UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

October 22, 2009

Dale Morris
Regional Director
Pacific Regional Office
Bureau of Indian Affairs
2800 Cottage Way
Sacramento, CA 95825

Subject: Draft Environmental Impact Statement (DEIS), Point Molate Mixed-use Tribal Destination Resort and Casino, Richmond, CA (CEQ # 20090231)

Dear Mr. Morris:

The U.S. Environmental Protection Agency (EPA) has reviewed the above-referenced document pursuant to the National Environmental Policy Act (NEPA), Council on Environmental Quality (CEQ) regulations (40 CFR Parts 1500-1508), and our NEPA review authority under Section 309 of the Clean Air Act. Based on our review, we have rated the DEIS as Environmental Concerns – Insufficient Information (EC-2) (see enclosed "Summary of Rating Definitions"). Our detailed comments are enclosed.

The proposed project would take 266 acres into federal trust for development of a mixed-use resort consisting of two hotels, 170,000 square feet (sq ft) of business, conference and entertainment facilities, a 240,000 sq ft casino, 54 luxury accommodation cottages, a 300,000 sq ft retail shopping center, public plazas, pedestrian trails, a shoreline park, Tribal government offices and cultural facilities, two parking garages, transportation facilities including a public ferry terminal, and restoration of 34 historic buildings. We commend BIA, the developer and the Tribe for including many environmentally favorable "green" elements in the project design, including a photovoltaic array atop both parking structures and along the covered walkway on the ferry pier, solar hot water heaters and photovoltaic panels for the alternatives with residential units (Alternatives B and D), water conserving low-flow bathroom fixtures, an on-site gray water recycling system, a vegetation covered "living roof" above the conference center, a composting program, and an aggressive recycling program.

As a cooperating agency for the project, EPA reviewed sections of the Administrative Draft EIS and submitted comments to the Bureau of Indian Affairs (BIA) on December 9, 2008. We appreciate the additional information that responded to some of our questions; however we continue to have concerns regarding the cleanup of contamination onsite and the cleanup levels as they relate to land uses. We request additional information regarding the sufficiency of the mechanism for retaining enforcement authority of the State's Regional Water Quality Control Board for the cleanup after the land is taken into Tribal trust.

EPA appreciates the opportunity to review this DEIS. When the Final EIS is released for public review, please send one copy to the address above (mail code: CED-2). If you have any questions, please contact me at (415) 972-3521, or contact Karen Vitulano, the lead reviewer for this project, at 415-947-4178 or vitulano.karen@epa.gov.

Sincerely,

Kathleen M. Goforth, Manager
Environmental Review Office (CED-2)

Enclosure: Summary of EPA Rating Definitions
EPA's Detailed Comments

cc: Merlene Sanchez, Chairperson, Guidiville Rancheria of California
Isi Mesa, Environmental Coordinator, Guidiville Rancheria of California
George Leyva, San Francisco Bay Regional Water Quality Control Board
Lina Velasco, City of Richmond Planning Division

SUMMARY OF EPA RATING DEFINITIONS*

This rating system was developed as a means to summarize the U.S. Environmental Protection Agency's (EPA) level of concern with a proposed action. The ratings are a combination of alphabetical categories for evaluation of the environmental impacts of the proposal and numerical categories for evaluation of the adequacy of the Environmental Impact Statement (EIS).

ENVIRONMENTAL IMPACT OF THE ACTION

"LO" (Lack of Objections)

The EPA review has not identified any potential environmental impacts requiring substantive changes to the proposal. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposal.

"EC" (Environmental Concerns)

The EPA review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impact. EPA would like to work with the lead agency to reduce these impacts.

"EO" (Environmental Objections)

The EPA review has identified significant environmental impacts that should be avoided in order to provide adequate protection for the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no action alternative or a new alternative). EPA intends to work with the lead agency to reduce these impacts.

