Buena Vista Rancheria/Buena Vue Casino
NPDES Permit CA 0049675

Final Response to Comments Document
September 2015

Written Comments Submitted on 2015 Public Notice

	Commenter	Signed by	Comments dated	Comment #
a.	Jackson Valley Irrigation District	H.D. Willy	June 18, 2015	2a, 3a, 3b, 4b, 4e, 6a, 6b
b.	County of Amador	G. Gillott	June 22, 2015	1a, 1b
c.	Friends of Amador County	J. MacLean	June 22, 2105	1c-g
d.	Amador Resource Conservation District	D.W. Port	June 22, 2015	3c, 4
e.	Amador County Environmental Health Department	M. Israel	June 19, 2015	2b, 4, 5, 6b

1 – RANCHERIA AS TRIBE

1a. Comment: The Buena Vista Rancheria is not a reservation, is not allotted lands, and is not Indian Country. The record indicates that the land sited for the proposed project, Buena Vista Rancheria, has never been held in trust.

RESPONSE:

EPA does have jurisdiction over the permit because the Buena Vista Rancheria was restored to "reservation" status as a result of a class-action settlement in the federal district court in the early 1980s. *See Hardwick v. U.S.*, No. C-79-1710 SW (N.D. Cal. Filed 1979). In 1958, Congress enacted the California Rancheria Termination Act, which authorized the termination of the Buena Vista Rancheria and sixteen other Rancherias in California. Pub. L. No. 85-671, 72 Stat. 619 (1958). In 1979, Indian residents from the Rancheria joined Indians from the other Rancherias in a class action lawsuit to restore the reservation status of their lands. *See Hardwick v. U.S.* The plaintiffs asserted that their trust relationship had been illegally terminated under the Rancheria Act. *Id.* The U.S. District Court agreed and restored the reservation status of the Buena Vista Rancheria through a settlement between the plaintiffs and the United States. *Id*.

Following the settlement, the members of the class and the United States entered into a stipulated judgment. *See Hardwick*, Stipulation and Order, Dec. 22, 1983. The United States agreed to restore the status of the class members of the individual Rancherias as Indians. *Id*. Importantly, the United States agreed to restore the same status that the Indians possessed prior to the distribution of the assets of the Rancherias under the California Rancheria Termination Act. *Id*.

The members of the class also entered into a stipulated judgment with their respective counties. In 1987, the members of the class from the Buena Vista Rancheria entered into a stipulated judgment with Amador County. The stipulation ordered stated that "[t]he original boundaries of the [Buena Vista Rancheria]… are hereby restored, and all land within these restored boundaries of the [Buena Vista Rancheria] is declared to be "Indian Country." (emphasis in original). *Hardwick*, Stipulation and Order (Amador County) Para. 2.C., at 4, May 14, 1987. The *Hardwick* decision invalidated the federal law that terminated the Buena Vista Rancheria.

Furthermore, the National Indian Gaming Commission (NGIC) has ruled that the Buena Vista Rancheria is considered "Indian lands" pursuant to 25 U.SC. § 2703(4)(A) of the Indian Gaming Regulatory Act. *See* Letter from Penny J. Coleman, NIGC Acting General Counsel, to Judith Kammins Albietz, Esq. (June 30, 2005). In December 2004, the Tribe submitted a renewed request for an Indian lands determination to the NIGC because the Tribe proposed to build a casino on its reservation. Due to the controversy surrounding the proposal, the Tribe requested that the NIGC confirm whether the Rancheria is considered Indian country. The NIGC determined that the Buena Vista Rancheria is "Indian land" as defined in the Indian Gaming Regulatory Act, and that the Tribe could legally conduct gaming on the land.

Because the Buena Vista Rancheria qualifies as a reservation, the Tribe did not need to have the land taken into trust. 40 C.F.R. Part 122.2 defines Indian lands to include "[a]ll land within the limits of any Indian reservation under the jurisdiction of the United States Government." This definition mirrors the definition of Indian lands in the IGRA. *See* 25 U.S.C. § 2703(4)(A). Neither Congress nor EPA interpret the meaning of Indians land to require that lands within the boundaries of a reservation be held in trust.

