NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

September 10, 2009

Colonel Thomas H. Magness, IV
58th Commander, Los Angeles District
U.S. Army Corps of Engineers
915 Wilshire Blvd., Suite 1101
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Mr. David J. Castanon
Chief, Regulatory Branch
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Dear Col. Magness and Mr. Castanon:

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

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

I. Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

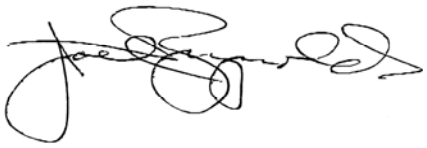
And these obligations exist independently under state and federal law. Thus, however one assesses the adequacy of the CEQA review of this Landfill project, there can be no question that a comprehensive NEPA analysis, including an analysis of alternatives, is vital and legally required.

VI. Conclusion

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

Thank you for your attention to this important matter.

Very truly yours,



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