

1 **BEFORE THE CALIFORNIA DEPARTMENT**
2 **OF RESOURCES RECYCLING AND RECOVERY**

3
4 In the Matter of:

5 Pala Band of Mission Indians,

6 **Petitioner,**

7 San Diego County Department of
8 Environmental Health, Solid Waste Local
9 Enforcement Agency,

10 **Respondent**

11 GCL, LLC, a Delaware limited liability
12 company,

13 **Real Party in Interest**

) **APPEAL OF SAN DIEGO COUNTY**
) **LOCAL ENFORCEMENT AGENCY**
) **HEARING PANEL DECISION ON**
) **GREGORY CANYON LANDFILL,**
) **ISSUED FEBRUARY 11, 2016**

) **Public Resources Code Sections § 44307,**
) **45030 et seq.**

) **DECISION AND ORDER**

14
15 **PROCEDURAL BACKGROUND**

16 1. This matter came before me as Director of the Department of Resources Recycling and
17 Recovery (CalRecycle) on a timely administrative appeal filed pursuant to Public Resources
18 Code (PRC) Section 45030. Petitioner, Pala Band of Mission Indians (Pala), was represented by
19 Walter E. Rusinek, attorney at law. Respondent San Diego County Department of Environmental
20 Health, Solid Waste Local Enforcement Agency (LEA), was represented by Rodney Lorang,
21 Senior Deputy County Counsel. Real Party in Interest, GCL LLC (GCL), was granted
22 intervention in this proceeding and was represented by E. William Hutton, attorney at law.
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1 2. Pala appealed a decision by the San Diego County Local Hearing Panel that certain
2 demolition work proposed by GCL at the site of the proposed Gregory Canyon Landfill was an
3 effort to abate a public nuisance and not the initiation of a construction project that would trigger
4 GCL's compliance with certain conditions in the solid waste facility permit (SWFP). The local
5 hearing panel determined, pursuant to PRC 44307, that the LEA did not fail to act as required by
6 relevant portions of the Integrated Waste Management Act (IWMA) by refusing to enforce
7 conditions in the SWFP that are triggered by construction. I accepted the appeal and decided,
8 pursuant to PRC section 45031(c), that I would review this matter based upon written arguments
9 submitted by the parties, including evidentiary exhibits.

10 3. Having considered the arguments of legal counsel and the evidentiary record before me,
11 and for good cause appearing, I have made the following determinations:

12 **FACTS**

13 4. The LEA issued a revised SWFP for the proposed Gregory Canyon Landfill on August 1,
14 2011.

15 5. GCL is the owner/operator subject to the terms of the SWFP.

16 6. As CEQA Lead Agency, the LEA certified a Final Environmental Impact Report (FEIR)
17 in December, 2002 to support the issuance of a SWFP.

18 7. The LEA certified a revised FEIR in March, 2007.

19 8. Three Addendums to the FEIR were issued in July 2008, December 2009 and May 2010
20 respectively.

21 9. Section 17 of the SWFP contains the LEA's permit conditions.
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1 10. Pala put five of those permit conditions at issue in its initial request for hearing to the
2 LEA and in supplemental briefing to the hearing panel: Conditions 17(g), (i), (m), (n) and (o).¹

3 11. The Mitigation Monitoring and Reporting Program (MMRP) from the FEIR was
4 incorporated into Condition 17(g) and contains certain requirements that are triggered prior to
5 construction.

6 12. Chapter 3 of the LEA's certified FEIR contains the Project Description for the proposed
7 Gregory Canyon Landfill.

8 13. Section 3.3 of Chapter 3 of the FEIR is titled "Construction" and states, "This section
9 describes the initial construction phase as well as other construction activities that could occur
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12 ¹ These SWFP conditions read as follows (emphasis added):
"17. LEA Conditions:

13 ...
14 (g) The operator shall comply with all Mitigation Measures contained in the Mitigation Monitoring and Reporting
15 Program (MMRP) and all other mitigation measures and project design features included as attachments to the
16 permit application or described in the JTD. The operator may propose minor modifications to these Mitigation
Measures/Conditions of Approval or project design features as allowed in Title 27, C.C.R. Article 3 (CIWMB-
Enforcement Agency Requirements), including but not limited to Section 21665 (Processing Proposed Changes at
Solid Waste Facility), and subject to the limitations contained in the California Environmental Quality Act (CEQA)
with respect to changes that would necessitate supplemental environmental review [Pub. Resources Code, Section
21166, Title 14 C.C.R. Section 14000 [sic] et seq. (CEQA Guidelines), Sections 15162, 15163, 15164].

17 (i) Prior to commencement of landfill construction the owner/operator shall commit to participation in a Community
Facility District or a Developer Agreement to address fire service.

18 (m) The owner/operator shall reach a contractual agreement with the County Water Authority (CWA) concerning
pipeline protection or relocation prior to the start of construction. For purposes of the required agreement with the
CWA, relevant construction includes construction of the bridge over the San Luis Rey River.

19 (n) The operator shall offer to implement noise mitigation measures at residences located along SR 76 that are likely
to experience an increase in noise of 0.1 dBA CNEL or more from project-generated traffic if the occupants of those
residences are exposed to noise levels from traffic without the project that exceeds the County's standard of 60 dBA
CNEL. These offers shall be made to each residence owner in writing just prior to the commencement of
20 construction and if that offer is declined again between one and two years after the first acceptance of wastes at the
facility. If an owner accepts the offer of mitigation and provides site access for construction, the project applicant
21 shall install noise mitigation measures (e.g. sound walls, vegetative screens, sound-attenuating windows and doors,
etc.) acceptable to the residence owner that are at least sufficient to offset the incremental noise impacts of project-
related traffic, unless the residence owner will only consent to measures that are less effective.

22 (o) Prior to commencement of landfill construction, the operator shall provide the LEA a copy of the insurance
policy it obtains to satisfy the insurance requirements contained in Section 9 of the First Supplement to the Water
23 Supply Mitigation Agreement between the owner/operator and the San Luis Rey Municipal Water District.

1 during initial construction as well as after initial construction is complete and the landfill is
2 operational.”

3 14. Section 3.3.1 of Chapter 3 of the FEIR is titled “Initial Construction” and states, “Several
4 activities, which are considered the initial construction phase, are necessary to prepare the site
5 and the landfill for operation. The initial construction of the project includes...[r]emoval of the
6 existing dairy buildings and residences on the site.”

7 15. Other aspects of initial construction listed in Section 3.3.1 include but are not limited to
8 construction of an access road and bridge, improvements to State Route 76 at the access road,
9 excavation of the river channel, construction of ancillary facilities, and excavation of Phase I of
10 the landfill footprint.

11 16. Section 3.3.1 states that, “The initial construction period will be approximately nine to
12 twelve months in duration.”

13 17. Section 3.3.2 is titled “Other Construction Activities” and describes other construction
14 that may occur at various times *after* the landfill is operational.

15 18. The FEIR and Addendums, among other documents, are listed in Section 15 of the SWFP
16 as describing the operation of the facility.

17 19. Counsel for Pala sent an email to the LEA and other regulatory agencies on November
18 20, 2015 alleging that “construction fencing” had been erected near old, abandoned residences
19 and dairy buildings on the proposed landfill property.

20 20. The email claimed that the SWFP requires the owner/operator to comply with certain
21 conditions prior to the commencement of landfill construction and alleged that any proposed
22 demolition of the dairy buildings and residences on the property was identified in the FEIR for
23 the project as “initial construction.”

1 21. On November 25, 2015, counsel for the LEA responded by email stating that, “the LEA
2 does not have the authority to require GCL, LLC or GCL to provide notification and schedules
3 for work or activities on the larger site property that are not directly related to the SWFP
4 (including the MMRP).” Furthermore, the response stated that, “...the LEA does not consider
5 the demolition of the old buildings on the larger property to constitute ‘commencement of
6 landfill construction.’”

7 22. Based on the LEA’s response, Pala filed a request for hearing on December 22, 2015
8 pursuant to PRC Sections 44307 and 44310 seeking review of the LEA’s determinations that (a)
9 the proposed demolition activity does not fall within any SWFP conditions that are triggered by
10 construction; and (b) the LEA does not have authority to regulate activities on all of the 1783
11 acres identified in the “Description of Facility” in the SWFP.

12 23. On February 11, 2016, the local hearing panel held an administrative hearing on the
13 matter with appearances and argument made by all parties.

14 24. Evidence was presented at the hearing suggesting that the abandoned buildings and
15 adjacent area on the proposed landfill property were being used by trespassers for various
16 activities including a “skate park” and illegal drug use.

17 25. GCL indicated it was concerned about potential liability issues due to the trespass
18 activities and wished to demolish the structures to eliminate what GCL’s project manager
19 interchangeably termed a “nuisance,” an “attractive nuisance,” and a “public nuisance.”

20 26. There was no evidence presented indicating local code enforcement or other such
21 authorities were concerned about or had ordered any action regarding the alleged trespassing on
22 the property.

1 27. While the hearing panel found that a public nuisance existed, there was no evidence in
2 the record to indicate with specificity the effect of the trespass or property conditions on the
3 community or a significant number of persons.

4 28. The hearing panel found there was conflicting testimony as to whether actual
5 construction in the form of grading activity had commenced on the site.

6 29. Nevertheless, Pala presented evidence to the hearing panel in the form of a "Notification
7 of Asbestos Renovation or Demolition Operations" dated January 13, 2016 and submitted to the
8 San Diego Air Pollution Control District (SDAPCD) indicating a proposal by GCL to demolish
9 52 units at a location described on attached maps prepared by Ninyo & Moore as "Gregory
10 Canyon Landfill Property, Pala, California." The demolition operation start date was indicated as
11 January 27, 2016 and the demolition operation end date was listed as December 30, 2016.

12 30. The completed SDAPCD form indicated that heavy equipment is proposed to be used in
13 the demolition, including "bulldozer," "backhoes," "excavators," and "skid loaders/bobcats/Top
14 Loaders."

15 31. GCL's project manager testified that they do not plan to perform complete construction at
16 the proposed landfill until all permits are in place and "they can initiate the whole thing at
17 once."²

18 32. One member of the hearing panel indicated concern regarding the timing of other permits
19 necessary for the proposed landfill construction, stating, "...this may never be approved, which
20 would mean the landowner is stuck with a potential liability of having these structures there that
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24 ² Local Hearing Panel Transcript, February 11, 2016 p. 76, lines 3-5.

