequacies in the application also were provided by other interested parties at the same time. Unfortunately, those comments do not appear to have been considered because the Regional Board declared the new application to be complete on October 13th, the work day following its receipt of these numerous comments, and those same problems are apparent in the new application. We trust that those previous comments, these comments, and any other comments submitted will be given full consideration now.

Sincerely,



Walter E. Rusinek

cc: Robert Smith, Chairman of the Pala Band of Mission Indians
Lenore Lamb, Director, Pala Environmental Services
Ms. Laura Yoshii, United States Environmental Protection Agency, Region IX
Ms. Michelle Moreno, United States Fish & Wildlife Service
Ms. Theresa O'Rourke, United States Army Corps of Engineers
Representative Bob Filner, 51st Congressional District
Representative Susan Davis, 53rd Congressional District

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Assemblymember Diane Harkey, 73rd Assembly District
Assemblymember Lori Saldaña, 76th Assembly District
San Diego County Board of Supervisors
San Diego City Council
Mr. Jerry Sanders, Mayor, City of San Diego
Mr. Jim Wood, Mayor, City of Oceanside
Mr. Bud Lewis, Mayor, City of Carlsbad
Ms. Maureen Stapelton, San Diego County Water Authority
Mr. Scott Harrison, Surfrider Foundation
Mr. Dave Seymour, Rainbow Municipal Water District
Mr. Joel Reynolds, Natural Resources Defense Council
Native American Environmental Professional Coalition
Mr. Edward Kimura, Sierra Club, San Diego Chapter
Ms. Joy Williams, Environmental Health Coalition
Mr. Dan Silver, Endangered Habitats League
Mr. Bruce Reznik, San Diego Coastkeeper
Mr. Mark Schlosberg, Food & Water Watch
Mr. Marco Gonzalez, Coastal Environmental Rights Foundation
Mr. Serge Dedina, Wildcoast

Mike Porter - agenda Nov 18 #9

From: <deannie550@sbcglobal.net>
To: <rb9agenda@waterboards.ca.gov>
Date: 10/31/2009 17:12
Subject: agenda Nov 18 #9
CC: "Chiara Clemente" <CClemente@waterboards.ca.gov>, <mporter@waterboards.ca.gov>

Item #9 Gregory Canyon Bridge

http://www.swrcb.ca.gov/rwqcb9/water_issues/programs/401_certification/docs/projects/gregory_canyon

To Whom it May Concern,

I strongly object to issuance of a 401 permit for the Gregory Canyon Bridge. This is a premature application and as such should be postponed until such time as the primary project is either disapproved or approved, ie. the Gregory Canyon Dump project.

At this point in time, it is somewhat doubtful if that project will be approved. I can see no logical reason to disturb the San Luis Rey River and its associated water quality, quantity and flora and fauna in the immediate vicinity at this time for any reason.

This appears to be an 'end-run' to start appropriating permit approvals and is not being heard in the appropriate, logical order such as any other project that requires the same or similar permitting authority. To my knowledge, there is no project approved that this bridge could possibly serve so this application is premature. The bridge currently in place is adequate for any other needs at this time.

This is an attempt to piecemeal this project and is simply not allowed under CEQA. Any such permit should be required as a part of a complete water quality permitting package for the entire project.

What better way to protect water quality than to postpone and/or deny this permit item until such time as the collateral project has ripened? Again, it is doubtful the project can ever be built to do a lack of project water so why put the cart before the horse. This type of permit adds to the cumulative effect on water quality and thus must be considered at the same time as the other effects. The whole of the project must be considered at the same time.


Further this bridge was a reasonably foreseeable consequence of the project and the foreseeable, substantial environmental impacts were not properly considered in the EIR. Under *Laurel Heights vs. Regents (1988)* 47 Cal3rd 376 et seq, an EIR must include this information. Further CEQA Guidelines 13555 require *all* cumulative effects to be considered in the EIR for the project.

Please refuse to certify this permit at this time and I further request a Revised EIR that properly considers *all* the environmental impacts of the project in its entirety as required by the rules and case law that shall include this bridge and its effects.

Thank you for allowing me to comment and please put into the official record. As always, I appreciate the time, effort and knowledge the staff has committed to processing information for this agenda item.

Nadine L. Scott, Attorney at Law

Friends of Loma Alta Creek
Nadine L. Scott, Attorney at Law
 550 Hoover St.
 Oceanside CA 92054

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www.lomaaltacreek.org