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LAW OFFICES OF
E. WILLIAM HUTTON, P.C.
6303 OWENSMOUTH AVENUE
10TH FLOOR
WOODLAND HILLS, CA 91367
TELEPHONE: (818) 936-3480
WWW.HUTTONLAWOFFICE.COM

E. William Hutton, Esq.
Direct Dial: (818) 936-2457
E-mail: bill.hutton@huttonlawoffice.com

June 21, 2010

Mr. Jack Miller, Director
County of San Diego
Department of Environmental Health
1255 Imperial Avenue
San Diego, CA 92101

Re: Comments on the 2009 Addendum to the Final Environmental Impact Report for the Proposed Gregory Canyon Landfill

Dear Mr. Miller:

Thank you for forwarding a copy of the April 21, 2010 letter from Mr. Rusinek, on behalf of the Pala Band of Mission Indians (Pala Band), for review and comment by Gregory Canyon, Ltd., the project applicant.

The December 2009 Addendum to the Final Environmental Impact Report (2009 Addendum), certified by the Director of the County of San Diego Department of Environmental Health (DEH) on January 7, 2010, included a detailed analysis of the criteria for use of an Addendum, as opposed to a Supplemental or Subsequent EIR (SEIR) pursuant to the California Environmental Quality Act (CEQA). The 2009 Addendum concluded that none of the conditions requiring preparation of a Subsequent or Supplemental EIR had occurred. Based on our review of the comment letter, no significant new information has been presented that would change that conclusion.

In order to facilitate review and response to the comment letter, it has been broken down into specific issues and bracketed, similar to the process in preparing responses to comments to a Draft EIR. A copy of the bracketed letter is attached, and responses are set forth below.

Response to Comment #1:

The comment takes the position that because there are "substantial changes in the Project and the circumstances under which the Project is undertaken and [] new information that identifies significant effects," DEH should prepare a SEIR. The comment also requests an opportunity to comment on the requested SEIR. The comment does not cite to a specific reason for the SEIR,

nor does it rely on any applicable law. Nevertheless, a brief overview of the law applicable to a SEIR is helpful to support the responses to the remainder of the letter.

Public Resources Code section 21166 does not allow a lead or responsible agency to require preparation of a SEIR unless (a) substantial changes are proposed in the project which will require major revisions in the EIR, (b) substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the environmental impact report, or (c) new information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available. *A Local & Regional Monitor v. City of Los Angeles* (1993) 12 Cal. App. 4th 1773, 1799-1800 ("ALARM"); Public Resources Code section 21166. CEQA Guidelines section 15162 further provides that any "substantial changes" or "new information" must result in a new significant impact, or a substantial increase in the severity of a previously identified significant effect. *Id.* at (a)(2).

"[B]ecause in-depth review has already occurred, [and] the time for challenging the sufficiency of the original EIR has long since expired," the only possible inquiry "is whether circumstances have changed enough to justify repeating a substantial portion of the process." *River Valley Preservation Project v. Metropolitan Transit Development Board* (1995) 37 Cal. App. 4th 154, 167; *see also*, *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1050. CEQA intends section 21166 "to provide a balance against the burdens created by the environmental review process and to accord a reasonable measure of finality and certainty to the results achieved." *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1074. After an environmental impact report is finalized and Public Resources Code section 21166 comes into play, "the interests of finality are favored over the policy favoring public comment." *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1018.

DEH properly relied upon an addendum in this situation, which is appropriate where "some changes or additions are necessary but none of the conditions described in Section 15162 calling for preparation of a Subsequent EIR have occurred." CEQA Guidelines section 15164(a). An addendum does not need to be circulated for public review, but can be attached to a final environmental impact report when the project is considered for approval by a lead agency. *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1398; CEQA Guidelines section 15164(c), (d). As explained by the Court in *Mani Brothers*, addenda have been upheld in numerous cases, including where many years elapsed between the original environmental impact report and later project revisions and where the project's appearance had changed fairly dramatically. *Mani Brothers Real Estate Group, supra*, 153 Cal.App.4th at 1399.¹ The 2009 Addendum included the necessary analysis of the issue and properly concluded that a SEIR was not required.

¹ *See, e.g., Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689; *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538; *River Valley Preservation Project, supra*, 37 Cal.App.4th 154.

Response to Comment #2:

The comment argues that the 2009 Addendum failed to identify and analyze the potential impacts associated with the use of pre-moisturized clay to install the landfill liner. In particular, the comment alleges the 2009 Addendum should have considered the amount and source of water used to moisture condition the clay at the mine site. First, the comment fails to provide any support – legal or otherwise – for the notion that the demanded analysis was required. Second, it would be utterly impossible to try and analyze every possible source of water that might be used to moisturize clay from the large number of potential mine sites. As explained in the 2009 Addendum, various mines may be used to supply clay for the landfill; the information provided by Pacific Clay was included simply as an illustration of the fact that this approach is viable. At this stage, it would be entirely speculative for DEH to attempt to analyze the issue, and therefore, CEQA does not mandate this herculean task. CEQA Guidelines §15145.

Moreover, the type and scope of analysis requested by the comment would turn CEQA's reasonableness requirement on its head. *See, e.g.,* CEQA Guidelines § 15151; *City of Long Beach v. Los Angeles Unified School District* (2009) 176 Cal.App.4th 889, 922 ("The statute does not demand what is not realistically possible, given the limitation of time, energy and funds.") A project need not analyze in detail the potential environmental impacts that may be caused by every single commodity used when the project is developed. For instance, the proposed project admittedly will use construction equipment to both build and operate the landfill. It would be unreasonable to demand that an EIR analyze the potential impacts caused when the needed equipment was built. The same argument holds true for the pipes that will be used on the landfill site, as well as the synthetic liner material, conduit, gates, signs, bathrooms and other miscellaneous items that will be used for the landfill. Such a focus on one single item in an addendum is excessive and contrary to the recognized limits of CEQA.

Therefore, the comment does not raise substantial changes or new information requiring preparation of a SEIR.

Response to Comment #3:

This comment claims that moisture conditioning of the clay at the mine could result in potential impacts to water quality at the mine, and impacts from transportation to the landfill site.

The only activity occurring at the mine is adding water to clay that has been mined and stockpiled. Moisture conditioning at the mine would not affect the basic operations of mining, stockpiling, loading and transporting the clay. The only difference is that water might be added to the clay stockpile prior to loading, if required based on the characteristics of the particular stockpile.

The only potential impact from water conditioning might be from runoff of soil particles, analogous to potential storm water impacts. However, that analogy has limited usefulness for two reasons. The clay is a commodity to be sold, and the mine operator has a substantial

incentive not to lose product through runoff. Also, water application (unlike natural rainfall events) is controlled, and can be managed to prevent or minimize runoff.

As mentioned in Response to Comment #2, since the liner material could come from any number of clay mines, it would be speculative for DEH to attempt to analyze the issue, and is not required by CEQA. Moreover, as also mentioned in Response to Comment #2, it is neither practical nor required under CEQA to analyze the impacts of the manufacture of every commodity used at the landfill site.

Finally, clay mining operations would be subject to applicable regulatory requirements to manage storm water, similar to those applicable to the landfill site.