1 could be used as a drug houses [*sic*]. I guess they are abandoned. It sounds like a dangerous
2 situation that we should all be onboard with remedying.”³

3 33. Following the hearing, the local hearing panel issued a “Minute Order of Written
4 Decision” finding that the proposed demolition project was an effort to abate a “public nuisance”
5 and “not the initiation of a construction project, and Petitioner [Pala] does not have grounds for
6 the Hearing Panel to compel the LEA to require compliance” with the relevant permit conditions.

7 34. Pala subsequently filed a timely appeal to CalRecycle under PRC 45030 seeking
8 administrative review of the local hearing panel’s decision.

9 35. GCL filed a timely motion to intervene in this appeal proceeding, which I granted.

10 36. GCL indicated in its filing that “the partial demolition work would not commence until
11 September 15, 2016 at the earliest.”

12 **KEY LEGAL ISSUE**

13 37. The outcome of this proceeding hinges on the meaning of “construction” and/or “landfill
14 construction” as used in the relevant conditions of the SWFP. If the demolition of the 52 former
15 dairy buildings and residences falls within the meaning of those terms, the SWFP conditions are
16 triggered and GCL must comply with them. Furthermore, PRC Section 43209 would obligate the
17 LEA to enforce those conditions. The LEA would have such enforcement authority even if the
18 demolition is just a proposal but has not yet commenced. PRC Section 45005 states that an LEA
19 may issue a cease and desist order to a person who is operating, has operated, or *proposes to*
20 *operate* a solid waste facility in an unauthorized manner.

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³ Id. p. 69, lines 1-6.

1 **LEGAL ANALYSIS**

2 **A. Meaning of Construction**

3 38. The term “construction” is not defined anywhere within the SWFP. Nor does the SWFP
4 effectively differentiate the meaning of “construction” versus “landfill construction” despite both
5 terms being used in the relevant permit conditions. Looking strictly at the four corners of the
6 SWFP, it would be tempting to conclude that these terms are ambiguous and subject to
7 interpretation through common dictionary definitions or how the LEA states they were intended
8 to apply under the current circumstances. However, the SWFP was not created in a vacuum. Its
9 approval was informed by⁴ the LEA’s own lengthy CEQA process.⁵

10 39. It is therefore reasonable to conclude that the meaning of “construction” and/or “landfill
11 construction” is indicated by how the LEA described those activities in the environmental
12 documents that it prepared to guide how its own SWFP would be crafted. The LEA took the
13 CEQA lead agency role for its issuance of the Gregory Canyon Landfill SWFP. It prepared,
14 reviewed and certified an FEIR and adopted several Addendums all with the purpose of
15 informing the drafting, approval, and implementation of the SWFP.

16 40. Under CEQA, an EIR describes the whole of a project being approved by a lead agency.⁶
17 The LEA described with particularity the full extent of the landfill construction in the Project
18 Description of its FEIR. The “Initial Construction” portion of the Project Description outlines the

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20 ⁴ CEQA is intended to provide information to decision-makers and the public concerning the environmental effects
of proposed and approved activities. 14 Cal. Code Regs. Section 15002(a)(1). Informed decision making is a
fundamental purpose of the CEQA process. *Citizens of Goleta Valley v. Board of Supervisors* (1990) 42 Cal.3d 553.

21 ⁵ I make no findings herein regarding the LEA’s compliance with CEQA, but instead refer to its CEQA documents
22 as part of the administrative record in this proceeding to assist in determining the meaning of the terms of the SWFP
issued pursuant to the IWMA.

23 ⁶ 14 CCR Section 15378, *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277,
1297; *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1220.

1 entirety of the necessary work to implement the landfill design and make the facility operational.
2 The LEA stated therein that demolition of the dairy buildings and residences on the property was
3 a component of initial construction. The full initial construction phase was clearly described by
4 the LEA as one operation with various components, including dairy demolition, occurring in
5 concert over the course of nine to twelve months.

6 41. The LEA then issued a SWFP that directly referenced the FEIR and incorporated certain
7 parts of its content into the conditions. Most of the SWFP conditions mitigate effects of the
8 described initial construction. Condition 17(g), for example, *per se* requires consultation with the
9 MMRP from the CEQA document to determine the meaning of that condition. While the other
10 conditions at issue do not explicitly refer to the FEIR, they are conditions to mitigate certain
11 effects of the initial construction described in that document. I therefore conclude that the
12 meaning of “construction” and “landfill construction” in the SWFP must be applied consistently
13 with how the LEA described that portion of its own CEQA project in its own environmental
14 document. All of these documents had a single author – the LEA.

15 **B. Enforceability of SWFP Conditions**

16 42. The Respondent urges this agency to ignore the LEA’s extensive environmental review
17 of this facility, how it described the whole of the project it was approving, and find that neither
18 the local hearing panel nor CalRecycle has jurisdiction to review SWFP conditions that were the
19 implementation of the LEA’s CEQA obligations. According to the LEA’s argument, the
20 conditions are not related to the implementation of the IWMA and thus a failure to enforce those
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1 conditions is not reviewable under PRC Section 44307 or 45030 et seq.⁷ The LEA has made this
2 argument before and this will not be the first time this agency rejects it.⁸

3 43. I acknowledge that the conditions in this SWFP are atypical in that they control facility
4 construction. With the vast majority of solid waste facilities, a local land use agency first grants a
5 general permit, such as a Conditional Use Permit, which usually has conditions regulating
6 construction activities. This almost always leaves the LEA to issue a permit with conditions
7 limited to controlling day-to-day solid waste operations. That was not the case with Gregory
8 Canyon Landfill. The project received initial local approval through a San Diego County voter
9 initiative entitled "Proposition C." Regardless, the record indicates that the conditions in the
10 SWFP apply to activities within the facility boundaries that will define the design and operation
11 of the solid waste facility to protect public health, safety, and the environment as required by the
12 IWMA.⁹

13 44. An LEA has only one source of authority for issuing an SWFP and implementing
14 conditions – the IWMA.¹⁰ CEQA explicitly does not provide any special powers or independent
15 authority to impose or enforce conditions on a project. PRC Section 21004 provides (emphasis

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17 ⁷ The administrative review process under these sections is limited to an LEA's failure to act as required by Parts 4,
5, and 6 of Division 30 of the Public Resources Code.

18 ⁸ A November 14, 2008 letter was sent from the Chief Counsel of CalRecycle (then the California Integrated Waste
19 Management Board) responding to counsel for the LEA regarding the processing of a permit application for the
Gregory Canyon Landfill. The LEA had argued for treating so called CEQA-derived SWFP conditions differently
20 than IWMA-derived conditions. This argument was rejected for reasons that will be restated in this decision. I am
taking official notice of that letter pursuant to Government Code Section 11515 and attaching it hereto as Exhibit 1.

21 ⁹ PRC Section 44012.

22 (a) When issuing or revising a solid waste facilities permit, the enforcement agency shall ensure that primary
consideration is given to protecting public health and safety and preventing environmental damage, and that the
long-term protection of the environment is the guiding criterion.

23 (b) When issuing or revising a solid waste facilities permit, an enforcement agency may impose those terms and
conditions on a solid waste facilities permit that it deems necessary and appropriate to govern the design and
operation of the solid waste facility, for purposes of implementing the requirements of subdivision (a).

24 ¹⁰ Id.

1 added): “In mitigating or avoiding a significant effect of a project on the environment, a public
2 agency may exercise only those express or implied powers provided by law *other than this*
3 *division*. However, a public agency may use discretionary powers provided by such other law for
4 the purpose of mitigating or avoiding a significant effect on the environment subject to the
5 express or implied constraints or limitations that may be provided by law.” Moreover, CEQA
6 Guidelines Section 15040(b) states that, “CEQA does not grant an agency new powers
7 independent of the powers granted to the agency by other laws.” Thus, there is no such thing as a
8 “CEQA permit condition.” There are only permit terms enforceable under the LEA’s authority
9 granted by the IWMA. With this in mind, the LEA’s argument taken to its logical conclusion
10 would mean that it has no authority to enforce the mitigation of the significant effects on the
11 environment it identified in its own FEIR for both construction and operation of the landfill. This
12 would render its CEQA review pointless.

13 45. The LEA’s argument is also in conflict with its stated position in 2011 in its summary of
14 public comments on the issuance of the revised SWFP. The LEA is on record acknowledging
15 that the project design features and CEQA mitigation measures would be enforced through the
16 conditions of the SWFP, not through CEQA or some other ambiguous, uncited authority. That
17 document stated:

18 *“The LEA has determined it can use this permit to ensure the enforceability of*
19 *project features proposed by the applicant and the enforceability of mitigation*
20 *measures determined through the CEQA process to be necessary to reduce and to*
21 *mitigate adverse environmental impacts of the project...The step taken by the LEA*
22 *relative to these comments in the context of the proposed permit was to propose*
23 *an SWFP that will make enforceable all project design features that limit or*
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1 of the required elements of public nuisance under state law.^{12,13} There was no evidence in the
2 record that any code enforcement or other similar authorities had raised public nuisance concerns
3 with either GCL or the LEA. There was no evidence as to the effect of the property condition on
4 the community or a considerable number of persons. The testimony and statements in the
5 transcript, moreover, fluctuate between calling the property condition a “nuisance,”¹⁴ an
6 “attractive nuisance,”¹⁵ and a “public nuisance”¹⁶ begging the question as to the exact nature of
7 the problem. Regardless of the lack of evidentiary foundation, the SWFP directly regulates the
8 proposed demolition. Nothing in the IWMA or any other legal authority cited in the record
9 indicates grounds for a variance from the terms and conditions of this SWFP even if a nuisance
10 had been established. The impacts to the environment from initial construction are the same
11 regardless of whether the demolition is characterized as nuisance abatement or landfill
12 construction. While there are regulatory provisions for an emergency waiver of standards¹⁷ or a
13 temporary waiver of SWFP terms,¹⁸ such allowances require a defined emergency and a waiver

16 ¹² Cal. Civil Code 3479. Anything which is injurious to health, including, but not limited to, the illegal sale of
17 controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to
18 interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the
19 customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or
20 highway, is a nuisance.