"EU" (Environmentally Unsatisfactory)

The EPA review has identified adverse environmental impacts that are of sufficient magnitude that they are unsatisfactory from the standpoint of public health or welfare or environmental quality. EPA intends to work with the lead agency to reduce these impacts. If the potentially unsatisfactory impacts are not corrected at the final EIS stage, this proposal will be recommended for referral to the Council on Environmental Quality (CEQ).

ADEQUACY OF THE IMPACT STATEMENT

"Category 1" (Adequate)

EPA believes the draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis or data collection is necessary, but the reviewer may suggest the addition of clarifying language or information.

"Category 2" (Insufficient Information)

The draft EIS does not contain sufficient information for EPA to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the EPA reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analysed in the draft EIS, which could reduce the environmental impacts of the action. The identified additional information, data, analyses, or discussion should be included in the final EIS.

"Category 3" (Inadequate)

EPA does not believe that the draft EIS adequately assesses potentially significant environmental impacts of the action, or the EPA reviewer has identified new, reasonably available alternatives that are outside of the spectrum of alternatives analysed in the draft EIS, which should be analysed in order to reduce the potentially significant environmental impacts. EPA believes that the identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. EPA does not believe that the draft EIS is adequate for the purposes of the NEPA and/or Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS. On the basis of the potential significant impacts involved, this proposal could be a candidate for referral to the CEQ.

*From EPA Manual 1640, Policy and Procedures for the Review of Federal Actions Impacting the Environment.

EPA DETAILED COMMENTS ON THE DRAFT ENVIRONMENTAL IMPACT STATEMENT, POINT MOLATE MIXED-USE TRIBAL DESTINATION RESORT AND CASINO, RICHMOND, CALIFORNIA, OCTOBER 22, 2009

Contamination and Cleanup

Cleanup Levels and Land Use Restrictions

The DEIS conveys the impression that parcels with contamination will be cleaned up to a level that would support unrestricted use; however, based on conversations with the Regional Water Quality Control Board (RWQCB), this is not currently the expectation. The RWQCB Tentative Order in Appendix X outlines the cleanup effort, and the EIS should be consistent with the Order, or, if a more stringent cleanup is planned, the EIS should specify that the Order does not represent the full cleanup effort. Additionally, the DEIS states on page 5-44 that regulatory closure allowing unrestricted use would occur when the RWQCB issues a No Further Action (NFA) statement, and this is not correct according to the RWQCB. The Tentative Order states that in some cases, interim land use controls may be replaced by final land use controls depending on the scope of each proposed cleanup action for areas of the site that do not meet unrestricted use standards. Unless cleanup to residential standards would occur, the EIS should not state that unrestricted use is expected.

As we previously commented to the Bureau of Indian Affairs (BIA), the cleanup levels or Fuel Product Action Levels (FPALs) are relatively high, significantly higher than more generic national and state health-based levels that EPA often uses, and could allow substantial amounts of potentially hazardous constituents to remain in place. In some cases, up to 10% of the constituent by weight would be allowed to remain, which is essentially soil that is saturated with product. The basis for use of the FPALs as cleanup levels and their consistency with the intended and/or potential land use is not clear.

We understand that the FPALs have been approved by the RWQCB, and we defer to them on cleanup decisions since EPA is not currently involved with this CERCLA[1] site cleanup. However, since the land would be taken into Tribal trust for use by the Tribe, we encourage cleanup efforts be pursued that will offer the least amount of restrictions and the most protection of public health and the environment. Unless conservative cleanup levels are pursued, any soil that may be removed from certain areas by the Tribe in the future might contain levels of pollutants that would require management as a hazardous waste based on toxicity or ignitability. At a minimum, there could be nuisance concerns, such as picking up and tracking contamination on the bottoms of shoes, etc.

We previously recommended that the cleanup efforts at the proposed cultural roundhouse and dance grounds occur to residential standards, since children would be expected to visit these areas. We also suggested that, since it's possible that children could be brought to the tribal park offices, a residential standard may be appropriate for this area as well.