With respect to transportation impacts, the Final Environmental Impact Report (2003 Draft EIR) expressly contemplated the delivery of materials to the landfill property as part of construction activities (2003 Draft EIR, p. 3-28). Truck trips related to construction were considered in the traffic analysis in both the 2003 Draft EIR and the Revised Final Environmental Impact Report (RFEIR) (2003 Draft EIR, p. 4.5-9 – 4.5-10, see also Table 4.5-4; RFEIR, Table 4.5-7). The noise analysis in both the 2003 Draft EIR and the RFEIR was based on the number and distribution of truck trips used for the traffic analysis, which included construction-related trips (2003 Draft EIR, p. 4.6-20; RFEIR, p. 4.6-7). The air quality analysis in the 2003 Draft EIR considered impacts from truck traffic related to both waste hauling and other service trips, which would include construction-related trips (2003 Draft EIR, p. 4.7-25). The daily and hourly trip limits imposed in the RFEIR (MM 4.5-2 and MM 4.5-3) related to trips from all sources, including “waste disposal, construction, recycled water and other trips” (RFEIR, p. 4.5-10).

As a result, the 2009 Addendum did not raise any new impacts not already disclosed, nor did it increase the intensity of impacts previously disclosed.

Response to Comment #4:

The comment concedes that Pacific Clay (one potential source of liner clay) has the capability to moisturize clay to a specified moisture content for purposes of manufacture of fire brick. The process for determining the moisture content in clay slated for use in liner construction is no different. There is no factual basis for the assertion that somehow this cannot be accomplished. The process for determining the moisture content for shipped clay was described in the 2009 Addendum (2009 Addendum, p. 4). Also, the clay that may be sold to Gregory Canyon by Pacific Clay has been used at other landfills throughout Riverside, Orange and Los Angeles counties over the past 30 years (2009 Addendum, Appendix D, p. 1).

Finally, the Joint Technical Document (JTD) provides for Construction Quality Assurance (CQA) of construction materials, which expressly includes material testing for “Processed moisture content (following moisture conditioning)” (JTD, p. C.4-7). CQA will ensure that the material received from a mine, Pacific Clay or another mine, would be suitable to meet requirements for the protection of groundwater resources.

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As a result, this comment does not raise significant new information requiring preparation of a SEIR.

Response to Comment #5:

The comment makes several claims related to the use of SOILTAC® as a dust suppressant.

As indicated in the 2009 Addendum, Gregory Canyon intends to utilize SOILTAC®, manufactured by Soilworks, LLC, or a similar product. SOILTAC® is a polymer-based product that creates a flexible solid mass at the soil surface. Depending on the rate of application, SOILTAC® can provide a soil crust or at heavier application rates generate qualities similar to cement. More specifically, soil stabilizers/dust suppressants, such as SOILTAC®, work by binding to soil to prevent the generation of dust particles by wind or mechanical means such as driving upon treated unpaved roads. Although SOILTAC® is soluble in water, once the product cures (dries), the solubility is reduced, minimizing transport off-site in storm water. Due to the binding nature of these products, it is not likely that these products would be transported in water to other areas on the site or to off site locations.

Vinyl chloride and acetone contained in SOILTAC® are volatile and evaporate quickly from water or soil, minimizing the possibility of transport to nearby water bodies (<http://www.atsdr.cdc.gov/substances/index.asp>, Accessed May 24, 2010). In addition, landfill components, including the internal haul roads on which the soil sealant would be used, are designed so that runoff would not discharge directly to the river. Gregory Canyon will implement storm water control measures including best management practices (BMPs), such as desilting basins, bioswales, and percolation areas, in accordance with the Storm Water Management Plan (SWMP) and the Storm Water Pollution Prevention Plan (SWPPP), aimed at minimizing the risk of storm water runoff reaching the river (URS Corporation, Storm Water Management Plan for Gregory Canyon Landfill; URS Corporation, Storm Water Pollution Prevention Plan). Due to the binding process of the SOILTAC® product, the evaporative properties of vinyl chloride and acetone, and the use of highly effective storm water BMPs, it is unlikely that vinyl chloride or acetone would impact nearby water bodies such as the San Luis Rey River.

Ecological toxicity tests have been performed for SOILTAC® for a range of animal species consistent with USEPA guidance. Test species used in the toxicity identification are sensitive to a variety of pollutants and would be representative of toxicity in other species. In general, USEPA uses fish toxicity data as a surrogate for aquatic-phase amphibians (Technical Overview of Ecological Risk Assessment, http://www.epa.gov/oppefed1/ecorisk_ders/toera_analysis_eco.htm#WSAN, USEPA 2010). Toxicity data for Fathead Minnow (Fish) presented in the MSDS show that SOILTAC®, is, in the words of the USEPA, practically non-toxic (LC₅₀>100 ppm) as defined in their ecological risk assessment guidelines. Therefore, the effect to amphibians or other species would be less than significant.

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As a result, this comment does not raise significant new information requiring preparation of a SEIR.

Response to Comment #6:

The comment makes two sets of assertions related to riparian rights.

The first set relates to the effect of a 1913 deed from South Coast Land Company, which was discussed in footnote 2 of Appendix G to the 2009 Addendum. That set of assertions is incorrect.

The claim that the 1913 Grant Deed from South Coast Land Company to the Grantee forever severed the riparian rights from the land is premised on a misunderstanding of the purpose and intent of the deed, which was to reserve to South Coast the rights it would need to build a dam and reservoir across Doane Valley, and appropriate water for use outside of the watershed. No dam was ever built across Doane Valley, and the appropriative rights were not maintained. Even so, the deed gave the grantee the right to use riparian water to meet the "requirements of the land," with agricultural uses being examples of those, as those were the uses envisioned at the time.

State law makes it clear that the beneficial use of riparian water may change with changes in the use of the riparian land. "Riparian rights in a stream or watercourse attach to, but to no more than so much of the flow thereof as may be required or used . . . for the purposes for which such lands are, *or may be made adaptable*, in view of such reasonable and beneficial uses; provided however, that nothing . . . shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use or of depriving any appropriator of water to which he is lawfully entitled." (California Water Code Section 101, emphasis added.) As a result, the claim that riparian rights are forever limited to the agricultural uses stated in the 1913 deed is incorrect.

The case cited in the April 21, 2010 letter, *Carlsbad Mutual Water Co. v. San Luis Rey Development Co.* (1947) 78 Cal. App. 2d 900, in fact supports the proposition that a riparian owner can convey certain of his riparian rights while retaining the rest. There is no automatic severance of all riparian rights as asserted in the comment.

The second set of assertions claims that because portions of Grant No. 6 have been described as "Parcels" 9 and 10 in deeds and have separate assessor's parcel numbers, the portion of Grant No. 6 which has been referred to as Parcel 9 has lost its riparian status. That set of assertions is incorrect both factually and legally.

As explained in Appendix G of the 2009 Addendum, Parcels 9 and 10 are a single tract conveyed to Maggie J. Lovell by Homestead Certificate No. 2061 executed on September 7, 1894 and recorded on May 31, 1899 (2009 Addendum, Appendix G, p. 10). The property description is

"South East quarter of the South East quarter of Section thirty-two, in Township 9 South of Range two West and the Lots numbered three and four of Section five in Township ten South of Range two West of San Bernardino Meridian, in California, containing one hundred and eighteen acres and seventy-two hundredths of an acre." It has long been held in California that lands that were in the public domain and conveyed by the government to a private party in a single certificate are considered a single tract for purposes of determining riparian status. "All the sections or fractional sections mentioned in any one certificate constitute a single tract of land." *F. Boehmer v. Big Rock Irrigation District* (1897) 117 Cal. 19, 27.