19 ¹³ Cal. Civil Code 3480. A public nuisance is one which affects at the same time an entire community or
20 neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted
21 upon individuals may be unequal.

20 ¹⁴ Local Hearing Panel Transcript, February 11, 2016 p. 19, line 8.

21 ¹⁵ Id., p. 28, line 20.

22 ¹⁶ Id., p. 73, line 14.

22 ¹⁷ 14 Cal. Code of Regulations Sections 17210 et seq.

23 ¹⁸ 14 Cal. Code of Regulations Sections 17211 et seq.

1 request from the operator. There was no evidence of an emergency or a waiver request from
2 GCL.

3 **E. Compliance Alternatives**

4 48. GCL has expressed concern about potential liability from trespass on the facility property
5 at and around the dairy structures. At least one member of the local hearing panel had
6 apprehension that GCL would be unable to alleviate the trespass issue due to uncertainty with the
7 timing of issuance of additional required permits from other agencies. First, GCL is not
8 prohibited by the SWFP from performing the demolition. It just has to comply with the relevant
9 conditions. Second, I note that an SWFP is not carved in stone indefinitely and should, in fact, be
10 modified or revised if conditions on the ground change. The Legislature included a requirement
11 to review and, if necessary, revise SWFPs every five years for this very reason.¹⁹ The IWMA
12 provides an avenue to change a permit even without the five year review.²⁰ The LEA or GCL
13 may feel that the SWFP conditions no longer make sense due to changed circumstances and
14 require clarification to allow the demolition work to move forward on its own prior to the other
15 elements of landfill construction without complying with certain requirements they believe to be
16 unrelated. If that is the case, applying for a SWFP change would follow proper legal channels
17 and avoid an impermissible permit reinterpretation that conflicts with the LEA's well-
18 documented prior written description of the project.

19 **ORDER**

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¹⁹ PRC Section 44015.

22 ²⁰ PRC 44004(b) states, "If the operator wishes to change the design or operation of the solid waste facility in a
23 manner that is not authorized by the existing permit, the operator shall file an application for revision of the existing
24 solid waste facilities permit with the enforcement agency..."

1 49. Pursuant to the authority granted to me by PRC Section 45032, I am overturning the
2 February 11, 2016 decision of the San Diego County Local Hearing Panel. Furthermore, I order
3 the LEA to enforce the conditions of the SWFP with the understanding that all permit conditions
4 that reference "construction" and "landfill construction," including the terms of the MMRP
5 incorporated by reference as Condition 17(g), are triggered by the demolition of the 52 dairy
6 structures.

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8 **IT IS SO ORDERED**

9 Dated: May 26, 2016

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12 
13 Scott Smithline, Director
14 Department of Resources Recycling and Recovery

EXHIBIT 1



LINDA S. ATKINS
SECRETARY FOR ENVIRONMENTAL
PROTECTION



ARNOLD SCHWARZENEGGER
GOVERNOR

CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD

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November 14, 2008

Mr. Rodney F. Lorang
Senior Deputy County Counsel
County of San Diego
1600 Pacific Highway, Room 355
San Diego, CA 92101-2469

Subject: Gregory Canyon Landfill (SWIS No. 37-AA-0032)

Dear Rod:

I am writing in response to your letter of September 10, 2008 to Ted Rauh and myself regarding the above captioned matter. Your letter included a number of items related directly to the processing of a solid waste facilities permit application from the operator of Gregory Canyon Landfill (the "Landfill"). Ted Rauh will be responding with a letter to Gary Erbeck, LEA Director, regarding the Landfill's application. Separate from that communication, I wanted to focus on certain overarching legal principles you have raised.

I wanted to expressly respond to two issues that you have included within the context of your legal analysis, one of which goes to the core of the meaning of the Integrated Waste Management Act (the "IWMA") and the relationship between local enforcement agencies ("EAs") and CIWMB. On the issues set out below, I want to make it very clear that the CIWMB vigorously disputes your interpretation of state law. I appreciate that you may have taken the positions I am challenging here in an effort to support your arguments on the merits of the Landfill permit issues. In doing so, however, you have misstated the fundamental relationship between CIWMB and EAs as set out in statute and regulation. While I hope that the LEA and CIWMB can resolve the Landfill permit matter, it would be a mistake for the LEA to proceed in a future matter in reliance on what I am satisfied is a misinterpretation of the IWMA as to the following two points.¹

¹ Although I focus here only on certain of the assertions you make in your September 10, 2008 letter, please do not infer that I concur with any of the other assertions made in your letter. For example, you argue that an EA's issuance of a SWFP, following CIWMB concurrence, is a "discretionary," rather than a "ministerial," decision (pp. 6 - 7). I disagree. However, that is an issue more related to the question of whether CIWMB should accept a proposed modified SWFP, rather than the issues addressed in this letter.

An EA Does Not Have Authority To Issue a SWFP to Which CIWMB Has Objected –

The most important of the erroneous assertions that you make in your argument is asserting that the LEA may issue a SWFP over the objection of CIWMB (pp. 7-9 of your letter). To make the case that an EA's decision to issue a SWFP is a discretionary decision, not a ministerial one (see, pp. 6-7), you declare that the LEA could approve a modified SWFP for the Landfill over the Board's objections and could issue a SWFP even if the Board had objected pursuant to Section 44009(a)(2).² I believe the law is clear that an EA may not issue a SWFP to which the Board has properly objected in the manner provided in Section 44009, a conclusion supported by well-established practice across the state. The statutory scheme is straightforward. The EA must submit its proposed permit to the Board 65 days before it proposes to issue the permit. Section 44007. The Board must then concur or object within 60 days. Section 44009(a)(1). The Board must object if it finds the proposed permit does not satisfy specified requirements. Section 44009(a)(2). The EA can only issue the SWFP "if the board has concurred in that issuance...pursuant to Section 44009." Section 44014(a) (emphasis added). Indeed, the EA must issue the permit if the Board has concurred in the proposed permit. Section 44014(a).³ Board regulations set this process out in greater detail but without variation in the overall process: the EA drafts a proposed permit and submits it to CIWMB (Title 27, California Code of Regulations ("CCR"), § 21650(g)(1)); and following Board concurrence, the EA issues the permit (27 CCR § 21663(a))⁴.

In light of the overall statutory scheme, I am satisfied that the Legislature did not intend to authorize EAs to issue SWFPs to which the Board has objected, despite the use of the word "consideration" in Section 44009(a)(2). It is not remotely plausible that the Legislature adopted requirements that SWFPs must meet (including state minimum standards, financial assurances, and consistency with local solid waste plans) and created a State-level agency to assure those requirements are met, then intended that EAs could issue permits that fail to meet those requirements, as determined by the CIWMB. Instead, the "consideration" the Legislature intended in subdivision (a)(2) is that the LEA should amend the proposed permit to bring it into compliance with State standards or should deny the application. Any other conclusion would put the Board in a merely advisory role to the EAs and would make its existence superfluous with respect to solid waste facility permitting in California.

To my knowledge, no EA has ever attempted to issue a SWFP to which the CIWMB has objected under Section 44009. If that were to occur in the future, and we could not persuade the EA against issuing the permit, I presume that CIWMB would take action to decertify the EA or to take over the EA's permitting functions and to obtain a legal determination as to the validity of the permit that the EA issued without authority.

² Section 44009(a)(2) provides, in pertinent part: "If the board determines that the permit is not consistent with the state minimum standards...[and other requirements], the board shall object to provisions of the permit and shall submit those objections to the local enforcement agency for its consideration."

³ "...[T]he local enforcement agency shall issue...a solid waste facilities permit if the board has concurred in that issuance..." Section 44014(a) (emphasis added).

⁴ "[U]pon the concurrence of the CIWMB..., the EA shall issue the solid waste facilities permit as provided in Public Resources Code § 44014." 14 CCR § 21663(a) (emphasis added).

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When an Operator Seeks To Change the Design or Operation of a Solid Waste Facility and the EA Imposes Conditions on the SWFP To Adequately Protect the Public Health and Safety or the Environment, the EA Must Treat the SWFP as a Revised Permit, Not a Modified Permit --

You have requested further explanation of our rationale for our view that the imposition of conditions on a proposed SWFP for an existing facility triggers an application for a revised, rather than modified, permit (p. 13). Statute provides that when the operator of a SWF wants to "make a significant change in the design or operation of the SWF that is not authorized by the existing permit," the operator must apply to the EA for a revised SWFP. Section 44004(a), (b). CIWMB regulations have interpreted this statute to allow EAs to handle such changes as either Report of Facility Information ("RFI") amendments, permit "modifications" or permit "revisions," depending on the nature of the change in design or operation the operator seeks. 27 CCR §§ 21665. Applications for each type of change have different processing requirements. CIWMB regulations distinguish permit modifications from permit revisions on the basis of the potential effects on the public health and safety and the environment that can arise from the change in activity at the SWF. A proposed change is properly treated as a permit modification when the change is a "nonmaterial change"⁵ or when "the EA determines that the proposed change is such that the SWFP does not need to include further restrictions, prohibitions, mitigations, terms, conditions or other measures to adequately protect public health, public safety, ensure compliance with State minimum standards or to protect the environment." 27 CCR § 21665(d) (emphasis added). If an operator proposes changes that do not qualify for an RFI amendment or a permit modification, the EA must treat the application as an application for a revised SWFP. 27 CCR § 21665(e). Therefore, when an EA proposes to CIWMB a permit to allow a change in the design or operation of a SWF and the EA has imposed "mitigations, terms, conditions or other measures" to "protect public health, public safety...or to protect the environment," the EA must propose to CIWMB a revised permit, not a modified permit.⁶

You argue strenuously that Section 21620 of Title 27 contains limiting language that requires the EA to distinguish between mitigation measures the EA imposes on a SWFP pursuant to CEQA and those it imposes pursuant to the IWMA, and that such an interpretation is necessary to "reconcile" Section 21620 with Section 21665 (pp. 13-16). There is no need to "reconcile" the two regulations. Section 21620 is found in Article 2,⁷ Applicant Requirements. Article 2 sets out the requirements applicants must meet when they desire a SWFP to operate a SWF or to change activities at a permitted facility. Section 21665 is found in Article 3,⁸ Enforcement Agency (EA) Requirements. Article 3 describes the steps EAs must follow when processing permit applications. There is no conflict between the two articles that requires reconciliation.