1b. Comment: In light of the ongoing litigation between Amador County and the Department of the Interior regarding the status of the Rancheria, the EPA should, at a minimum, postpone any action on this permit until after the federal court has ruled on the underlying jurisdictional issue.
RESPONSE:
EPA is under no obligation to postpone its renewal of the Buena Vista Rancheria NPDES permit due to the ongoing litigation between Amador County and the Department of the Interior. NPDES permits are issued for a five year period and while they may be administratively extended *See* 40 C.F.R. 122.6, keeping current on permit issuance helps ensure that discharges are properly controlled with the most current information.

1c. Comment: EPA has an ongoing obligation to consider its position when taking an affirmative action, including its interpretation of the statutes it administers and its jurisdiction in a particular case.
RESPONSE:
EPA continues to rely on *In re: Buena Vista Rancheria Wastewater Treatment Plant*, NPDES Appeal Nos. 10-05, 10-06, 10-07 & 10-13 (EAB 2011), the *Hardwick* decision, and the NIGC lands determination letter to inform its decision-making. All of these continue to support EPA's determination that the agency has properly asserted its jurisdiction to implement the NPDES program, when neither the state nor tribe in question has the authority to administer the NPDES program on "Indian Lands."

1d. Comment: The California Rancheria Termination Act precludes treating the Rancheria as Indian county (sic) and the recipients as Indians entitled to services.
RESPONSE:
One commenter asserted that the Secretary of the Interior carried out the 1958 Act by distributing the land of the Buena Vista Rancheria to Louie and Annie Oliver. *See* Property of California Rancherias and of Individuals Members Thereof, 26 Fed. Reg. 3073 (Apr. 11, 1961). This assertion is historically inaccurate because the United States never fully carried out section 3 of the Act, which was at the heart of the controversy in the *Hardwick* adjudication.

Because of the federal government's failure to provide improvements, including sewers, running water, streets, and educational programs so that the Indians could earn a livelihood, the United States restored the status of Indians to the Buena Vista Tribe. *See Hardwick.* Today, the Buena Vista Rancheria of Me-Wuk Indians of California is a federally-recognized Indian tribe. *See* 80 Fed. Reg. 1942, 1943 (Jan. 14, 2015). Therefore, there is no evidence that any federal law precludes treating the Rancheria as Indian country and the Buena Vista Tribe as Indians.

1e. Comment: When a statute creates a necessary or inescapable interference – as the California Rancheria Termination Act clearly does – a court's equity jurisdiction is restricted. The court, in *Hardwick*, does not appear to have the authority to fashion a remedy that conflicts directly with a federal statute, as the stipulation on which the Board relied does.
RESPONSE:

In one of the cases that the commenter cites, *Porter v. Warning Holding Co.*, 328 U.S. 395, 398 (1946), the U.S. Supreme Court states that "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." The Court further states that "the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." *Id*. The Court in *Porter* clearly stated that equity jurisdiction should not be limited unless the language of a particular statute expressly places limits on the courts' equitable powers. *See Id*.

The California Rancheria Termination Act does not create a necessary or inescapable inference because Section 3 of the Act created obligations on the federal government to provide services to the tribes *prior* to termination. *See* Pub. L. No. 85-671, 72 Stat. 619, § 3 (1958). Because those obligations were never fulfilled prior to termination, the court had proper equity jurisdiction to resolve the parties' dispute with a stipulated judgment. Moreover, EPA is simply following the current status of the Rancheria as determined by the courts, not re-litigating those cases.

1f. Comment: The proposed facility is not a publicly owned treatment works (POTW).
RESPONSE:
A publicly owned treatment works ("POTW") is defined in 40 C.F.R. § 403.3 as "a treatment works as defined by section 212 of the Act, which is owned by a State or municipality (as defined by section 502(4) of the Act)." Section 502(4) of the Act in turn defines municipality to include, among other things, an "Indian tribe." 33 U.S.C. § 1362(4). The regulations implementing the Clean Water Act define an Indian tribe as "any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation." 40 C.F.R. § 122.2. Therefore, the Tribe's proposed wastewater treatment Facility is a POTW.