Over the years, the same tract created by Homestead Certificate No. 2061 was conveyed intact from grantor to grantee. The claim that Grant No. 6 was subdivided is factually incorrect. Only conveyances of title can operate to sever land from its riparian status. Assessors and title companies assign "parcel" numbers to pieces of land for their own convenience and purposes. For example, title companies often group "parcels" together in title insurance documents to make it easier to describe easements. Such designations do not affect water rights, which are real property rights that cannot be altered by an entity with no ownership interest in the property. Also, the fact that Parcels 9 and 10 have different tax assessors' numbers is irrelevant to their riparian status.

Finally, *Rancho Santa Margarita v. Vail* (1938) 11 Cal. 2d 501, 538, squarely supports the conclusion that where Parcels 9 and 10 were conveyed as one tract in the original Homestead Certificate, were riparian from the initial conveyance, and remained intact and were conveyed together through all conveyances, the whole of the original grant retains its riparian status.

As a result, this comment does not raise significant new information requiring preparation of a SEIR.

Response to Comment #7:

The comment asserts that the extent of riparian rights within Parcel 10 is questionable, based on a Plate created in August 2003 and included in the JTD. This graphic was prepared for a different purpose, is not at the same level of detail, and does not include the boundaries of Grant No. 6. For that reason, the specific and detailed data collection effort described in Appendix F of the 2009 Addendum provides substantial evidence as to the extent of the Pala Basin alluvium.

In addition, Appendix F of the 2009 Addendum also indicated that the alluvial boundary was within Parcel 10 (as well as Grant No. 6; see Response to Comment #6) at a second location, a finding that was not discussed in the comment (see 2009 Addendum, Appendix F, Figures 3 and 4; Appendix G, Figure 5).

The assertion that a subsurface investigation is required to define alluvial limits is not consistent with the findings of the State Water Resources Control Board (SWRCB) in Water Rights Decision 1645, which was discussed in the 2009 Addendum (2009 Addendum, p. 13). SWRCB found that groundwater flowing in the alluvium of the Pala Basin is flowing in a subterranean

stream, and that the geologic formation described as the basement complex forms its bed and banks (SWRCB, Water Rights Decision 1645, p. 24). The bed and banks are characterized by material that is “comparatively” impermeable (SWRCB, Water Rights Decision 1645, p. 6). As a result, the extent of the subterranean stream is determined by the outer extent of the bed and banks. That was precisely the analysis undertaken by Geo-Logic Associates, to determine the point of alluvial contact with the underlying bedrock. (2009 Addendum, p. 14; Appendix F, p. 1).

As a result, this comment does not raise significant new information requiring preparation of a SEIR.

Response to Comment #8:

This comment is without support, and is factually inaccurate in a number of ways.

First, to the extent that a water pipeline would cross under SR 76, the location for that would be within the portion of SR 76 that is proposed for realignment in accordance with MM 4.5.C5I. The location of that realignment is shown in RFEIR, Exhibit 4.9-3, which when compared with Figure 6 in the 2009 Addendum, shows that this pipeline would pass under the realigned section of SR 76. Construction of this pipeline would be concurrent with construction of the realigned section of SR 76, and no additional impacts would result.

In addition, it should be noted that Orange Grove Energy/SDG&E constructed a natural gas pipeline that crossed underneath SR 76 in 2009. Crossing under roads is a normal and routine part of many construction projects.

Second, as with other utilities that would serve the landfill site, the water pipeline(s) would be hung from the bridge over the San Luis Rey River, which is a normal practice in portions of California where sustained freezing temperatures are not expected. There will be no installation “through the river,” and no impacts other than those already analyzed in connection with construction of the bridge.

Third, based in Figure 6 of the 2009 Addendum, the pipelines would cross the SDCWA aqueduct at the same location as the landfill access road, and would be included with that construction. There would be no impacts not already considered.

Finally, the 2009 Addendum disclosed that the wells and pipelines would be within areas slated for habitat creation/enhancement or open space preservation (2009 Addendum, p. 31-32; 35-36; Appendix K). Potential impacts were analyzed, and project design features were incorporated to assure that impacts to biological resources would remain less than significant (2009 Addendum, p. 50; p. 52).

As a result, this comment does not raise significant new information requiring preparation of a SEIR.

Response to Comment #9:

The comment asserts that percolating groundwater from four distinct watersheds/groundwater basins within the landfill property cannot be used on land that does not overlie the groundwater source. This claim is incorrect.

First, the ability to use percolating groundwater on any portion of the landfill property was discussed in the RFEIR (RFEIR, p. 4.15-14), and was not challenged in prior CEQA litigation. The comment is looking for a second bite at the apple on an issue that could have been raised previously but was not.

Second, percolating groundwater rights fall into two categories, analogous to surface water rights: overlying and groundwater-appropriative. Overlying rights are limited to use on the overlying property (like riparian rights). Groundwater-appropriative rights can be used anywhere (like surface appropriative rights). Overlying rights have priority over groundwater-appropriative rights, but where there is no injury to overlying right holders, groundwater-appropriative rights can be used off the overlying property. The California Supreme Court has repeatedly made it clear that percolating groundwater may be appropriated for use on lands that do not overlie the groundwater source so long as the water is surplus to the needs of the overlying owners. *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 277-281; *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925-926. Moreover, no permit is required to utilize percolating groundwater, whether overlying or groundwater-appropriative (“Percolating groundwater is not subject to the Water Code sections that apply to applications, permits, or licenses to appropriate water . . .”; SWRCB, Water Rights Decision 1645, p. 5).

As can be seen on Figure 6 of the 2009 Addendum, the entirety of the Gregory Canyon watershed/groundwater basin lies within the landfill property, as is the case with all but small portions of Basins 1, 2 and 3 (2009 Addendum, p. 23). As a result, Gregory Canyon is the owner of the overlying property with respect to virtually the entire extent of these watersheds/groundwater basins, and in any event there are currently no overlying uses of the groundwater within any of these watersheds/groundwater basins. Gregory Canyon may therefore use the water from the identified watersheds/groundwater basins anywhere on the landfill property, so long as the use is reasonable and beneficial.

As a result, this comment does not raise significant new information requiring preparation of a SEIR.

Response to Comment #10:

In evaluating the potential water supply of percolating groundwater from other portions of the landfill property, the 2009 Addendum utilized the same assumptions and methodologies that were used in the RFEIR for the Gregory Canyon watershed/groundwater basin percolating groundwater wells. This was reasonable, since these other watersheds/groundwater basins are in close proximity and in the same geologic formation.

The comment primarily takes issue with the assumption of 25 inches of annual rainfall in making this calculation. The same assumption was made in the RFEIR when evaluating the potential supply of percolating groundwater within the Gregory Canyon watershed/groundwater basin, which also included a thorough discussion regarding the basis for this assumption (RFEIR, Appendix C, p. 10; Response to Comment 007-6).

These portions of the RFEIR were challenged in prior litigation, but were upheld as adequate by the Superior Court and the Court of Appeal, Fourth Appellate District. The comment is seeking a second bite at the apple on an issue that has already been litigated.