⁵ Defined as a change that requires the SWFP to be amended but that "would not result in any physical change that would alter the approved design or operation of the facility." 27 CCR § 21563(d)(5). An example of a nonmaterial change is a required change in the SWFP to reflect the RWQCB's issuance of amended Waste Discharge Requirements which do not constitute a change in the design or operation of the SWF. (See Proposed Permit Implementation Regulations, Response to Comments Received During 60-Day Comment Period, p. 9.)

⁶ Note that this is a determination that the EA makes, not the permit applicant. 27 CCR 21665(b).

⁷ 27 CCR §§ 21570 - 21640.

⁸ 27 CCR §§ 21650 - 21680.

The language on which your argument hinges is found in Section 21620(a): "This section does not apply to changes to the facility, where such a change is not subject to the authority of the EA acting pursuant to the IWMA or regulations promulgated under such Act." The plain language of the regulation is clear – the operator of a SWF does not have to apply to the EA to revise or modify its permit when the change the operator seeks to undertake is not within the jurisdiction of the EA when it is carrying out its duties under the IWMA or CIWMB regulations. This makes sense – the EA could not authorize an activity or impose conditions on a permit based on any law other than the IWMA or CIWMB regulations.

You read the cited sentence in Section 21620(a) to mean that other CIWMB regulations, namely Section 21665, distinguish between EA authority that arises under the IWMA and authority that arises under other laws, particularly CEQA (pp. 14-16). I do not agree that CIWMB intended any such distinction to be made.⁹ The quoted sentence in Section 21620(a), which is part of the article that governs the operator's portion of the SWFP application process, means nothing more than the operator does not need to amend its permit if the change it seeks to make is not subject to the authority of the EA and the change does not effect a change in design or operation that is within the EA's authority. For example, the operator need not revise or modify its permit if it gets a permit to operate a gas flare from the local air pollution control district or if the operator modifies its operation of settling ponds at the facility with the consent of the Regional Water Quality Control Board. Section 21665, in the article that governs the EA's evaluation and processing of the operator's application, describes how the EA is to analyze the application it receives from the SWF operator. Depending on the nature of the change the operator seeks, the EA determines whether to handle the application as an application for an RFI amendment, a permit modification or a permit revision. 27 CCR § 21665(b). Nothing in Section 21665 contradicts or qualifies Section 21620(a).

Keeping this regulatory structure in mind, I want to address your argument that an existing SWFP can be "modified," rather than "revised," even though the EA must impose permit conditions to protect the public health and safety or the environment when those conditions are CEQA mitigation measures. I understand that the LEA intends to incorporate, as conditions in the SWFP for the Landfill, all of the mitigation measures which the LEA, acting as lead agency under CEQA, required in the Mitigation Monitoring and Reporting Program for the Landfill project, including three new sets of mitigation measures related to biological mitigation, offsite traffic mitigation and water receipt and water storage, required as a result of CEQA litigation (p. 17).¹⁰ You argue that conditions an EA imposes pursuant to its authority under the IWMA should be treated differently from conditions it imposes pursuant to CEQA (p. 13-14.). As noted above, CIWMB regulations do not contemplate that such a distinction be made. The factor that triggers a revised permit, as opposed to a modified permit, is the imposition "mitigations" or "conditions" intended "to adequately protect public health [or] public safety,...or to protect the environment." 27 CCR § 21665(d). On their face, mitigation measures that an EA imposes on a SWFP as permit conditions are such "mitigations" or "conditions." That is true whether the EA imposes them when acting as lead agency

⁹ As you know, courts tend to defer to administrative agencies in the reasonable interpretation of their own regulations and statutes.

¹⁰ This understanding is based on our staffs' discussions over the past year. Of course, until the LEA submits a proposed SWFP, we will not know whether it will incorporate those mitigation measures into the SWFP, or not.

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under CEQA or imposes them in carrying out its role as EA under the IWMA. Whichever function the EA is fulfilling at the time it imposes a permit condition is not germane to the "revised permit" versus "modified permit" question. After all, with respect to its ability to issue, revise or modify SWFPs, an EA has only one source of authority - the IWMA. An EA does not gain any special or additional authority to impose conditions when it is acting as a lead agency under CEQA. CEQA does not expand a public agency's authority to impose mitigation measures on a project; an agency has only the authority granted to it by law other than CEQA. Public Resources Code § 21004.¹¹ A lead agency that imposes mitigation measures beyond its authority imposes conditions that are unenforceable.

Thus, if the conditions an EA adds to a SWFP are derived from the IWMA and they result in a physical change that would alter the design or operation of the facility, a revision of the SWFP is required. If the conditions are not derived from the IWMA, they should not be included in the SWFP at all, since the EA does not have the authority to impose or enforce them.

Conclusion -

In sum, the LEA does not have authority to issue a SWFP to which CIWMB timely objects, and, for purposes of determining whether a SWFP needs revision or modification, the IWMA and CIWMB regulations do not distinguish between conditions an EA imposes on a proposed SWFP pursuant to its authority as EA and those it imposes pursuant to other authority.

At this point, I realize that we may only be able to "agree to disagree" on these issues, but I thought it was important to expressly address the issues above so that the CIWMB's position on them was clear. However, if you would like, I would be happy to discuss these fundamental issues with you further.

Very truly yours,



Elliot Block
Chief Counsel

¹¹ Section 21004 provides: "In mitigating or avoiding a significant effect of a project on the environment, a public agency may exercise only those express or implied powers provided by law other than this division. However, a public agency may use discretionary powers provided by such other law for the purpose of mitigating or avoiding a significant effect on the environment subject to the express or implied constraints or limitations that may be provided by law." See also CEQA Guidelines Section 15040: "CEQA does not grant an agency new powers independent of the powers granted to the agency by other laws." 14 CCR § 1540(b).

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cc: Gary W. Erbeck, LEA
John J. Sansone, County Counsel
E. William Hutton
Walter E. Rusinek
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CIWMB Board Members
Ted Rauh
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EXHIBIT 2



County of San Diego

SOLID WASTE LOCAL ENFORCEMENT AGENCY

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Informational Meeting Package and Summary of Comments for the Proposed Gregory Canyon Solid Waste Facility Permit and Application Package

As required by Title 27 §21660 an Informational Meeting was held on February 23, 2011. A Meeting Notice (Exhibit 1) and Letter (Exhibit 2) were generated to provide notification of the meeting time and location, and distributed per Title 27 with additional e-mail, US Mail and web site posting. In addition, two legal advertisements were placed in local newspapers (Exhibit 3). A formal presentation was made by the LEA using a PowerPoint presentation which is attached as Exhibit 4. Speaker slips and sign in sheets (Exhibits 5 and 6) were used to track and coordinate speakers and attendees. A court reporter was on hand to record the presentation and the public comment and the resulting transcripts are Exhibit 7. Press packages (Exhibit 8) were provided to various media representatives.

To accommodate an anticipated large crowd, the meeting was held in a community meeting room adjacent to the Fallbrook public library, with seating for 200 people indoors. There were additional seats in adjacent outdoor patio with an audio/visual feed. Several Television and print media representatives attended the meeting and some of the associated press coverage is provided as Exhibit 9.

Comment Sources

Comments were received by mail, e-mail, in writing at the Informational Meeting and provided verbally at the Informational Meeting.

About 200 people attended the meeting and 35 completed speaker slips and provided oral comments on the project. All written comments are also attached to this report as Exhibit 10.

At the public meeting participants were asked to self-identify as government, organized group presentation, or individuals. Government speakers identifying themselves as such were invited to speak first. "Government" included cities and other government agencies, Indian Tribes and their representatives, and public agencies such as the San Diego County Water Authority.

Verbal comments were provided at the public meeting by the following:

Elected Officials / Tribal Leaders:

Pam Slater-Price - County Supervisor, District 3;

Mark Hammond - City of Oceanside and Office of the Mayor;

Pamela Epstein - representing City of Oceanside (spoke on behalf of Deputy Mayor Esther Sanchez);

Mel Vernon - Chairman, San Luis Rey Band of Mission Indians;

Robert Smith - Chairman Pala Band of Mission Indians; and

Shasta Gaughen - Environmental Director, Pala Band of Mission Indians

Hershill Price - County Water Authority Board Member representing the City of del Mar (spoke on behalf of Mayor of Del Mar, Don Mosier)

Lavon Peck - Chairman, La Jolla Band of Luiseno Indians

Group presentations:

Gregory Canyon Ltd.;
Sierra Club, San Diego; and,
RiverWatch

Members of the Public

26 individuals

Several of the individual speakers also stated that they were members of or were representing groups or organizations including the following.

Gregory Canyon Limited
League of Women's Voters
Natural Resources Defense Council
SurfRider Foundation
Environmental Health Coalition
County Water Authority
Procopio, Cory, Hargreaves and Savitch LLP ("Procopio")
(Attorneys representing the Pala Band of Mission Indians)
San Luis Rey Watershed Council Back County Coalition
Pala Band of Mission Indians

54 written comments (31 of which were generic form letters) were received at the meeting. Additional written comments were received after the meeting. The comment summary below addresses both oral and written comments. Written comments included the following Government and group submissions:

City of Oceanside
Native Lands Consulting Service
Pala-Pauma Sponsor Group
Procopio, on behalf of the Pala Band
County Water Authority
San Luis Rey Watershed Council
Natural Resources Defense Council
Pechanga / Temecula Band of Luiseno Indians
County of San Diego Parks Department

The applicant submitted written responses to several comment letters including letters from Procopio, the Natural Resources Defense Council, the County Parks department, the San Luis Rey Municipal Water District, and the Pechanga Cultural Resources Department of the Temecula Band of Luiseno Indians ("Pechanga Band"). Those responses are included in the attached written comments Exhibit 10.

Input Received and Comment Summary

All responses were reviewed for the individual comments within the letters and other forms of comment. For example one letter (response) might include several different individual comments on different subjects such as water or biological resources. All of the individual comments identified were classified into general categories as follows.

Location

Comments were received stating that the location did not meet established criteria for identifying potential landfill locations. (Some of these comments referred to criteria that have been superseded for regional solid waste facility planning purposes.) The location's proximity to the San Luis Rey River was also cited as a bad location for a landfill.

Biology

Commenters stated a variety of concerns for Biological and Natural resources in the canyon that would be impacted by siting a landfill at the proposed location.