One commenter asserted that the Environmental Appeals Board, in *In re: Buena Vista Rancheria Wastewater Treatment Plant*, NPDES Appeal Nos. 10-05, 10-06, 10-07 & 10-13 (EAB 2011), determined that the proposed facility was not a publicly owned treatment works (POTW). This is incorrect because the Board actually reached the opposite conclusion. *See Id.* at 25. The Board concluded that the Tribe's proposed wastewater treatment facility was a POTW because the Buena Vista Rancheria Tribe is a federally-recognized tribe and the *Hardwick* decision restored the Tribe's land as an Indian reservation.

1g. Comment: The Buena Vista Rancheria does not qualify as a "reservation" such that the Proposed Action is exempt from the National Environmental Policy Act review.
RESPONSE:
The Clean Water Act and its implementing regulations do not require EPA to prepare an environmental impact statement under the National Environmental Policy Act ("NEPA") for the renewal of an NPDES permit in this case. Section 511(c) of the Clean Water Act provides that the requirement to prepare an environmental impact statement generally is not triggered by EPA actions taken under the authority of the Clean Water Act. There are two exceptions, neither of which applies here. The first exception is for federal financial assistance for publicly owned treatment works. The second exception is for discharges of pollution by "new sources" within

the meaning of Clean Water Act § 306. A new source is defined as a facility which commenced construction after the promulgation of standards of performance under § 306 of the Clean Water Act which are applicable to such source. 40 C.F.R. § 122.2. EPA has not financially assisted the construction of this facility, nor has it promulgated § 306 standards of performance for publicly owned wastewater treatment plants. Therefore, an environmental impact statement is not required in this case.

Moreover, EPA reiterates its belief that all comments on the proposed permit and concerns related to the discharge of wastewater as allowed by the NPDES permit have been adequately addressed through the public comment process for the NPDES permit. Therefore, EPA does not agree that additional NEPA analysis is warranted.

2 – WATER SUPPLY FOR PROPOSED CASINO

2a Comment: Proposed Casino site is outside the Jackson Valley Irrigation District (JVID) service area boundary. Severe drought raises concerns about the source water for the casino, either groundwater or surface water.

RESPONSE:

The proposed casino has constructed three municipal wells on-site as well as existing agreement with Amador County for water supply from these wells. EPA acknowledges the concern for adequate water supply in drought conditions; however, federal regulations for issuing an NPDES permit do not require consideration of the supply of available source water when issuing such a permit to discharge wastewater and/or process water from a treatment facility.

2b Comment: Facility is described as being similar to that designed for Thunder Valley Casino which has experienced episodes of non-compliance and has proposed blending ground and surface water sources to reduce mineral content and improve performance of the treatment process. Commenter expresses concern that compliance at Buena Vue Casino will be difficult to achieve, as groundwater at Buena Vue site is also highly mineralized and surface water is unavailable for blending.

RESPONSE:

Currently the facility is not constructed, nor discharging wastewater, thus, there is no evidence of non-compliance for the Buena Vue Casino wastewater treatment plant (WWTP). Also, the Buena Vue facility is designed differently from Thunder Valley Casino. Based on lessons learned, Buena Vue will install active grease traps in the kitchen drains of casino; these traps are located above the WWTP headworks, whereas the Thunder Valley system used passive traps after the headworks. EPA disagrees with commenter that noncompliance observed at one facility is likely to correlate to noncompliance at this facility since each has different source water, operating conditions, etc.

3 – CONCERNS ABOUT DISCHARGE VOLUMES

3a Comment: Unclear on anticipated volumes of wastewater from the casino; e.g., hourly, daily, weekly, monthly or annual basis.

RESPONSE:

As described in the factsheet, the facility will be constructed in two Phases. Phase I anticipates the following initial discharge rates: 50,000 gallons per day (gpd) on weekdays, 100,000 gpd on weekends, and an average annual flow of 60,000 gpd. Phase II projections include an average weekend flow of 160,000 gpd. The facility has been designed for peak flow of 200,000 gpd.