With respect to all percolating groundwater wells on the landfill property, both the RFEIR and 2009 Addendum looked at more than just safe yield. In addition to safe yield, an analysis of sustainable yield was included (RFEIR, Appendix C, p. 9-10; 2009 Addendum, Appendix H, p. 1-3). The sustainable yield calculation, coupled with a series of project design features including level controls on all pumps, is the most direct method of assuring no significant impact to this groundwater resource, through limiting pumping to a given elevation to maintain equilibrium and avoid overdrafting (2009 Addendum, p. 51-52; Appendix H, p. 2). In contrast, the safe yield analysis is useful in that it provides a general estimate of available groundwater (2009 Addendum, Appendix H, p. 3).

Since the use of percolating groundwater wells in other portions on the landfill property does not create a significant impact, the conditions requiring preparation of a SEIR do not exist.

Response to Comment #11:

This is another instance where the comment is looking for a second bite at the apple on issues that have already been litigated.

The 2003 Draft FEIR included a discussion of baseline in analyzing impacts to water resources and public services and utilities (2003 Draft EIR, p. 4.3-15 - 4.3-17; 4.15-4 - 4.15-9). The use of this baseline was upheld by the Superior Court and the Court of Appeal, Fourth Appellate District.

The comment argues that the County should have updated the project baseline in the 2009 Addendum's groundwater analysis. Citing to a recent Supreme Court decision, the comment claims that because water has not been pumped from the site in eight years, the baseline must be changed. However, a careful reading of the applicable case law regarding baseline shows that DEH followed the proper course when it developed the project's baseline in the 2009 Addendum. In fact, the recent case cited in the comment, *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, supports DEH's decision. According to CEQA Guidelines section 15125, an EIR "must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time

environmental analysis is commenced, from both a local and regional perspective." *Id.* at (a); *see also*, *Communities for a Better Environment v. South Coast Air Quality Management District*, *supra*, 48 Cal.4th at 320-321.

In an even more recent appellate court decision, *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, the court held that "[e]stablishing a baseline at the beginning of the CEQA process is a fundamental requirement so that changes brought about by a project can be seen in context and significant effects can be accurately identified." (*Emphasis added.*) *Id.* at 89. *See also*, *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 127 ("meaningful environmental review must proceed at the outset from a determination of the property's existing physical conditions.").

In light of the case law, it would have been a significant error for DEH to revise the baseline in the 2009 Addendum. The baseline was calculated for the 2003 Draft EIR at the time environmental review began, and it remains the same for purposes of this analysis today. The comment is wrong in the assertion that DEH should look at current conditions – that is contrary to the direction of CEQA.

The 2003 Draft EIR determined that pumping of up to 193 acre-feet per year (AFY) (up to 205,000 gallons per day (gpd)) of alluvial groundwater from the Pala Basin would not have a significant impact on groundwater resources or public services and utilities. The Pala alluvial basin would be the "affected area." The adequacy of that determination was not challenged in prior litigation.

It stands to reason that pumping a fraction of the previously analyzed amount, between 8,414-66,742 gpd, would likewise not have a significant impact on water resources and public services and utilities. Given historical groundwater use on the landfill property and the pumping proposed in the 2003 Draft EIR, the assertion that "new pumping" in the Pala alluvial aquifer was proposed in the 2009 Addendum is misleading.

Nonetheless, the 2009 Addendum did update the impacts analysis in the 2003 Draft EIR, and determined that there was no new information that would alter the prior conclusion of no significant impact (2009 Addendum, p. 29-31; Appendix J).

Finally, the comment raises concerns with "localized impacts." However, again, it is hard to see how these impacts would be greater since the amount of pumping would be less than that analyzed in the 2003 Draft EIR. Also, with one exception, these issues were not raised in prior litigation, even though a higher rate of pumping from the Pala alluvial basin was proposed at the time. Only one of the issues mentioned in the comment was raised in prior litigation, subsidence, but that was only in connection with the pumping of percolating groundwater (Petitioner's Opening Brief, p. 17-18), and the courts did not uphold that challenge.

Given the lack of a significant impact, the 2009 Addendum did not constitute significant new information requiring preparation of a SEIR.

Response to Comment #12:

This comment is premised on a fundamental mischaracterization of the relevant contracts.

Under Section 2.2.3 of the June 27, 2006 agreement between San Gabriel Valley Water Company (SGVWC) and the Upper San Gabriel Valley Municipal Water District (USGVMWD), one of SGVWC's covenants is that it "will sell recycled water to any user other than LADPR [Los Angeles County Department of Parks and Recreation] pursuant to SGVWC's PUC [California Public Utilities Commission ("CPUC")] adopted Tariff Schedule for Reclaimed Water Metered Service." This is exactly what SGVWC did with respect to Gregory Canyon – it exercised its right to sell recycled water in accordance with the tariff schedule (see 2009 Addendum, Appendix I, p. 7 ("GCL shall pay SGVWC in accordance with Reclaimed Water Metered Service, Tariff Schedule No. LA-6.")).

Once SGVWC contracted with Gregory Canyon, that action created a series of obligations for USGVMWD. Under Section 3.1.4, USGVMWD has the obligation to "secure, maintain, and review all requisite permits and approvals for each SGVWC customer utilizing recycled water purchased from UPPER DISTRICT."

Similarly, under Section 8.2 of the January 12, 2005 agreement between USGVMWD and County Sanitation District No. 2 of Los Angeles County (LACSD), *USGVMWD* has the oversight obligations discussed in the comment.

The comment mischaracterizes these contractual provisions by concluding that somehow they created requirements for Gregory Canyon or SGVWC. That is incorrect, based on the plain language of both the June 27, 2006 and January 12, 2005 agreements. The simple answer to the complaint that these provisions were not discussed in the agreement between Gregory Canyon and SGVWC is that they were not relevant to that agreement.

The fact that third parties are obligated to take follow up actions in the normal course of business does not make the contracted-for supply of recycled water illusory in any way. Also, as noted in the 2009 Addendum, the San Diego Regional Water Quality Control Board is proposing to authorize the use of recycled water from any source (2009 Addendum, p. 24).

The comment misstates the record by claiming that an exception or deviation to the CPUC tariff was required with respect to the contract between Gregory Canyon and SGVWC. As noted above, the rate for recycled water is based on the CPUC-approved tariff, and for that reason no exception or deviation is required. The comment makes much of the SGVWC tariff, included as Exhibit D to the letter, but fails to disclose that the Reclaimed Water Metered Service, Schedule Number LA-6, is the exact tariff schedule referenced in the agreement between Gregory Canyon and SGVWC.

Moreover, because the tariff schedule will be followed here, CPUC Standard Practice U-8-W and CPUC Sheet 19-16-W do not apply. Pursuant to SGVWC's Rule No. 4, item 5, CPUC preauthorization is required only "[f]or any service to be furnished at rates or under conditions other than the rates and conditions contained in these tariff schedules." Thus, the comment's broad overstatement regarding CPUC authorization is in error.

And, as for its reliance on *California Water & Tel. Co. v. Public Utilities Com.* (1959) 51 Cal.2d 478, the comment again paints with too broad a brush. The comment implies that the SGVWC is going to improperly extend its service area through the Gregory Canyon contract. However, the *California Water* case addressed a situation where a regulated utility was going to extend service mains beyond its dedicated area. That is not what will happen here. *Id.* at 501. As explained in the 2009 Addendum, SGVWC has contracted to allow Gregory Canyon to pick up recycled water at a facility in South El Monte, which lies within the SGVWC boundaries. Because no service main extensions will be needed, the cited case law is inapplicable.