Geology

Several commenters suggested that seismic evaluations were not adequate considering the steepness of the slopes proposed for the landfill and the proximity of the site to the Elsinore and San Andreas faults.

Traffic

General comments were received on the negative impact of an increase in traffic on an already busy two lane stretch of highway that commenters said is inadequate to support the increased traffic associated with the landfill.

Noise

Some comments were made in general terms about the negative impacts of noise from the project.

General Opposition

Many comments included a statement of general opposition to the project.

General Support

Several commenters included a statement of general support for the project.

Money

There were several general comments made that the project was just being proposed to make a profit for the owners of the property.

Permit Application Completeness

A February 23, 2011 letter from Procopio stated with various examples that the permit application package was incomplete and should not move forward. Topics addressed in this letter include: legal standards for the complete and correct determination, type of permitted waste, daily waste disposal quantities, landfill capacity survey, status of current permits, fire protection, CEQA compliance, preliminary closure post closure maintenance plan, level of

design, other permits, temporary construction storage, inclement weather operation, alternative daily cover use, leachate collection and removal, leachate volumes, groundwater analysis, groundwater monitoring, storm water permitting, corrective action cost estimate, dust control, fire control, design features, material availability, stockpile / borrow area, leachate generation, leachate control and recovery system, landfill gas, hydrology, perimeter storm drain channel system, storm water desilting basin, landfill construction phasing, liner system development, drainage control development, floodplain, precipitation, geologic hazards, local hydrogeologic setting, final cover construction, floods, and emergency response notification. Procopio also filed a petition with the Solid Waste Hearing Panel on some of the grounds cited in their comment letter. The LEA filed a response to the petition, and Procopio filed a reply.¹ Topics addressed in this exchange include: legal standards for the complete and correct determination, preliminary closure post closure maintenance plan approval, CEQA compliance, aqueduct protection, inclement weather operation, groundwater monitoring well locations, corrective action cost estimate, fire control, design features, leachate control and recovery system, storm water desilting basin, floodplain, and geologic hazards. A couple of other commenter's cited areas where they felt that there was incorrect or incomplete information in the package including: adequacy of proposed groundwater monitoring program; incorrect calculations related to the availability of soil for cover material; and, completeness of the cost estimates for closure.

Water

A wide variety of comments were received on water-related issues including groundwater, surface water and storm water. Most of these comments stated that the facility was not properly designed to protect water sources or in practice would not be protective. Comments also focused on the proximity of the project to the San Luis Rey River, and the concept that the water in the San Luis Rey River was threatened with contamination from the landfill operation and that this in turn would impact drinking water supplies.

Pipeline

Several comments including one from the County Water Authority were related to protection of the aqueducts that run through the property.

Air

General comments were received on negative impacts of the facility on air quality.

Green House Gas (GHG)

Several comments were received on the issue of greenhouse gas generation by the decomposition of solid waste in the landfill and its effect on global climate change, and on the absence of GHG analysis in the CEQA studies for the project.

Fire Protection

¹ These materials are treated as written comments for purposes of this comment summary. In Exhibit 10 to this summary, these hearing materials are attachments to the applicant's response to Procopio's comment letter.

One commenter, Procopio, felt that the discussion of fire protection in the package was inadequate.

Landfill Capacity Needs

Commenters stated that based on current and future recycling rates and reductions in the current rates of solid waste generation there was no need for additional landfill capacity and therefore no need to build a landfill at this location.

Cultural / Environmental Justice

Some commenters felt that, based on the proximity to sites held sacred by Native Americans the landfill should not be constructed in this location. A couple of commenters felt that the location of the landfill presented environmental justice issues.

A comment was made by the Pechanga Band that they would "welcome the opportunity to meet with the LEA, and any other agency involved, to further explain and provide confidential documentation concerning specific cultural significance for the project".

Recreational Trails

The County Parks Department submitted a letter concerning recreational trails through the buffer zone associated with the landfill site. The applicant also submitted a letter on this subject.

CEQA Process

Individual commenters cited areas where they felt that the project or the conditions under which the project would be undertaken had changes, or that additional information about the project details or features had been provided which had not previously been available and therefore should result in additional review of the project under CEQA. Examples included blasting details provided in an Air Pollution Control District permit application, a changed Corps of Engineers determination of what parts of the project are within that agency's jurisdiction, the addition of a litter control fence on the top of the proposed bridge across the San Luis Rey, and quantities of green house gas (GHG) emissions.

Liability

A couple of comments were received requesting long term liability insurance for the facility.

Out of County Waste

A couple of commenters were concerned that the landfill would receive waste from areas outside the County of San Diego.

Comment Summary by Source (written and verbal)

Of the approximately 300 responses received to date the following shows numbers by source:

Citizen	253
Government	35
Environmental Group	16

Of the about 1,200 individual comments within those responses, the following show numbers by topic:

Water	322
Location	264
Capacity	261
General Opposition	188
Cultural / E.J	87
Biology	82
Traffic	9
General Support	8
Money	8
Geology	5
Noise	2
Permit Completeness	5
Air / GHG	6
Fire Protection	2
Liability	5
Out of County Waste	2

Many of the comments received were similar to the comments received and addressed during the CEQA process and have been incorporated into the mitigation measures identified during that process. These mitigation measures will be included as a permit condition in the Solid Waste Facility permit. Some additional discussion and some specific steps taken in response to comments received are outlined below.

Steps Taken by the LEA Relative to Comments Received at the Public Informational Meeting

Introduction

The material that follows is not intended to be a comprehensive response to comments received at the public meeting and in written comments; instead, the focus is on "steps taken" relative to comments received, as required by 27 CCR section 21650(g)(5). This summary is an informational permit-related document, not a CEQA findings or CEQA decision-making document.

Written comments and comments received at the public information meeting addressed both matters within the LEA's express jurisdiction under the Public Resources Code, and broader project impacts and mitigation measures. Many comments did not reflect the express limits on the LEA's jurisdiction under the Public Resources Code, or limitations imposed by the prior certification of the FEIR and RFEIR for this project. However, those limitations affected the steps the LEA could take relative to some comments received.

Because San Diego County Proposition C (1994) made a local major use permit for this facility unnecessary, the LEA has served as the CEQA lead agency for this project. In addition, LEAs are directed by Section 44012 of the Public Resources Code to give primary consideration when issuing permits to protecting public health and safety, preventing environmental damage, and long term protection of the environment. The LEA's consideration of environmental issues related to this project has therefore been broad in scope. However, matters reserved to the Air Pollution Control District

(APCD) and to the Regional Water Quality Control Board (RWQCB) under state law are explicitly excluded from LEA permitting and regulatory jurisdiction under the Public Resources Code. Therefore, while the LEA's review of environmental issues and consideration of public comments is broad, the actions it can take in the solid waste facility permit to regulate air and water matters is limited. The LEA has determined it can use this permit to ensure the enforceability of project features proposed by the applicant and the enforceability of mitigation measures determined through the CEQA process to be necessary to reduce and to mitigate adverse environmental impacts of the project, but cannot use this permit to intrude any further on matters within the jurisdiction of the APCD and RWQCB.

The Final Environmental Impact Report (FEIR) for this project dated December 2002 including a detailed Mitigation Monitoring and Reporting Program was certified by the LEA in February 2003 and is referred to in this document as the FEIR. Following litigation, additional analysis, and public comment the LEA certified a Revised Final Environmental Impact Report (RFEIR) in May 2007 and is referred to in this document as the RFEIR. Subsequently, three addendums were prepared. An addendum to address court ordered analysis of water supply was completed and adopted in 2008 and is referred to as the 2008 Addendum. An additional water source addendum, completed in December 2009 and adopted in January 2010, is referred to as the 2009 Addendum. An additional addendum addressing jurisdictional waters was adopted in May 2010 and is referred to as the 2010 Addendum. Because the EIR has been certified, the LEA's ability to require further environmental analysis of the proposed project is limited by Section 15162 of the CEQA Guidelines. This in turn limits the steps the LEA can take relative to comments received in writing or at the public informational meeting that requested further environmental review.

This summary of "steps taken" is not limited to actions taken by the LEA after the public informational meeting. Instead, this summary also describes prior determinations by the LEA that are relevant to some recurring areas of public comment.

1. Environmental Impacts and Environmental Mitigation Generally

Many comments received at the public meeting concerned the environmental impacts of the proposed project and mitigation for those impacts. In general, these comments were consistent with comments previously received by the LEA in connection with the CEQA process. Detailed responses to such comments are included in the RFEIR. The step taken by the LEA relative to these comments in the context of the proposed permit was to propose an SWFP that will make enforceable all project design features that limit or mitigate environmental impacts, all mitigation measures included in the CEQA Mitigation Monitoring and Reporting Program (MMRP), and additional project design features proposed by the applicant after the FEIR was certified.

As other agencies issue permits, similar or more stringent requirements are likely to be imposed by and become enforceable by those agencies. In the context of its own permit reviews, however triggered, the LEA will consider whether to delete from the SWFP requirements that are not based on the LEA's regulatory mandate under the PRC, if another agency with clear jurisdiction has imposed similar enforceable requirements in its permit.

2. Threats to Ground Water and Surface Water, and Post-Closure Care Issues

Many comments received at the public meeting expressed concerns that the landfill liner system would or could eventually leak, that other protective measures would prove inadequate, and that the landfill would eventually contaminate ground water and the San Luis Rey River. Concern was expressed that these failures might not fully manifest, or might not be resolved, while the operator was still present at the site to pay for any necessary response. These comments requested that an SWFP not be issued.

The EIR and RFEIR concluded that this project would not have a significant adverse impact on ground water or surface water. The LEA therefore has no basis under CEQA to deny a permit for this project based on generalized concerns that landfill liner systems and other protective systems will eventually be ineffective.

This landfill is expected to continue to generate landfill gas and leachate for more than 30 years post-closure. Current state regulations require landfill operators to provide financial assurance for post-closure care and groundwater corrective action based on a 30 year post-closure care period. Operator legal responsibility for air pollution control, leachate collection and management, other post closure care, and corrective action does not end at 30 years post-closure, but instead continues indefinitely. However, a special-purpose legal entity created to operate the landfill might not maintain adequate financial resources to address all applicable requirements at a facility for a longer post-closure period, unless required to do so by law.