Wastewater from septic and kitchen will pass through active grease traps prior to entering the wastewater treatment train. These active grease traps will remove grease prior to entering the wastewater headworks (inlet) and minimize potential problems within the membrane reactive treatment system. The treated effluent from the WWTP will discharge to a constructed vegetated swale located on the Rancheria. Over flow from the swale will flow into existing drainage that appears to be a partially constructed, partially natural channel and runs alongside Coal Mine Road. The existing drainage runs adjacent to the road, and, at the northwestern boundary of the property, adjacent to the wetlands area but separated by an elevated soil berm, and then flows into a drain under Coal Mine Road.

3b Comment: Need additional information regarding potential stormwater discharge volumes from the facility. Also, does stormwater flow through same discharge system as treated wastewater?
RESPONSE:
Stormwater runoff from the casino roof, parking lot and other buildings will be routed first to underground detention system within casino property. The underground detention system is made up of a network of high density polyethelene (HDPE) storm pipe. The network is interconnected and once the detention system fills to capacity then a 12-inch overflow pipe will be engaged to drain the excess. The outfall pipe connects to a water quality unit designed as a first flush device. The water quality unit has an internal network of velocity reducing weirs. The weir network will allow sediment, trash and oil to dissipate from the storm runoff. The water quality unit discharge pipe will flow into a riprap apron to reduce outlet velocities and protect against erosion. Thus stormwater is treated via settling prior to discharge from the casino site into the culvert under Coal Mine Road.

Treated wastewater pipes are separate and run parallel to stormwater discharge (HDPE) pipes, both converge at the discharge point from the property as it flows into a drain under Coal Mine Road to an unnamed tributary to Jackson Creek, which subsequently flows into Dry Creek and to the lower Mokelumne River.

See also response 3c.

3c comment – There is great potential for flood damage and erosion from Casino discharge point to South Slough, which is immediately downstream of culvert below Coal Mine Road. EPA has not yet provided an analysis of potential impacts into South Slough, which is immediately downstream and has smaller flow capacity than Jackson Creek, farther downstream segment.
RESPONSE:
As described above in response 3b, stormwater runoff from casino roof, parking lot and other buildings will be, to extent feasible, retained on-site via underground detention systems. These

detention systems provide for retention time on property prior to discharge as well as treatment via settling during flow rate reduction and retention. Peak storm runoff for existing drainage conditions vs. post-construction drainage conditions were evaluated in the *Technical Drainage Study Update for Flying Cloud Casino at Buena Vista Rancheria* (Kimley-Horn and Associates, Inc. February, 2009). This drainage study examined the 25- and 100-yr. storm events and provides both drainage maps and calculations of stormwater discharges, using the Rational Method in the appendices. The drainage study concludes the post-construction runoff condition ranges from zero to negative 5.2 cubic feet per second (cfs) lower than the existing condition. Therefore, due to collection of rainfall from impervious surface areas into the onsite underground detention system, there will be *less* storm runoff from the casino site following construction than existing pre-development runoff.

EPA notes the facility also has a 250,000 gallon storage tank that is designated as an emergency storage tank to hold either influent or treated effluent onsite. More wastewater information is presented in response 4a below.

Based on the conclusions of the Technical Drainage Study – that less rainfall runoff will from the post-construction site, as well as the fact that the facility has emergency storage tank for retaining wastewater onsite, EPA concludes there is minimal risk that the casino's discharges will contribute to any potential flood damage in South Slough, Jackson Creek or other downstream segments. (Presumably South Slough is the unnamed tributary prior to confluence with Jackson Creek.) See also response 3b above.

4 – POTENTIAL IMPACTS TO DOWNSTREAM WATER QUALITY

4a comment – Who has responsibility of water once it is discharged? The permit does not prevent or mitigate public health and environmental impacts resulting from noncompliant discharge. No viable alternatives are presented in event that the treatment system does not meet conditions of permit.