A similar issue was addressed in the 2008 Addendum to the Final Environmental Impact Report (2008 Addendum) and ensuing litigation. The 2008 Addendum indicated that the Olivenhain Municipal Water District (OMWD) had the right to sell its recycled water outside of the District, in accordance with Water Code section 1210 (2008 Addendum, p. 11). This determination was not challenged in prior litigation, but rather, it was asserted that Water Code section 1210 did not apply in that context because the OMWD recycled water was blended with raw water from SDCWA. The trial court rejected this claim, and in the current context, Water Code section 1210 applies without question since the recycled water to be purchased from SGVWC is not blended (2009 Addendum, p. 25).

A careful review of the January 12, 2005 agreement between USGVMWD and LACSD, attached as an exhibit to the comment, indicates that no geographic limitations have been placed by LACSD, the owner of the wastewater treatment plant producing the recycled water, on the sale or use of the recycled water. Under Water Code section 1210, LACSD holds the exclusive right to the recycled water it produces, which would include the right to determine where it might be sold or used.

Section 8.1 of the agreement between USGVMWD and LACSD contains certain limitations of use, the most relevant of which are the Water Reclamation Requirements of the Los Angeles Regional Water Quality Control Board (LARWQCB). Those requirements, set forth in LARWQCB Order No. 88-107, placed no limitation on the areas where the recycled water can be purchased or utilized (LARWQCB Order No. 88-107, p. 3-4). The order contained a finding describing the areas of recycled water use, but that simply codifies the intention as of that time (LARWQCB Order No. 88-107, p. 2). As that statement was not part of the order, it did not constitute a prohibition on use outside the identified area.

Further, as noted above, under Section 2.2.3 of the June 27, 2006 agreement between SGVWC and USGVMWD, SGVWC may sell recycled water to any user other than LADPR pursuant to

SGVWC's CPUC adopted Tariff Schedule, without any geographic limitation. Gregory Canyon certainly falls into this expansive definition.

As a result, this comment does not raise significant new information requiring preparation of a SEIR.

Response to Comment #13:

The comment argues that revisions to the CEQA Guidelines required an analysis of greenhouse gas (GHG) emissions in the 2009 Addendum. But, the comment oversteps applicable authority, and DEH was not required to analyze this issue in the 2009 Addendum.²

The 2009 Addendum analyzed revisions to an ongoing project, not to a new project. The law is clear that an environmental impact report is conclusively presumed to be valid after certification, unless the requirements for a SEIR apply. Public Resources Code section 21167.2. The comment seems to claim that GHG emissions represent new information that was not analyzed and thus, an SEIR was needed. However, the threat of global warming was well known even before the RFEIR was certified on May 31, 2007, and does not constitute "new information" within the meaning of Public Resources Code section 21166(c).³

The effect of GHG emissions on global climate change has been well known since the late 1970's. In *Massachusetts v. EPA*, 549 U.S. 497, 507-11 (2007), the United States Supreme Court discussed numerous legislative and executive actions prior to the year 2001, which devoted "serious attention" to GHG emissions and global climate change. By way of example, the Court noted that: (1) Congress enacted the National Climate Program Act in 1978, 92 Stat. 601, which required the President to establish a program to study global climate change; (2) the United Nation's Intergovernmental Panel on Climate Change issued three comprehensive assessment reports evaluating the state of global research on climate change in 1990 and 1995; (3) the United Nations held the Framework Convention on Climate Change in 1992; and (4) the Kyoto Protocol was enacted in 1997. *Id.* California has also taken a lead in the regulation of GHG emissions, with the enactment of AB 1493 to regulate GHG emissions from cars and trucks in 2002 (AR 16926, 16932-39). Given the widespread availability of these studies and legislative

² The comment relies on revisions to the CEQA Guidelines that became effective on March 18, 2010. The RFEIR was certified on May 31, 2007. Thus, the revisions were not applicable in this situation.

³ See, *ALARM*, *supra*, 12 Cal.App.4th at 1800 (in order to show that an SEIR is required, a petitioner must demonstrate that the "new information was not known and *could not have been known* at the time the EIR was certified." *Emphasis in original.*); *Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 114 (petitioner must establish "new information" could not have been obtained "with the exercise of reasonable diligence."). Since the information on GHG emission was available, the conditions for requiring preparation of a SEIR are not met.

actions prior to certification of the 2003 Draft EIR on February 3, 2003 and the certification of the RFEIR on May 31, 2007, the claim that impacts from GHG emissions represent "new information" is wrong. The failure to raise this issue previously closes the door to it at this time.

Response to Comment #14:

The comment claims that the 2009 Consolidated Fire Code should have been analyzed in the 2009 Addendum. It would appear, although it is never stated, that the comment contends the Fire Code represents significant new information that required preparation of a SEIR. Assuming that is what is meant by this comment, then it is important to remember that new information must result in a new significant impact, or a substantial increase in the severity of a previously identified significant effect, to necessitate a SEIR. CEQA Guidelines section 15162(a). The information presented in the comment does not meet that standard.

The 2009 Addendum did not address potential fire impacts, and as such, the 2003 Draft EIR – which was the last document to analyze the project's potential wildfire risks – is conclusively presumed to be valid on this point. This is especially the case where this issue was not raised in prior litigation, and the adequacy of the 2003 Draft EIR has been fully and finally adjudicated.

With regard to each of the comments raised, including those that addressed turnaround, the landfill's on-site water storage and the need for blasting, these issues are not CEQA issues – they relate to conditions of approval. When design-level plans are submitted, the fire authority having jurisdiction, in consultation with County staff and the County Fire Marshall, the applicable district fire chief, or the sheriff, will review the proposed building plans and compare them to the applicable fire code in place at that time. Any updates to the code between the time of initial project approval and now, and any changes between now and ultimate development, will be considered at the time of design-level permitting. Gregory Canyon will need to satisfy the requirements of the code as they apply to the landfill site. And, Gregory Canyon must apply for any necessary approvals related to blasting permits prior to engaging in any on-site blasting, as provided in the 2003 Draft EIR (2003 Draft EIR, Table 3-6, p. 3-77). Applicable requirements will be reviewed and implemented at that time.

For these reasons, the comment does not raise significant new information requiring preparation of a SEIR.

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In conclusion, for the reasons provided above, the comments on the 2009 Addendum did not raise significant new information requiring preparation of a SEIR. The determination by DEH to utilize an Addendum was both proper and supported. If you have any question regarding the information in this letter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "E. William Hutton".

E. William Hutton

Enclosure

cc: Rodney F. Lorang, Esq. (w/encl.)
Rebecca Lafreniere (w/encl.)
James Henderson (w/encl.)