Concerns of this kind were expressed by the San Luis Rey Municipal Water District (SLRMWD) several years ago. In response, the applicant entered into a contract with the SLRWD that imposes an obligation on the operator to provide replacement water if the aquifer near the landfill is contaminated by the landfill and that requires that a \$100,000,000 insurance policy be purchased to fund such a remedy if necessary. These contractual obligations are noted here because of their potential relevance to this set of comments. However, these contractual obligations will not be enforceable through the SWFP.

In connection with the SWFP, the step taken by the LEA relative to these comments was to consider whether the LEA could impose additional financial assurance requirements on the operator via the SWFP. After consulting with legal counsel, the LEA concluded that this was not possible because under state law financial assurance requirements are assigned to CalRecycle and are not entrusted to LEAs. However, state regulations could be revised during the period of operation of the landfill, or after closure, to require that additional financial assurance be provided. The LEA therefore urges CalRecycle to revise state regulations to require landfill operators to provide financial assurance based on the full period of time post-closure that continued management and monitoring of a landfill is expected to be necessary.

27 CCR 21650(i) limits the LEA's ability to take further steps in response to these comments. That section prohibits an LEA from including conditions in an SWFP that pertain solely to air or water quality. Instead, those matters are reserved to the APCD and RWQCB. As CEQA lead agency, the LEA has nevertheless included enforceable conditions pertaining to air and water quality in the proposed SWFP, but has limited these conditions to project design features and MMRP measures as described for item 1 above. The project applicant has agreed that it will not challenge such conditions

based on an assertion that the Public Resources Code does not allow such conditions to be included in an SWFP. Before the landfill can be constructed, the applicant will have to obtain permits from the APCD and RWQCB that will include clearly enforceable requirements to protect air and water quality. If and when the RWQCB issues Waste Discharge Requirements, the LEA will consider in consultation with the RWQCB whether to delete from the SWFP some or all requirements that pertain solely to water quality.

3. Green House Gases and Climate Change

Procopio and NRDC noted that the EIR and RFEIR do not include an analysis of the impacts of emissions of green house gases associated with the project on global climate change, and stated that such an analysis was necessary to comply with CEQA. The LEA responded to this assertion in its response to Procopio's March 3, 2011 Statement of Issues in support of Procopio's petition to the County Solid Waste Hearing Panel. (The LEA response is an attachment to an attached comment letter from Gregory Canyon, Ltd., see Response to Issue #3, in Exhibit 10). The LEA determined that these claims do not constitute "new information" within the meaning of Public Resources Code §21166(c) and section 15162 of the CEQA Guidelines because the threat of global warming was well known even before the Revised Final Environmental Impact Report was certified on May 31, 2007.

The NRDC comment letter also stated that the applicant had provided estimates of landfill gas generation rates to the APCD that were substantially higher than estimates contained in technical studies supporting the FEIR, and that this information could not have been known at the time the FEIR was prepared, making a supplemental or subsequent EIR necessary.

The NRDC's comparison of landfill gas (LFG) generation in the FEIR and the Air Quality Impact Analysis (AQIA) submitted to the San Diego Air Pollution Control District (SDAPCD) is flawed. The two estimates are not directly comparable—the FEIR addressed average emissions over a long period of time, and the AQIA was based on a conservative (i.e., high) estimate of peak year emissions. When adjustments are made to estimate average year emissions from both analyses, the average Global Warming Potential (GWP) of the landfill based on landfill gas emissions reported in the FEIR exceeds the average GWP reported in the AQIA. (This analysis is detailed in a technical memorandum prepared by Kleinfelder (2011), attached to a comment letter from Gregory Canyon, Ltd. submitted to CalRecycle with this summary (Exhibit 10).) Average year GWP is the relevant basis for comparison, because global warming is a long-term phenomenon, and not a function of emissions in a peak year. As a result, NRDC's comment does not disclose any "new information" within the meaning of Public Resources Code §21166(c) and section 15162 of the CEQA Guidelines.

In issuing a solid waste facility permit the LEA must also consider section 44012 of the Public Resources Code, which directs LEA to make long term protection of the environment a guiding light in permitting decisions. This landfill will generate landfill gas for many years, and some greenhouse gases will be emitted after control systems are taken into account. But the relevance of those expected emissions to the LEA in the context of section 44012 of the Public Resources Code is limited, because the control of emissions to air from the landfill is reserved to the APCD, and 27 CCR section 21650(i) prohibits an SWFP from containing conditions pertaining solely to air or water quality. Pursuant to the "note" to 27 CCR section 21650, the LEA has taken into consideration that APCD

requirements for the use of control systems to limit landfill gas emissions will limit releases of green house gases from the landfill.

The LEA also notes that GHC's that landfill gas generation and emissions will be addressed in the APCD permitting process, and in the Environmental Impact Study being prepared for the Army Corp of Engineers.

Despite the limitations in 27 CCR section 21650(i) the LEA as CEQA lead agency has included enforceable conditions pertaining to air quality in the proposed SWFP. Those conditions are limited to project design features and MMRP measures as described for item 1 above. The project applicant has agreed that it will not challenge such conditions based on an assertion that the PRC does not allowed such conditions to be included in an SWFP. Before the landfill can be constructed, the applicant will have to obtain an authority to construct and a permit to operate from the APCD. Those permits will include clearly enforceable requirements to protect air quality. If and when the APCD issues a Permit to Operate for the landfill, the LEA will consider whether to delete from the SWFP requirements that pertain solely to air quality.

4. County Water Authority Pipelines

Proposition C states "The project will include work required to protect any San Diego Aqueduct pipelines to the extent and in the manner required by the San Diego County Water Authority." The CEQA MMRP for the project implemented this requirement by providing that an agreement with the County Water Authority regarding pipeline protection or relocation was required to be in place prior to the start of construction.

At least three comments provided to the LEA after the LEA determined that the permit application for this facility was complete and correct addressed this project requirement. At the public meeting the County Water Authority stated that it had not received information it needed from the applicant concerning risks to the pipelines from landfill and bridge construction, and that it would therefore require that the pipelines be relocated. In a request for a hearing before the solid waste hearing panel on the LEA's determination that this application was complete and correct, Procopio stated that an agreement with the Water Authority was required before a permit could be issued, rather than prior to the start of construction. The Water Authority had previously made the same request to the LEA. However, Water Authority comments at the public information meeting only asked that this agreement be in place prior to the start of construction.

A third commenter stated that information related to blasting contained in the applicant's submission to the APCD was significant new information for purposes of Section 15162 of the CEQA guidelines, and that that information showed that these pipelines would be damaged by blasting.

The step taken by the LEA relative to the first two of these comments was to include a requirement in the SWFP that an agreement be reached with the Water Authority concerning pipeline protection or relocation prior to the start of construction. In addition, the LEA decided that the SWFP should clarify that for purposes of the required agreement with the CWA, relevant construction includes construction of the bridge over the San Luis Rey River. The LEA concluded that Procopio's assertion that an agreement was required prior to the issuance of an SWFP was not a correct interpretation of

Proposition C, was not consistent with the certified EIR and RFEIR and MMRP, and was not consistent with the Permit Streamlining Act.

The assertion that significant new information on blasting was provided to the APCD was reviewed by staff and determined to be incorrect. It is true that exact blast locations were not provided in Section 4.6 of the FEIR, but that detail was not necessary to ensure that project restrictions sufficient to protect the Water Authority's pipelines were specified. Based on criteria established in the Bureau of Mines RI 8507 standards and criteria set forth in the San Diego County Water Authority (SDCWA) design procedure manual 02229-3, and on an SDCWA request for an additional margin of safety, the FEIR provided that blasting would not occur within 500 feet of the pipelines unless approved by SDCWA, that blasting must be conducted by a State-licensed blasting contractor, and that seismographic instrumentation would be placed to measure vibration impacts (FEIR, p. 4.6-34- 4.6-35). Blasting anywhere outside of that zone was determined to have a less than significant impact as long as the above project design features were implemented, so precise blasting locations were therefore not required for purposes of this impacts analysis.

As for charge sizes, the information contained in the FEIR concerned two test charges detonated and monitored to measure geologic properties of the site. The information provided to the APCD concerned the effects of potential blasting events comprised of multiple charges detonated sequentially. Sequential detonations allow ground vibrations to subside between detonations. Therefore, while the charge weights discussed in the two analyses are quite different, it is because they are quantifying different things. There is no basis for NRDC's assertion that the information presented in the AQIA would result in a new or increased vibration impact to the pipelines. NRDC's comment does not disclose any "new information" within the meaning of Public Resources Code §21166(c).

5. Fire Protection Services

Some comments stated that an SWFP should not be issued because the facility did not have definitive arrangements for fire protection service in place.

A Zoning Project Facility Availability Form - Fire, was filed with the County of San Diego Department of Planning and Land Use. In response to this submission the County Fire Marshall has indicated in a letter to the LEA that the San Diego County Fire Authority will provide fire protection service, but that in order to receive fire service the project must commit to participation in a Community Facility District currently under formation or execute a Developer Agreement to address fire service. The LEA therefore included in the proposed SWFP a requirement for participation in a Community Facility District currently under formation or execution of a Developer Agreement prior to the start of construction.

6. Regional Solid Waste Disposal Capacity Planning

Several comments stated that the LEA should not propose to issue an SWFP for this facility because there was no need for the facility. These comments noted that other landfills in the County have daily capacity and/or total capacity expansions pending or planned, and noted that waste disposal rates in

the County had declined as recycling and recovery of waste materials increased. As a result, the most recent regional study of disposal capacity needs shows adequate daily disposal capacity for 16 to 18 years² without Gregory Canyon, assuming other capacity expansions at another landfill in the County are approved by specified dates. 16 to 18 years of daily capacity is more years of daily capacity than the 15 year planning horizon called for in section 41701(a) of the Public Resources Code ("PRC").

In the narrow context of the solid waste disposal facility LEA permitting provisions of the PRC, regional disposal capacity needs are not a relevant consideration for the LEA. The County of San Diego has assigned responsibility for integrated waste management plans within the County to the Department of Public Works, not to the LEA, to ensure that there is no conflict of interest between regional planning decisions concerning capacity needs and designated sites for facilities, versus LEA regulatory decisions that particular proposed facilities do or do not meet the standards specified in the PRC and state regulations. Pursuant to Section 44008(b) of the PRC and 22 CCR 21570(f)(5)(B), the LEA's inquiry into planning issues under the landfill permitting provisions of the PRC is therefore limited to whether the site for this project is designated as a landfill site in the regional integrated waste management plan. It is.