[1] Comprehensive Environmental Response, Compensation, and Liability Act

Finally, the 145-acre open space area with conservation easements that will ensure its preservation is a quality and commendable project element. We recommend BIA and the Tribe consider achieving FPALs for terrestrial ecological receptors for these areas.

> *Recommendation:* In the FEIS, correct statements regarding unrestricted land use, and clarify the cleanup that will occur for the different land uses on the site. We recommend identifying what cleanup level will occur at each site use area (e.g. hillside open space, Tribal cultural and administrative areas, casino/hotel areas, etc.) and the expected final land use controls that would accompany these cleanup levels. For example, identify which areas will have permanent land use restrictions (e.g. landfill), and which areas would be cleaned to residential (unrestricted) land use, preferably in a map presentation. We recommend residential cleanup standards for any areas where children could be present, and ecological receptors be considered in cleanup actions in open space areas.
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> The FEIS should identify the areas where ongoing monitoring would be necessary, indicate who would be responsible for this monitoring obligation, and identify the applicable regulatory process that would apply.

Enforcement of cleanup order and mitigation measures

We appreciate the information in the DEIS that describes the enforcement of the cleanup after the land is transferred into Tribal trust. The DEIS states that the list of mitigation measures will be attached as an exhibit to the Municipal Services Agreement (MSA), and thus will be incorporated into a legally enforceable contract that provides for a limited waiver of the Tribe's sovereign immunity for enforcement of contractual obligations specified in the Land Disposition Agreement (LDA) and its attachments, which includes the MSA (p. 1-14). It is unclear whether or how the City would enforce mitigation commitments that are unrelated to the scope and issues covered in the MSA (utilities, law enforcement, emergency services, transportation system management, etc.), such as air quality construction mitigation or other non-MSA related mitigation.

Additionally, it is not clear how the land use restrictions associated with contamination cleanup will be enforced. Appendix C of the DEIS includes a waiver of sovereign immunity (p. E-17), however the wording of this statement does not explicitly identify the continuing authority of the RWQCB during the cleanup after the parcels have been transferred into Tribal trust.

> *Recommendation:* Because of the importance of the cleanup, EPA recommends that the City, developer and Tribe work with the RWQCB to ensure that the waiver of sovereign immunity for the project is legally sufficient for the RWQCB to ensure that the site cleanup will occur despite land ownership status.
>
> The FEIS should also clarify how non-MSA related mitigation would be enforced, and clarify the discussion regarding deed restrictions. The DEIS states that deed restrictions will be replaced by land use controls, but also states that deed restrictions will be enforced by the City and the RWQCB, which is confusing.

Air Quality Impact Assessment
The contamination cleanup appears to be part of the project, since the project proponents are proceeding with early transfer with privatized remediation (p. 2-7). The impacts from the cleanup do not appear to be assessed and disclosed in the DEIS, however. For example, the air quality section estimates emissions from two distinct phases, the construction and the operation phase, and it is not clear if the construction phase includes cleanup activities. The DEIS does include demolition and addresses the potential release of asbestos, but does not specifically cite cleanup activities, such as the soil excavation that will occur in IR-02 Areas A and B, and IR-03 (p. 4.12-12 through 4.12-13).

In addition, the DEIS states that excavation for the semi-subterranean parking structures and the Point Hotel Casitas would produce excess fill material on the order of 1.38 million cubic yards, and that this would primarily be transported by barge (p. 2-29). Appendix R does not appear to include this vessel in emissions estimates, nor is it clear if truck transport of this material was included in the calculations. Also, since it appears that a parking structure is located in the area of the treatment ponds that will require remediation, it appears that this excavation could contain contaminated sediments.

> *Recommendation:* Include assessment of impacts to environmental resources during the cleanup phase; clarify whether this will occur concurrent with the construction phase or will precede it. Clarify whether barge and truck traffic exporting excavation materials was included and update air quality estimates if it was not. Discuss how contamination cleanup of these areas interfaces with construction excavation and ensure impacts from the cleanup to all applicable resources are assessed.