Procopio, Cory, Hargreaves & Savitch LLP

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

April 21, 2010

RECEIVED
APR 26 2010
DEH

Mr. Jack Miller
County of San Diego
Department of Environmental Health
Local Enforcement Agency
1255 Imperial Avenue
San Diego, California 92101

Re: **Comments on the Addendum to the Certified Final Environmental Impact Report for the Proposed Gregory Canyon Landfill**

Dear Mr. Miller:

These comments are provided on behalf of the Pala Band of Mission Indians on the "Addendum to the Certified Environmental Impact Report" ("Addendum") for the proposed Gregory Canyon Landfill ("Project") made public in January of this year. The Addendum was prepared to analyze the impacts of obtaining new sources of water for the proposed Project following the decision by the Olivenhain Municipal Water District to terminate its agreement to sell water to Gregory Canyon Ltd. ("GCL").

Unfortunately, the County determined that this analysis of the important issues raised by the need for new sources of water for the Project would not be improved by allowing public comment. That resulted in an inadequate analysis of the impacts of the proposed changes in the Project. After reviewing the Addendum and considering recent changes in California laws related to greenhouse gas emissions and fire safety, we have concluded that the analysis in the Addendum was inadequate for a number of reasons, including for the reasons discussed below. Given those inadequacies, the substantial changes in the Project and the circumstances under which the Project is undertaken and the new information that identifies new significant effects, the County should prepare a subsequent or a supplemental EIR for the Project and allow the public an opportunity to comment on that analysis.

I. The Addendum Failed to Analyze the Impacts of Obtaining Pre-Moisturized Clay for the Liner.

The Addendum claims that water demand at the proposed landfill can be reduced by "pre-moisturizing" clay for the liner at the clay mine, which the Addendum identifies for the first

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time as the Pacific Clay Products, Inc. Mine in Lake Elsinore, California. The Addendum includes a non-binding proposal from the company to supply the pre-moisturized clay as well as gravel for the proposed Project. The Addendum concludes that pre-moisturizing the clay at the mine site would reduce water demand at the proposed landfill site by 125,000 gallons per day ("gpd").

But, the Addendum fails to identify and analyze a number of impacts. First, there is no discussion regarding (1) the amount of water that would be needed to prepare the clay for trucking (to "over-moisturize" the clay), or (2) the source of the water for that process. If the proposed project water use would be reduced by 125,000 gpd, and the clay is being over-moisturized, the amount of water needed must be higher, but that fact is not discussed. Without some discussion of the amount and source of the water needed, the Addendum could not analyze how the use of that significant amount of water at the Pacific Clay Mine could impact other water users in the Lake Elsinore area. We note that footnote 5 of the Addendum claims that there are "numerous sources" of clay available in Southern California, but that information is not found in Appendix D or E as claimed. If another source of clay would be used, the impacts related to obtaining the material from that site should be analyzed. ②

In addition, the Addendum contained no description of the mine itself or of the process that would be used to mine and then "over-moisturize" the clay. Consequently, there was no analysis of the potential impacts to water quality from these processes. The Addendum also failed to analyze traffic, air quality, or noise impacts in the area from mining, moisturizing, and trucking the approximately 650,000 cubic yards of clay and 110,000 cubic yards of gravel that would be needed for the proposed landfill. No analysis was provided of the greenhouse gas ("GHG") emissions that would be caused by mining the clay and trucking the wet clay and gravel. ③

More troubling is the fact that the Addendum simply assumes that pre-moisturizing the clay at the mine to between four to six percent "above the optimum moisture content" would have no impact on the quality of the liner. There is no discussion of the quality assurance at the mine site to ensure that optimum moisture content has been achieved, given that clay does not easily take or give up water content. Although Pacific Clay represents that it currently moisturizes clay used to manufacture fire brick at its facility, there is no evidence that Pacific Clay ever has pre-moisturized clay for purposes of constructing a landfill liner or that pre-moisturizing clay for a landfill has been done anywhere in Southern California. That is critical information that should have been included and analyzed in the Addendum, and as the pre-moisturizing of the clay constitutes a significant change in the project, further analysis and comment was required under CEQA Guidelines Sections 15162 or 15163. ④

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II. The Addendum Failed to Analyze the Impacts of Using Soil Sealants in Areas Designated as Critical or Important Habitat for Endangered Species.

The Addendum also claims that water demand would be decreased by the use of soil sealants on unpaved roads. The Addendum also claims that use of the soil sealant "SOILTAC" would not affect water quality because "project components are designed so that runoff would not discharge directly to the river" and "areas in which the soil sealant would be applied are not located within close proximity to the river." (Addendum at pg. 37). But the Addendum did not identify where the soil sealants would be used, and the fact that a number of unpaved roads on the site are close to the San Luis Rey River raises questions about the basis for those assertions.

The Addendum also claimed that there would be no water quality impacts because laboratory test data for SOILTAC show "no detection of pesticides, PCBs, herbicides, or heavy metals, but indicate the presence of vinyl acetate and acetone." If the sealant contains vinyl acetate and acetone some analysis was required of the potential impact of vinyl acetate and acetone on water quality and species in the area. We note that the Material Safety Data Sheet ("MSDS") for the SOILTAC product included in the Addendum contains no information on acute eye, oral, skin, or inhalation toxicity, but specifically identifies first aid measures for eye contact, skin contact, inhalation or ingestion. The MSDS directs that such exposures be addressed immediately. ⑤

Given that the MSDS directs users of the product to limit skin contact and oral ingestion, the Addendum should have analyzed the impact of applying the sealant on property, especially in areas where the endangered arroyo southwestern toad and other species have been found. The MSDS does include information on ecotoxicity, but there is no discussion of impacts to amphibians or other species. Some analysis of that important issue was required under CEQA.

III. The Analysis in the Addendum of Claimed Riparian Water Rights Was Inadequate.

The Addendum asserts that one of the new sources of water would be water from the Pala Basin alluvial aquifer that would be diverted on the basis of a claimed riparian water right. There are a number of reasons why the analysis of this issue in the Addendum was inadequate.

First, footnote 2 of Appendix G to the Addendum acknowledges that, when the South Coast Land Company ("SCLC") sold a number of the riparian parcels in 1913, SCLC reserved the right to use all water developed on the parcels in excess of the amount of water needed for use on the Properties. The deed states that the new owner retained the right to use the riparian water "necessary for irrigation, domestic and stock purposes" on those riparian parcels. (Exhibit A.)

That provision in the 1913 grant deed forever severed the riparian rights from the land, except for that amount necessary for irrigation, domestic and stock purposes. (*Carlsbad Mutual*

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Water Co. v. San Luis Rey Development Co. (1947) 78 Cal.App.2d 900, 913; *Forest Lakes Mutual Water Co. v. Santa Cruz Land and Title Co.* (1929) 98 Cal.App. 489, 496). The proposed landfill would not use water for any of the listed purposes. Moreover, because the grant burdened the land with the limits on water use, the claims in Footnote 2 that (1) there is no evidence that the rights reserved by the seller were used, or (2) even if the water reserved by SCLC had been used, those rights “would be subordinate to riparian rights” are both wrong and irrelevant. It should be noted that, as discussed in the *Carlsbad Mutual Water* case, SCLC was involved at the time in purchasing land and water rights for both downstream and upstream diversions, including the construction of Lake Henshaw. Consequently, the facts appear to show that the water was used by SCLC and/or its successors-in-interest. ⑥

Second, the analysis in the Addendum claims that parcels that were riparian when the initial grant was made from the public domain retain those rights even if a subdivided parcel is no longer riparian. By law, where a parcel is conveyed by a deed “that is silent as to riparian rights, the conveyed parcel is forever deprived of its riparian status.” (*Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 538). This rule is particularly pertinent to original Grant No. 6, which includes current Parcels 9 and 10 (App. G, Figure 1). The claim that the “whole of the property remained intact through numerous conveyances” is not supported by the evidence. Parcels 9 and 10 are separate parcels with different assessor’s parcel numbers. Because the Addendum shows that Parcel 9 is not riparian to the alluvial aquifer, it no longer has any riparian rights.