In the broader context of CEQA and the LEA's responsibilities as CEQA lead agency, whether this landfill would provide significant benefits is a critical consideration, because the FEIR identified significant unmitigable environmental impacts from the project. This CEQA issue is discussed in the CEQA findings and statement of overriding considerations, and in the LEA staff report for this permitting action.

7. Tribal Sacred Sites

Tribal representatives and others at the public meeting stated that Gregory Mountain was given to the Luiseno people by God as a place of worship, and that construction of the landfill should not be allowed because it would desecrate an Indian sacred site. As they did during the CEQA process, Tribal representatives stated that in Luiseno Indian tradition Gregory Mountain (called "Chokla" by the Luiseño) is believed to be one of the residing places of "Taakwic", a powerful and feared spirit. Several commenters asked that Jack Miller, Director of DEH, come to the Gregory Canyon site to experience its spiritual significance. Commenters also stated, as during the CEQA process, that construction of the landfill near Medicine Rock would be inappropriate due to Tribal interests.

These cultural resources (Gregory Mountain and Medicine Rock) were recognized as being significant to Native Americans during the CEQA process. A very brief summary of related facts and of the conclusions reached during the CEQA process follows.

The western portion of Gregory Mountain, including the peak, is located on the eastern boundary of the project site. The eastern portion of Gregory Mountain is on the Pala Indian Reservation. Because the peak and the western portion of Gregory Mountain have been in private ownership for many

² The 18 year figure is used in the draft study. However, only 16 years will pass from the end of calendar 2011 when this study will be finalized, until the beginning of the year in which a daily disposal capacity shortfall is project to exist.

years, tribal access to the site for spiritual and religious uses has been limited. Heavy underbrush and topography limit access to the top of Gregory Mountain.

Medicine Rock is not located on the project site. At its nearest point, Medicine Rock is located approximately 1,400 feet from the ancillary facilities included as part of the project. Medicine Rock is located on property recently acquired by the Pala Tribe. The Medicine Rock site is not within the Pala Reservation.

The impacts of the project on both Gregory Mountain and Medicine Rock were evaluated from an objective and a subjective standpoint in the FEIR. For the objective evaluation, air quality, noise, and visual impact studies were completed to evaluate project impacts. Some objective impacts were determined to be insignificant (e.g., noise, and view impacts) and some were mitigated to a level of insignificance (e.g., dust). The project was determined to contribute cumulatively to a preexisting violation of air quality standards.

The subjective component of the analysis considered the belief of the Luiseño that impacts of the project to Gregory Mountain and Medicine Rock are significant and unmitigable. Their belief is based on their intangible use and relationship to Gregory Mountain and Medicine Rock. Following interviews with the Luiseño people, and considering land ownership and physical conditions, the CEQA analysis concluded that recent use of Gregory Mountain for spiritual or religious purposes has been very limited. Although Medicine Rock is considered an important cultural resource by the Luiseño, a search of ethnohistoric literature and the cultural resources report has not documented any significant use of Medicine Rock for religious or ceremonial purposes.

Although the objective analysis of impacts from the project did not support significant impacts to either Gregory Mountain or Medicine Rock, and although the recent use of either Gregory Mountain or Medicine Rock for religious or spiritual purposes has not been documented, the FEIR accepted the subjective position of the Luiseño that impacts of the project upon both Gregory Mountain and Medicine Rock are significant and unmitigable. Mitigation measures were therefore accepted to reduce these impacts wherever feasible. To partially mitigate the impacts to Gregory Mountain, the project has been required to either convey a permanent open space easement or to dedicate the western slopes and the top of Gregory Mountain to preserve the resource. The project will also dedicate an access easement that will grant the Pala Band of Mission Indians the right to walk or hike from the western boundary of the land owned by the Pala Band to the summit of Gregory Mountain. The project will also provide a cash contribution to the Pala Band of Mission of Indians to create a footpath to the top of Gregory Mountain. Construction of this footpath will be the responsibility of the Pala Band of Mission Indians and is not part of the project. The project will provide funding as needed for the annual maintenance of the trail from the eastern base to the top of the mountain during the operational life of the landfill. These obligations are open ended; the Pala Band can call on the developer to fulfill these obligations at any time after a solid waste facility permit containing these requirements is issued and accepted, until the landfill is no longer operating. The FEIR did not conclude that these measures would reduce subjective impacts to Gregory Mountain or Medicine Rock to less than significant, so these significant subjective impacts must still be overridden if the project is to be approved.

Following the public meeting, the Pechanga Band submitted a comment letter asserting that "the Luiseno Ancestral Origin Landscape ... is a region or area" not a particular site or feature, and asserting generally that this broad regional landscape should be protected. The certified FEIR for this project did not address Tribal assertions of this kind; no such assertions were made during the CEQA comment process or in subsequent litigation challenging the FEIR.

In its comment letter, the Pechanga Band stated that it would "welcome the opportunity to meet with the LEA, and any other agency involved, to further explain and provide confidential documentation concerning specific cultural significance for the project." The LEA decided not to meet separately with Pechanga Band representatives, in part because the permitting process is subject to statutory deadlines, in part because the Pechanga Band comments did not indicate that the Band could provide new information of substantial importance that could not have been known with reasonable diligence at the time the previous FEIR was certified, and in part because the information the Pechanga Band offered to provide was not being offered for inclusion in the public record. The LEA has considered the Pechanga Band's written comments in its consideration of this permit application package. The applicant also submitted a letter responding to the comments of the Pechanga Band.

In response to the further comments at the public information meeting and the written comments submitted by the Pechanga Band, the LEA considered whether the comment process had provided any significant new information or had identified any additional feasible mitigation measures that should be required for this project, other than disapproval of the project. Staff concluded that this information was not new information that could not have been known at the time the FEIR was prepared, and determined that the mitigation measures already included in the MMRP included all feasible mitigation measures that had been identified to reduce impacts to these sites and to the Pechanga cultural affiliation with the general region around the landfill property, other than disapproval of the project. Staff therefore considered whether a solid waste facility permit for this project could be denied based on significant subjective impacts to the Indian sacred sites identified in the FEIR or based on the more general Indian cultural affiliations asserted by the Pechanga Band. Staff concluded that the Pechanga Band's recent assertions of general cultural affiliations could not be a basis for denying a permit, because the threshold tests established in section 15162 of the CEQA Guidelines for a project with a certified EIR had not been met. Staff concluded that a permit could be denied based on the significant subjective impacts to the Indian sacred sites identified in the FEIR, because under CEQA the LEA could not approve this project and propose to issue a solid waste facility permit unless it concluded that the benefits of the project outweighed these and other significant adverse environmental effects. However, the Director, DEH instead determined that the benefits of this project do outweigh this and other significant and unavoidable impacts of the project and has adopted overriding findings in accordance with CEQA Guidelines §15093. Prior to making this determination the Director visited the site. The Director's findings are included in a Separate Statement of Overriding Considerations.

8. Environmental Justice Issues Other than Tribal Sacred Sites

An Environmental Health Coalition representative stated at the public information meeting that a landfill at this location would violate environmental justice principles because of the Tribal interests discussed above, and because poverty levels in the area exceed national averages, and because the average percentage of white residents in the zip code that includes the landfill site is lower than the

County average. This speaker stated that siting landfills in poorer and less white areas was a disturbing trend in the County, and urged that CalEPA and its boards and commissions are committed to environmental justice in the issuing of permits, including application of the precautionary principle. The speaker urged that permitting a landfill near the San Luis Rey River would involve high environmental risks and therefore would violate the precautionary principle of environmental justice.

In response to these comments, LEA staff asked the applicant to provide a summary of prior environmental justice reviews of this project. Staff learned that the applicant has provided a discussion of this issue to the Chair and Executive Officer of the Regional Water Quality Control Board in 2005, following comments at a public workshop, and had also provided an updated summary of this issue to the Chair of the State Water Resources Control Board in preparation for a briefing on the project. Those materials included analyses of potential environmental risks to low income and non-white communities, a discussion of environmental justice concepts and of the review of this issue in the FEIR, an analysis of relevant ethnic and racial profiles and income profiles, mitigation measures for impacts to ethno-historical values, and a summary of the opportunities provided for public participation in the LEA's CEQA and permitting processes. These summaries are attached at Exhibit 11. LEA staff concluded that the FEIR and these additional prior reviews did not support the denial of this permit based on environmental justice considerations.

LEA staff also determined how ethnic/racial and demographic issues are currently reviewed by CalRecycle in making permitting decisions, and learned that relevant data had already been assembled by CalRecycle staff in anticipation that a proposed permit could be forwarded to CalRecycle. Those data as provided to the LEA were as follows:

According to the 2000 Census, the population consists of the following:

US Census Bureau Data Census Tract – 191.01, in the Pauma Valley in San Diego County	Percent
White	55.4
Black or African American	1.1
American Indian and Alaska Native	19.8
Asian	2.3
Native Hawaiian & Other Pacific Islander	0.1
Some other race	17.9
Two or more races	3.4

About 38 % of this Census Tract identified themselves as Hispanic or Latino. Additionally, 7.8% of the families were below the poverty level and 10.1% of the individuals in Census Tract 191.01 were below the poverty level.

Based on these data it does not appear that this landfill would be located in an area that is disproportionately poor or non-white. In addition, the statutory criteria for LEA permitting decisions do not include environmental justice concerns such as proximity to other facilities or local socioeconomic and demographic profiles.

CalRecycle also requires its grant recipients including LEAs to agree to comply with the environmental justice principles set out in Government Code section 65040.12(e) in their use of grant funds. This section provides as follows: "For the purposes of this section, 'environmental justice' means the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies."

The LEA does not use CalRecycle grant funds to fund work on permits, inspections, or enforcement. All LEA costs related to the Gregory Canyon project have been or will be recovered through permit application fees, permit fees, and other payments by the applicant. This grant condition is therefore not applicable to LEA decisions concerning a permit for this landfill. Moreover, a grant condition of this kind, if applicable, could not override statutory and regulatory directives the LEA must follow in making permitting decisions, because compliance with those legal requirements would not be "unfair." Finally, within the scope of its discretion, the LEA's actions and decisions concerning this project have not treated people of any race, culture or income unfairly.

