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May 29, 2013

Via Certified Mail Return Receipt Requested

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Regional Transportation Commission
May 29, 2013
Page 2

Re: 60-day Notice of Intent to Sue for Violation of Section 404 of the Clean Water Act—Failure to Obtain Permit for Discharge of Dredged/Fill Material into Waters of the United States

Dear Sir or Madam:

This firm represents the Upper Southeast Communities Coalition (Coalition), a non-profit organization whose members reside and recreate in communities near the Regional Transportation Commission of Washoe County, Nevada's proposed SouthEast Connector ("SEC" or "Project") and therefore will be severely impacted by its construction and operation. We write to inform you that, by proceeding with construction of "Phase I" of the SEC prior to obtaining a Section 404 permit—which, in turn, requires Section 401 certification, environmental review under the National Environmental Policy Act ("NEPA"), Endangered Species Act ("ESA") consultation with U.S. Fish and Wildlife Service ("USFWS"), and review under the National Historic Preservation Act ("NHPA")—the Regional Transportation Commission of Washoe County ("RTC") has violated the requirements of the Clean Water Act ("CWA"). This letter constitutes formal 60-day notice of intent to initiate litigation under the citizen suit provision of the CWA. *See* 33 U.S.C. § 1365.

We request that the RTC take immediate action to remedy this violation by ceasing construction of any portion of the SEC until the RTC has obtained the required Section 404 permit. Until now, the Coalition has not taken steps to institute legal action against the RTC because it had been informed by the RTC and the federal permitting agency, the U.S. Army Corps of Engineers ("Corps"), that Section 404/401 analysis, NEPA review, and USFWS consultation were imminent. As the months roll by without any action taken on these necessary approvals and construction of "Phase I" commences, the Coalition cannot wait any longer.

In fact, the permitting process seems to have gone in reverse in recent months. The RTC withdrew its applications for a Section 404 permit and the related Section 401 certification in September 2012 and has yet to submit new applications. Tellingly, these original applications described the Project as being a "major arterial" extending "from Veterans Parkway and South Meadows Parkway in the south, north to the intersection of Greg Street and Sparks Boulevard"—that is, the entire Project. *See* Application for Department of the Army Permit, SouthEast Connector, Washoe County, Nevada (May 31, 2011) ("May 31, 2011 Application") at 3; SouthEast Connector Preliminary 401 Water Quality Certification Application (June 1, 2011) ("June 1, 2011 Application") at 1. Now, however, the RTC has withdrawn those applications and has

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actually begun constructing the Project without any federal review or approval. According to information provided to the public at the March 28, 2013 Public Information meeting, the RTC does not even plan to submit its new Section 404/401 permit applications for the Project until July 2013.

The RTC has apparently attempted to justify this blatant violation of federal law by calling one segment of the SEC "Phase I" and suggesting that no CWA permits are required for this initial phase because it does not require the placement of fill in any "waters of the U.S." The flaw in this logic is that "Phase I" is just one part of the SEC Project; it has no independent utility separate from the whole SEC. In fact, it is the quintessential "bridge to nowhere," extending a dead-end road over a river and agricultural land so that it will dead-end one mile further south at a little-traversed, two-lane surface street. The only reason for constructing "Phase I" is that it is a necessary portion of the SEC as a whole. The RTC's own website plainly acknowledges that these two phases are both part of the same SEC Project. As a result, the RTC must apply for and obtain its Section 404 permit before continuing work on "Phase I"—or any portion—of the SEC Project.

RTC's initiation of "Phase I" construction *now* is a blatant attempt to end-run the federal review and environmental analysis that must be completed before issuing a Section 404 permit. If the permitting process set forth in the CWA and its implementing regulations is to have any meaning at all, it must be conducted *before* the permit applicant has committed serious resources to, much less begun construction on, the project requiring the permit. If a developer could construct all portions of a project other than those directly impacting waters of the U.S. before even applying for a Section 404 permit, the Corps's analysis of less environmentally damaging alternatives and environmental effects, required under the CWA, NEPA, and the ESA, would be truncated and meaningless, surely not the result Congress had in mind.