Third, the claim that Parcel 10 is riparian to the alluvial aquifer also is questionable. Figure 5 of Appendix F of the Addendum claims to show the extent of the alluvial aquifer on the parcel, but that description is based on field surveys, not on a subsurface investigation. In fact, Figure 5 directly conflicts with the extent of the alluvial aquifer identified on Plate 1 in the Joint Technical Document (“JTD”) titled “Geology, Hydrogeology and Geotechnical Analyses” by GeoLogic Associates, dated May 2003, and Figure 2-3A of the JTD. Those maps clearly show that, at the farthest, the “finger” of alluvium in the area identified in Figure 5 of Appendix F pinches out before the 330-foot contour and does not reach to the 370-foot contour as claimed on Figure 5. That is a significant spatial difference that leaves the extent of the alluvium far outside the boundary of Parcel 10, and raises serious questions about the use of surface investigations to define the limits of the alluvial aquifer. ⑦

The same problem plagues the assertion that the northwest corner of Parcel 10 abuts the alluvial aquifer. Again, that claim is based solely on surface investigations and is suspect given that the boring log for Well GLA-14, which is very near that corner, shows that the water-bearing area is in an area below weathered bedrock, not in the alluvium.

Given all these problems with the analysis in the Addendum of these claimed riparian rights, further CEQA analysis is required. Prior that analysis being completed, however, additional subsurface field investigations must be conducted to confirm that Parcel 10 actually is riparian to the alluvial aquifer and that the aquifer is water-bearing in that area.

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IV. The Addendum Failed to Analyze the Impacts of Piping Any Pumped Groundwater.

In addition to the use of seven point-of-compliance monitoring wells to supply water to the proposed Project, the Addendum identifies (1) three wells located on the former Lucio Dairy on the north side of the San Luis Rey River where groundwater would be pumped from the alluvial aquifer and (2) three new percolating groundwater wells that would be located in Borrow Area B and Borrow Area A “watersheds” and in an area north of State Route 76 as on Figure 1 of Appendix H. Figure 1 shows the proposed routes for pipelines from these wells to water tanks to be located near the facilities area and in Borrow Area B, which are both on the south side of the river. Although the Addendum claims that the construction and maintenance of these pipelines would not cause any impacts, the analysis of the issue is superficial and relies on the argument that the pipelines would be installed in disturbed areas.

But it is clear that the pipeline from the groundwater well proposed for the north side of State Route 76 would have to be installed under State Route 76. Some analysis of the impacts to the road and traffic from that construction should have been included. In addition, that pipeline and the separate pipeline for the Lucio “riparian” wells (there would be two pipelines to separate riparian water from percolating groundwater) would have to cross the San Luis Rey River to reach the water tanks on the south side of the river. Even so, there was no discussion regarding the impacts of installing these pipelines through the river.

In addition, Figure 1 shows that these pipelines as well as the pipeline from the proposed Borrow Area A well would have to cross the San Diego County Water Authority Aqueduct. Again, there was no discussion of the impacts of installing these pipelines on the Aqueduct. All of these areas also are within critical habitat and habitat for the endangered arroyo toad. Because the Addendum failed to analyze the impacts of the pipelines on the river, the Aqueduct, and species, it violated CEQA.

Under state law, percolating groundwater is appurtenant to the land, and can only be used on the overlying parcel from which the water is pumped. (*See, e.g., California Water Service Co. v. Edward Sidebotham & Son, Inc.* (1964) 224 Cal.App.2d 715, 725). That contradicts with the assumption in the Addendum that groundwater pumped from the three proposed percolating groundwater wells could be used anywhere on the site.

Worse, the Addendum claims that the “safe yield” of these three new wells is 22.8 acre feet of water per year (7.4 million gallons) even though no wells have been drilled in or near any of the three “basin” areas. Rather, as discussed in Appendix H, the Addendum simply assumes that the areas would receive 25 inches of rain annually and that a portion of that water would infiltrate to the bedrock system. Not only is the rainfall assumption not supported by any evidence, but the lack of any hydrogeologic data on the amount of water these wells could produce makes the wells an illusory source of water that cannot be used to assume that there is an adequate source of water on the site.

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V. The Impacts of Pumping Water From the Lucio Dairy Wells Was Inadequate Because the Wrong Baseline Was Used.

The Addendum claims that pumping groundwater from the Lucio Dairy wells would have no impact because the amount pumped would be less than the historic amount pumped on the site. But the analysis of the impacts of pumping should have been based on current uses on the site. The fact is that no water currently is being pumped from the site and has not been pumped for approximately eight years.

Under CEQA, the impacts of a project must be compared “to the actual environmental conditions at the time of CEQA analysis” and must assess “the ‘existing physical conditions in the affected area’ [citation omitted] that is, the ‘real conditions on the ground’ [citations omitted].” (*Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310 at *4). Water pumping amounts from eight or more years ago do not establish a proper baseline under CEQA for current conditions. (*Save Our Peninsula Committee v. Monterrey County Board of Supervisors* (2001) 87 Cal.App.4th 89, 126).

In addition, claiming that the proposed pumping would cause no impacts based on the amount of water stored in the entire Pala Basin aquifer and the alleged “safe yield” of that aquifer ignores the need to assess impacts in the “affected area.” Also, under the riparian doctrine, all riparian owners are entitled to a proportional share of water (*see, e.g., Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742, 753), so some analysis was needed of how this new pumping could impact current uses.

In addition, some analysis is needed of the impacts of pumping at the proposed rate on existing habitat, on species especially the arroyo toad, on the ability to create mitigation areas based on water levels, and on surface flows in the river. Other localized effects could include subsidence and impacts on the access road. The failure to even consider these impacts violated CEQA.

VI. The Addendum Failed to Consider the Legal Limitations on the San Gabriel Valley Water Company’s Sale of Recycled Water.

The Addendum also claims that recycled water for the proposed Project would be obtained pursuant to a “Recycled Water Agreement” between the San Gabriel Valley Water Company (“SGVWC”) and GCL dated September 30, 2009. (“GCL Agreement”). Under the GCL Agreement, water would be obtained from the SGVWC facility in El Monte, California, east of Los Angeles, and then trucked 90 miles to the proposed landfill site. SGVWC is a privately owned utility regulated by the California Public Utilities Commission (“CPUC”). What the Addendum fails to discuss, however, are the agreements under which SGVWC obtains this recycled water and the conflicts between the terms of the GCL Agreement and those other agreements.

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Specifically, the SGVWC's source of recycled water is the Whittier Narrows Water Reclamation Plant operated by the Los Angeles County Sanitation District ("Sanitation District"). The Sanitation District sells recycled water to the Upper San Gabriel Valley Municipal Water District ("Upper District") pursuant to that "Agreement for Purchase and Sale of Reclaimed Water" dated January 12, 2005 (the "2005 Agreement") (Exhibit B). The Upper District then sells a portion of that water to SGVWC pursuant to the "Whittier Narrows Agreement dated June 27, 2006 ("2006 Agreement") among the Upper District, SGVWC, and the Los Angeles Department of Parks and Recreation ("LADPR"). The 2006 Agreement is attached as Exhibit C.