In response to the environmental justice comments at the public information meeting, LEA staff also further reviewed CalRecycle guidance on the application of environmental justice considerations to landfill siting decisions. The best recent summary of CalRecycle's guidance that staff could locate was from a staff report for a CIWMB meeting on November 15 2006, Agenda Item 18, "Consideration of the Board's Future Environmental Justice Actions." Staff's recommendations were adopted by the Board in Resolution 2006-212. CIWMB staff's advice to the state board was as follows:

Siting of Facilities

The CIWMB is responsible for certifying, overseeing, and evaluating the 55 local enforcement agencies (LEAs) in the State. In turn, LEAs are responsible for inspecting and issuing permits for solid waste facilities. The CIWMB also must decide whether to concur in the issuance of any solid waste facilities permit by a LEA, pursuant to specific requirements in statute. The statutory criteria do not include environmental justice concerns such as proximity to other facilities or local socioeconomic and demographic profiles. Moreover, the CIWMB has no explicit authority or role in the actual siting of a solid waste facility. This role is vested entirely at the local decision-making level (e.g., City Council or County Board of Supervisors). This local role includes, among other things, assessment and selection of sites (which may include evaluation of environmental justice issues), preparation and approval of California Environmental Quality Act documents, and approval of local land use entitlements.

No similar CIWMB regulation or guidance directed to LEAs was located concerning environmental justice generally or the application of the precautionary principle in an environmental context to support environmental justice.

Local planning, zoning and land use entitlement issues for the Gregory Canyon project were resolved by the voters of San Diego County when County-wide Proposition C was adopted in 1994. Even in the absence of Proposition C, the development of landfill siting criteria and the identification of landfill sites in San Diego County is a regional planning matter pursuant to the Public Resources Code, and

the County's participation in that process is through the Public Works Department, not the LEA. The LEA, like CalRecycle, has no authority to determine where landfills will be sited, but can only propose to issue or not propose to issue a permit for facilities that submit applications to the LEA, based on applicable law. The CEQA process for this project did not identify high environmental risks related to the project location, but instead concluded that project impacts to water resources would be less than significant. The LEA has therefore concluded that environmental justice consideration including if applicable the precautionary principle as applied to environmental impacts do not provide a legal basis for the LEA to deny a solid waste facility permit for this project.

9. Traffic Safety

The FEIR disclosed an overall accident rate on SR 76 that was higher than statewide averages. The landfill project will add traffic to SR 76, and will also realign and widen SR 76 within the project site. The realignment will increase sight distances, and will provide an east-bound deceleration lane and a west-bound acceleration lane for landfill traffic. The FEIR included an analysis of how trash trucks would impact this traffic safety situation with these improvements to SR 76 in place. The FEIR identified and discussed potential traffic safety improvement projects, including improvements to the hairpin turn west of Couser Canyon Road at PM 19.393 and improvements to the Rice Road intersection, or a contribution for safety improvements such as speed monitoring and enforcement. (FEIR, p. 10-61). The FEIR also analyzed the potential environmental impacts from Couser Canyon/Rice Canyon improvements, and provided for mitigations to reduce potentially significant impacts to a level of insignificance. (FEIR, pp. 10-61). However, the FEIR concluded that traffic from the landfill project would not have a significant impact on the traffic accident rate on SR-76. The FEIR therefore did not require mitigation measures for traffic safety impacts.

Traffic safety nevertheless continued to be a concern for the LEA. Traffic safety has also been raised as a concern whenever the public has had an opportunity to comment on this project. In 2004, the LEA and the applicant discussed traffic safety again. Those discussions resulted in commitments by the applicant to two additional traffic safety measures, memorialized in a September 20, 2004 letter from the project applicant to the LEA.

First, the applicant agreed to install a traffic light at the intersection of the landfill access road with realigned SR 76, at the applicant's expense. The signal construction would coincide with realignment work on SR 76, with activation prior to the acceptance of waste. As required by state law, activation was conditioned on agreement by CalTrans that traffic conditions warranted a light. (Proposition C MMRP measure MM4.5.C51.) Second, the applicant agreed that prior to the commencement of operations it would make an irrevocable offer to contribute up to \$1 million to Caltrans that Caltrans, in its discretion, may use to make traffic safety improvements on SR-76 in the vicinity of the landfill project.

The LEA accepted these commitments and determined that they should be made enforceable through the Solid Waste Facility Permit.

Traffic safety information was updated in the RFEIR in 2007. That document presented information that fatality rates on SR-76 were less than the statewide average per million vehicle miles traveled, that the combined fatality plus injury rate was slightly higher than the statewide average, and that the

accident rate remained higher than the statewide average. The RFEIR again concluded that traffic from the landfill project would not have a significant impact on the traffic accident rate on SR-76.

Because of the comments received at the public information meeting, the LEA has revisited the commitments the applicant made in 2004 to ensure that they would provide real and timely traffic safety benefits. Staff confirmed that prior analysis has shown that the conditions CalTrans will consider to determine whether a traffic light is warranted will be met when the landfill is operating. (That analysis was provided to DEH in 2004, and is also contained in the 2006 Traffic Study (Appendix A to the RFEIR), at Appendix J, P. J7-J8. It is therefore virtually certain that CalTrans will consent to activation of the traffic signal prior to the commencement of operations. Earlier activation of the signal is possible, after the realignment of SR 76 is completed, if ongoing landfill construction traffic warrants the signal under CalTrans standards.

LEA staff also inquired into whether a \$1 million contribution to CalTrans was enough money to substantially fund a useful traffic safety improvement project on SR 76. Staff were informed that the \$1 million contribution figure used in 2004 exceeded the then-estimated cost of the improvements to the hairpin turn west of Couser Canyon Road at PM 19.393 plus improvements to the Rice Road intersection that were examined in the FEIR.

Finally, the LEA has proposed to the project applicant that the requirement to provide this irrevocable offer of funding be accelerated from prior to the commencement of operations, to prior to the start of construction. The applicant has agreed to this change, and the change is included in the proposed permit. An earlier contribution to Caltrans for traffic safety improvements should result in earlier implementation of one or more traffic safety improvements than would otherwise occur. The earlier completion of one or more such projects would provide a public benefit by contributing to a safer highway and a reduced accident rate in the general vicinity of the project.

10. Revised ACOE Jurisdictional Determination

NRDC's comment letter stated that the LEA's May 2010 Addendum, which was prepared to consider a revised U.S. Army Corp of Engineers (ACOE) determination concerning the extent of ACOE jurisdictional waters on the project site, was inadequate under CEQA. The Addendum concluded that no "new information" was compiled by the ACOE to support this determination and that no "new information" arose from the ACOE determination itself, for purposes of section 15162 of the CEQA Guidelines. This was because the additional jurisdictional waters identified by the ACOE were in areas already designated for disturbance as part of the project, and mitigation measures reducing the impacts of that disturbance to a level of less than significant had already been provided. The LEA has further considered and stands by that conclusion.

The NRDC letter also cites a more recent determination that the RWQCB has identified approximately 16,000 linear feet of waters of the state that would be impacted by the landfill development. The 2010 Addendum provides estimates of impacts to waters of the state in Table 4.9-5, but expressly acknowledged that these estimates were "subject to final confirmation from the agencies." The overall increase in designated waters of the state in the more recent determination referenced by NRDC is about 0.4 acres. But again all of those waters are within areas of the landfill development that would already be disturbed. For that reason, whether or not they are determined to be jurisdictional does

not constitute a change in the project or a change in the physical impacts of the project. As noted in the 2010 Addendum, "whether or not a water on the landfill site is jurisdictional or not, the activity that may create a significant impact is the disturbance of that portion of the landfill property" (2010 Addendum, p. 6). Even if the revised jurisdictional determinations are viewed as a change in the circumstances in which the project is undertaken, then that change does not result in new or increased impacts. Section VI of the CEQA Project Findings provided to CalRecycle with the proposed permit presents that analysis.

11. Litter Control Fence on Access Road Bridge

The 2010 Addendum described a litter fence for the bridge over the San Luis Rey River that was being incorporated into the project design at the request of the San Diego Regional Water Quality Control Board. NRDC's comment asserts that the litter fence could have a significant adverse effect on endangered birds that use the river as a flyway, making a subsequent or supplemental EIR necessary.

This assertion of a significant impact on birds seemed implausible to the LEA, but the LEA asked the project applicant to have an expert address that question. Bill Magdych Associates (2011) prepared a technical memorandum analyzing potential impacts to birds that populate the area in and around the proposed bridge. The analysis concluded that the fence would present little or no potential for bird strikes or entanglement. The analysis is attached to a comment letter by Gregory Canyon, Ltd. attached to this summary. LEA staff conclude that NRDC's comment does not disclose any new significant impact or any "new information" within the meaning of Public Resources Code §21166(c) and CEQA Guidelines section 15162.

Exhibit List

- Exhibit 1 - Meeting Notice
- Exhibit 2 - Meeting Notification letter
- Exhibit 3 - Legal Advertising for two Newspapers
- Exhibit 4 - PowerPoint Presentation
- Exhibit 5 - Speaker Slips
- Exhibit 6 - Sign in sheets
- Exhibit 7 - Meeting Transcripts
- Exhibit 8 - Press Package
- Exhibit 9 - Press Coverage
- Exhibit 10A - Comments Received at the Informational Meeting
- Exhibit 10B- Comments Received by Mail
- Exhibit 10C - NRDC Bulk Comments
- Exhibit 10D - Late Comments
- Exhibit 11 - Environmental Justice Summaries



DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY

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PROOF OF SERVICE

I, Ryan Egli, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to this action. My place of employment and business is as in the letterhead.

On May 26, 2016, I served the DECISION AND ORDER, In the Matter of Pala Band of Mission Indians, **Petitioner**, San Diego County Department of Environmental Health, Solid Waste Local Enforcement Agency, **Respondent**, GCL, LLC, a Delaware limited liability company, **Real Party in Interest** to:

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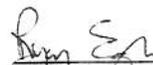
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First Class US Mail - In a sealed envelope, with postage thereon fully prepaid, via United States Postal Service

Certified Return Receipt First Class US Mail - In a sealed envelope, with postage thereon fully prepaid, via United States Postal Service

By Email - to the email address listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at Sacramento, California, on the 26th day of May, 2016.



Ryan Egli
Declarant