RESPONSE:

EPA would prefer to avoid making legal conclusions regarding EPA or another entities' legal liability for actions that are hypothetical and outside the scope of the NPDES permit issuance. This permit does not authorize discharges that do not meet it conditions. If the Tribe violates the conditions of its permit, then EPA has authority to take enforcement actions including issuing compliance orders and assessing penalties against the Tribe.

The WWTP is being designed with emergency storage tanks that can be utilized for influent or treated effluent, thus the probability of a complete plant failure and ensuing discharge to environment is remote. Under Phase I average day flow conditions and emergency storage tank capacity of 250,000 gallons, we estimate the Tribe would have about 60 hours (2.5 days) of emergency storage time in which to either repair the wastewater treatment system or to provide for alternative temporary wastewater disposal (e.g. portable toilet facilities). In the unlikely event that the emergency storage tank becomes full, then the casino has other options. One option is for facility to hire septic trucks to pump out and haul away the contents of emergency storage tanks. Or the facility can shut down operations (including wastewater flows) until such time as the wastewater treatment problems are resolved. The Tribe is prohibited from discharging

untreated or partially treated wastewater to waters of the U.S. simply for the purpose of maintaining casino operations (See Standard Federal NPDES Permit Conditions, Attachment to Permit).

Table 1. Hours of Emergency Storage for Buena Vista WWTP

Phase/conditions	Flow rates (gpd)	Time (hrs)
Phase I weekday	50,000	120
Phase I average	100,000	60
Phase II weekend	160,000	37
Phase II capacity	200,000	30

Based on 250,000gpd storage tank capacity

4b comment – In the event of noncompliance discharge, will any local agencies be notified?
RESPONSE:
EPA is adding a condition to final permit that the facility must notify the Amador County Health Dept. within 24 hours of any noncompliant discharge. This permit condition does not mean that Amador County Health Dept. has any authority for the NDPES permit for the permitted facility; however it help ensure key local agencies are aware of any discharge problems.

4c comment- If plant failure occurs during or after storm event and South Slough overflows, then discharge from the Casino will flow onto farming and grazing land. Agricultural products from those properties would be illegal to sell if untreated wastewater has been present on land.
RESPONSE:
EPA has determined that the proposed discharge will not contribute to any existing flooding risk. As described in response 3c above, the casino has two separate on-site underground detention systems that can retain stormwater runoff and ultimately reduce runoff from the site to lower than existing conditions. Also, as described in response 4a above, the WWTP also has an emergency storage tank to retain treated effluent and minimize discharge in the remote possibility of plant failure.

4d comment- To further protect downstream landowners, the Casino should be required to run a discharge pipeline off site and Jackson Valley Irrigation District should have means and authority to shut off wastewater in the event of plant failure, thereby refusing to accept discharge of untreated wastewater.
RESPONSE:
EPA disagrees with the need for discharge pipeline off the site since the facility is adequately designed with advanced treatment capabilities and emergency storage tanks to retain wastewater on-site. EPA also disagrees with the suggestion for Jackson Valley Irrigation District to have authority to shut off wastewater in the event of plant failure. There is no need for such discharge features. See response 4a above.

4e comment- Unclear on permit conditions for potential irrigation restrictions; i.e., use of treated wastewater for reclaimed use.
RESPONSE:
EPA has identified reclaimed water limitations in this permit; these limitations are retained from the existing permit. Requirements for using reclaimed water irrigation are consistent with the

criteria contained in Title 22, California Code of Regulations. See Permit, Part II, Special Conditions (C).

5 – MONITORING

5a comment – There is no mention of monitoring the receiving water for potential water quality impacts. How will Casino or contracted personnel get access to collect water samples in downstream areas if on private property?

RESPONSE:

Requirements to monitor the receiving water when water is present have been included in this permit. See Permit, Part I.B.2 states:

> "2. The permittee shall conduct weekly receiving water quality monitoring for pH, dissolved oxygen, turbidity, total dissolved solids, and temperature at the following locations when water is present in the receiving water:
> M001U - Outfall 001 Upstream: *Approximately 10' upstream of location where discharge enters receiving water*.
> M001D - Outfall 001 Downstream: *Approximately 100' downstream of location where discharge enters receiving water*." [Emphasis added.]