Section 8.2 of the 2005 Agreement requires that the Upper District "oversee any and all sites that receive reclaimed water from Upper District, and to ensure, by agreement, ordinance, or other such administrative mandate, that each site using reclaimed water from the water reclamation plant does so in accordance with the rules, regulations, guidelines and any other pertinent criteria for such use mandated by the Department and/or other regulatory agencies with appropriate jurisdiction." That provision also states that the Upper District must provide the Sanitation District with a copy of the Upper District's plan to inspect sites where the reclaimed water would be used, and required that the Sanitation District and its Board approve any new or extended portions of the Upper District's reclaimed water distribution system. The Addendum does not mention these requirements or show that they have been satisfied. Appendix B to the 2005 Agreement includes State Water Resources Control Board Order No. 88-107, which only allows reclaimed water from the Whittier Narrows Reclamation Plant to be used "within the San Gabriel Valley Hydrologic Subunit." The proposed landfill site is not within that subunit. (12)

The Addendum also conveniently fails to mention that Section 2.1.6 of the 2006 Agreement states the SGVWC's sale of recycled water to third parties other than the LADPR must be pursuant to a separate agreement between the Upper District and SGVWC. In addition, Section 3.1.4 of the 2006 Agreement requires that the Upper District "secure, maintain, and review all requisite permits and approvals for each SGVWC customer utilizing recycled water purchased from" the Upper District. The Addendum does not mention those provisions or provide any evidence that these requirements have been met.

In addition to ignoring these agreements, the Addendum also failed to discuss the fact that because the SGVWC is a CPUC-regulated public utility, any exceptions or deviations to the SGVWC's CPUC-approved tariffs requires approval of the CPUC, and any contract must be authorized by the CPUC before the contract becomes effective. (CPUC Standard Practice U-8-W). For example, CPUC Sheet 19-16-W, dated December 16, 2009, lists SGVWC's sale of recycled water to the LADPR under the "list of contracts and deviations" from SGVWC's standard tariff that were approved by the CPUC. (Exhibit D).

CPUC approval is specifically required where water service is being extended by a CPUC-regulated water company outside of its identified service area. There is no question that

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the proposed Gregory Canyon Landfill site is far outside the SGVWC's CPUC-approved service area. The CPUC rules requires that if the new service territory is more than 2,000 feet from the existing service area, or is not in the same city in which the utility already provides service, the utility must file for formal certification by the CPUC. As an example, the SGVWC requested such a modification on October 13, 2006, to add the LADPR. (CPUC Advice Letter 346, attached as Exhibit E). Case law indicates that a contract is not effective if water service is extended without the approval of the CPUC. (See e.g., *California Water & Telephone Company v. Public Utilities Commission of the State of California* (1959) 51 Cal.2d 478, 501). Failure to address let alone analyze this issue in the Addendum was a violation of CEQA.

The fact is that the GCL Agreement is invalid without CPUC approval. Relying on such a speculative source of water is an improper basis for decision making under CEQA. (*Vineyard Area Citizens For Responsible growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 432).

VII. New CEQA Guidelines Require that the Impacts From Emissions of GHGs From the Proposed Landfill Must Be Analyzed and Circulated for Public Comment.

Revisions to the CEQA Guidelines adopted by the Natural Resources Agency to address the analysis of impacts related to greenhouse gas emissions under CEQA became effective March 18, 2010. CEQA Guidelines Section 15064.4 identifies requirements for determining whether a project would cause significant impacts due to GHG emissions, and new CEQA Guidelines Section 15126.4(c) addresses mitigation measures for GHG emissions. The new rules also discuss how the cumulative impacts of a project's GHG emissions must be assessed. (CEQA Guidelines § 15130). The CEQA Guidelines define the term "greenhouse gas" to include methane, which would be emitted by the proposed landfill, and other pollutants and contaminants that would be emitted by the trucks that would be hauling water and pre-moisturized clay.

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The issuance of these Guidelines confirms that GHG emissions constitute a significant adverse affect that must be analyzed under CEQA. No such analysis was provided in the Addendum as to the direct or cumulative impact of the proposed landfill project. Because new information of substantial importance shows that the Project will have one or more significant effects, a subsequent or supplemental EIR must be prepared. (CEQA Guidelines § 15162; *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 384-84 (listing of steelhead trout as an endangered species after certification of the FEIR required supplemental analysis of the project). The fact is that the certification of the original FEIR occurred more than seven years ago, making review of that issue even more critical. (See *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 143 (two-year delay after certification raised issue of need for subsequent or supplemental EIR).

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VIII. The Issuance of a Consolidated County Fire Code in November of 2009 Requires That Further Analysis of the Proposed Project Be Completed to Assess Impacts.

Another significant change that affects the proposed Project was the release of the 2009 Consolidated Fire Code for the County of San Diego, which became effective on November 13, 2009. The revision of the Fire Code was completed by the County in response to significant wildfires in October 2003 and 2007. The FEIR had addressed the issue of fire protection by relying on the North County Fire Protection District ("NCFPD") and State and County mutual aid agreements for fire protection and on the fact that a 20,000-gallon water tank would be installed on the site. At least part of the site for the proposed Project appears to be in a very high fire hazard severity zone, and the 2007 Rice Canyon Fire burned just to the northwest of the site.

There has been no analysis of the requirements of the new Fire Code. For example, Section 503.1.2 of the Fire Code requires that areas with dead-end access like the proposed landfill have "turnarounds" at a maximum of 1,320-foot intervals as well as a turnaround within 150 feet of the end of the road. The ability to provide those turnarounds and the impacts of doing so should be analyzed.

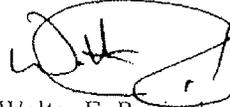
Section 508.2 also establishes specific requirements for water reservoirs that would be used to fight fires, especially in areas without centralized service from a water district. Given the size of the proposed Project, the lack of a secure source of water, and the small size of the water tanks proposed for the property, some analysis should be provided regarding whether the storage capacity would meet the requirement of the new Fire Code.

Likewise, the requirements of Section 3301.2 of the new Fire Code governing the use of explosives need to be assessed. Significant blasting would be required to construct the proposed landfill, and some analysis of these Fire Code requirements should be completed in light of that required blasting.

IX. Conclusion

Once again, the County chose to avoid public discussion of these important issues by preparing an Addendum to the RFEIR to avoid public comment. As described above, the result was an inadequate analysis of these critical issues. To rectify that result, we urge the County to prepare a subsequent or supplemental EIR that would address these issues properly and allow for public input.

Sincerely,



Walter E. Rusinek

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WER/bb

cc: Chairman Robert H. Smith, Pala Band of Mission Indians
Ms. Lenore Lamb, Director, Pala Environmental Services
Ms. Theresa O'Rourke, Army Corps of Engineers
Ms. Michelle Moreno, United States Fish & Wildlife Service
Ms. Chiara Clemente, Regional Water Quality Control Board
Mr. Stephen Moore, San Diego County Air Pollution Control District
Ms. Alexis Strauss, United States Environmental Protection Agency
Joel Reynolds, Esq., NRDC
Damon Nagami, Esq., NRDC