Climate Change Discussion
The DEIS includes a statement that many in the scientific community contend that global climate variation is not necessarily related to human activities (p. 3.4-11). We recommend that this statement be revised or substantiated. The DEIS acknowledges the Intergovernmental Panel of Climate Change (IPCC) conclusion that "most of the observed increase in globally-averaged temperatures since the mid-20th century is very likely due to the observed increase in anthropogenic GHG concentrations." The IPCC is the leading scientific body for the assessment of climate change, established to provide the world with a clear scientific view on the current state of climate change and its potential environmental and socio-economic consequences. Thousands of scientists from all over the world contribute to the work of the IPCC. We recommend removing the reference that states that many scientists disagree with the IPCC conclusions, or providing data that substantiates this statement.

In addition, the discussion regarding the California waiver is dated and should be updated. EPA granted the State of California the waiver on June 30, 2009. For more information, see: http://www.epa.gov/otaq/climate/ca-waiver.htm.

Green Building and Sustainability Features

As we noted above, the project design includes many sustainable and green building features and we commend BIA and the Tribe and developer for including these features. Because the DEIS states that there is interest in the project being a highly visible model of green building features (p. 2-2), the Tribe and developer should consider designing and constructing facilities for Leadership in Energy and Environmental Design (LEED) certification by the U.S. Green Building Council. This would offer an additional opportunity for marketing the facilities as environment-friendly, and for the Tribe to establish themselves as recognized leaders in the green building sector.

We understand that indoor smoking provides some limitations to LEED certification. To address this, smoking sections could be provided separately which would allow the rest of the facilities to pursue LEED certification. A recent survey by J.D. Power and Associates shows that a vast majority (85%) of Southern California Indian gaming casino customers prefer a smoke-free environment[1]. Additionally, a separate survey of hotel guests showed that 82 percent of hotel guests say they prefer a smoke-free hotel environment[2]. At a minimum, all buildings that are not connected to a casino could pursue LEED certification.

> *Recommendation:* Specify that project facilities will be constructed for LEED certification by the U.S. Green Building Council. This specification will guide the building process and create high-performance, sustainable buildings.

Additional Comments

- Avoid wetlands: The site contains 3 acres of wetlands and the project could impact almost one-forth of these (0.72 ac). It appears that the site design could be modified to avoid all wetlands, and we encourage the developer to ensure this avoidance occurs.
- Stormwater: The DEIS acknowledges that grading and vegetation removal can degrade the quality of surface waters (p. 3.3-13). The area identified for residential development under Alternative B and D could be restored with vegetation to reduce stormwater impacts if the proposed action or an alternative other than B or D is selected. We encourage the developer to restore this site for the benefit of water quality and habitat values.
- Ferry terminal: EPA commends the Tribe and Developer for incorporating on-site ferry and transit services which will help reduce highway congestion and improve air quality. We recommend that the developers coordinate with San Francisco Bay Area Water Emergency Transportation Authority on this project component, and specify that ferries utilize lower-emission diesel fuel and emission control technology.
- Residential development under Alternative A: The DEIS references the portion of the site "slated for residential development" under Alternative A, however Alternative A proposes no residential development (p. 4.2-4). Additionally, there is reference to this site as a Future Use parcel in amendments to the Municipal Services Agreement, which references phased

[1] See http://www.jdpower.com/corporate/news/releases/pressrelease.aspx?ID=2008082

[2] See (http://www.jdpower.com/corporate/news/releases/pressrelease.aspx?id=2007116

development on this parcel. If future residential development is expected in a phased approach under the proposed action (Alternative A), this should be clearly disclosed in the EIS.

Minor comments

- Table 1-1 does not list EPA's role in issuing Water Quality Certification on tribal lands. (p. 1-14 through 1-15)
- Page 3.3-13 contains a typo – should read Objectives, not Objections.
- On page 3.4-13, line 3, there is an error in referring to the discussion of wetlands in Section 3.5.4. It should reference Section 3.5.6