Facility personnel will have access to both sampling points since they are on facility property.

5b comment – No mention of monitoring for radionuclides in discharged water, yet commenter asserts that radionuclides are present in groundwater in this region. Groundwater quality data (2009) can be found in Well Work Plan prepared by Erler & Kalinowski, Inc.

RESPONSE:

EPA has reviewed the suggested *Monitoring Well Work Plan* by Erler & Kalinowski, Inc. (2009). Groundwater results for radiochemistry are presented for three wells on two separate sampling dates: December 20, 2005 and January 16, 2009. One well result in 2005 showed elevated gross alpha results; however, 2009 results for gross alpha gross and gross beta parameters were not at levels of concern for all three wells.

For several reasons, EPA does not find that one elevated result in groundwater supply wells is sufficient rationale to delay or decline renewing this NPDES permit. First, the elevated gross alpha result is nearly ten years old and more recent (2009) gross alpha and gross beta sampling results are below levels of concern. Second, the facility will provide commercially bottled drinking water throughout the casino facility, thus staff and attendees will not be drinking water from onsite groundwater wells. Third, EPA issues NPDES permits for pollutants in treated effluent water, <u>not for potential contaminants in supply water</u>. Fourth, EPA can always re-open the discharge permit and request additional effluent monitoring results during permit term if necessary. See Permit, Part II, Special Conditions (D).

6 – PUBLIC PROCESS

6a comment – Uncertain of public process regarding the proposed permit.

RESPONSE:
EPA issued notification on May 21, 2015 by e-mail to all previous commenters for the 2010 permit.
EPA also posted a notice of availability for public review on EPA Region 9's public website. This notification indicated that all comments received within 30 days would be considered as part of permit renewal process. When EPA is the permitting authority, it must issue a "response to comments" document whenever a final permit decision is issued. A "final permit decision" is "a decision to issue, deny, modify, revoke and reissue, or terminate a permit."
EPA has considered all submitted comments as part of decision process prior to issuing final permit decision.

6b comment – Request that EPA hold a public hearing in community prior to issuing NPDES permit.
RESPONSE:
EPA regulations provide a process for permit issuance that includes a number of requirements relating to public notice and public comment. *See* 40 C.F.R. §§ 124.1—.21, 124.51—.66. Public hearings may be requested, but the permitting authority is required to hold such a hearing only if there is a significant degree of public interest. 40 C.F.R. § 124.12(a)(1). *See Costle v. Pacific Legal Foundation*, 445 U.S. 198, 216 (1980) (Supreme Court rejected the argument that the Clean Water Act mandated a public hearing for every NPDES permit action EPA takes). EPA Region IX has exercised its discretion not to hold a public hearing for this permit renewal. This decision took into account the following factors:

1. When this NPDES permit was originally issued in 2010, a public hearing was held;
2. There is only one noteworthy change in this permit. The facility to-be constructed (Phase I) is smaller and its corresponding treated wastewater discharge rates (100,000 gpd for average weekend) will be smaller than the original (2005) application discharge rates (200,000 gpd);
3. The facility is not applying, nor proposing to exceed discharge rates already approved in the current (2010) permit;
4. There have been only two requests for a public hearing out of five total comments received. This indicates there is likely not a significant degree of public interest in the permit renewal;
5. All other federal NPDES regulations have been met, thus, EPA finds it is reasonable to renew this permit

6c Comment: Clarify role of Central Valley Regional Water Quality Control Board in this process.
RESPONSE:
The Central Valley Regional Water Quality Control Board has received e-mail notification of this draft permit on May 21, 2015. The Regional Board did not submit written comments on this draft permit. The Central Valley Regional Water Quality Control Board is considered an interested party or stakeholder in this process; however, it does not have any jurisdiction regarding final permit conditions for this NPDES permit issued to Buena Vista Rancheria.