Again, this letter is provided as formal 60-day notice under the CWA citizen suit provision, 33 U.S.C. § 1365, of our intent to file suit in federal court to enforce the CWA if the RTC does not act within the next 60 days to remedy these legal violations.

IDENTITY OF ORGANIZATION GIVING NOTICE

The name, address and phone number of the organization giving notice of intent to sue under the CWA is:

SHUTE, MIHALY
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Regional Transportation Commission
May 29, 2013
Page 4

Upper Southeast Communities Coalition
4885 Sinelio Drive
Reno, Nevada 89502

Counsel for the organization giving notice is:

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BACKGROUND

In May 2011, the RTC submitted an application to the U.S. Army Corps of Engineers requesting approval of a Section 404 permit to discharge dredged and fill materials into waters of the United States as part of its construction of the SouthEast Connector in Washoe County, Nevada. The RTC subsequently applied to the Nevada Department of Environmental Protection for a related Section 401 certification.

As described in these permit applications, the SEC would be a “major arterial”—i.e., a six-lane highway extending from the intersection of Veterans Parkway and South Meadows Parkway in the south to the intersection of Greg Street and Sparks Boulevard to the north. The *entire* proposed roadway would be located within the Federal Emergency Management Agency (FEMA) Special Flood Hazard Area as well as both Zone I and Zone II Critical Flood Pools. In fact, it would bisect an area that has been designated by the Corps as a detention basin for flood waters from the Truckee River (the Truckee Meadows Flood Control Project). In an attempt to alleviate the “dam” effect of placing a major arterial through the heart of a detention basin, the RTC proposed to elevate the entire roadway and install more than one hundred culverts underneath. The Project would result in the loss of at least 3.4 acres of wetlands and other waters of the United States. In a recent public meeting, representatives of the RTC acknowledged that this proposed major arterial is not needed to address any current traffic congestion, but is intended to alleviate projected congestion in the future. *See Minutes of March 28, 2013 SouthEast Connector Community Open House Before the Regional Transportation Commission at 9-10.* In some places, the RTC has described the project benefit as “reliev[ing] congestion for 2030 forecast.” *See Meeting Boards for March 28, 2013 meeting.*

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Scores of residents living near the proposed project site, as well as the U.S. Fish and Wildlife Service, Pacific Southwest Region, and the Washoe-Storey Conservation District (whose comment letters are attached at Exhibits A and B, respectively), objected to the RTC's permit application, expressing concerns about the road's flooding impacts, destruction of wetlands, impacts on birds and other species, loss of property value, air quality degradation and noise impacts. Commenters also questioned the need for a new 5.5-mile-long, six-lane highway, given the economic downturn, the bursting of the housing bubble, and the existence of a major arterial (S. McCarran Blvd.) which runs parallel to the proposed SEC and lies only 1.5 miles to the west of the SEC alignment. Members of the Coalition were among those commenters who objected.

Following this public outcry, in September 2012 the RTC withdrew its applications for a Section 404 permit and Section 401 certification. No environmental review had been disclosed to the public. No consultation had been held to analyze the proposed Project's impacts on endangered species or historic/cultural resources.

With no Section 404 permit in hand, and no permit application in the works, on November 21, 2012, the RTC approved a construction contract with Kiewit Western and Atkins Global for the construction of "Phase I" of the SEC. "Phase I," which had not been called out as a separate project in the RTC's original Section 404/401 applications, is nothing other than the northernmost one-mile stretch of the SEC. This one-mile stretch includes a bridge over the Truckee River and an overpass over Clean Water Way, dead-ending just beyond Clean Water Way. Clearing and grubbing for the improvements at Greg Street and Sparks Boulevard began in February. Grading and other earthmoving activities have occurred at Clean Water Way. At a neighborhood meeting on May 23, 2013, representatives of the RTC indicated that they were "10%" done with "Phase I." According to information presented at an earlier meeting, Intersection Improvements at Greg Street and Sparks Boulevard were not expected to be complete until September 2013; the Clean Water Way Overcrossing was not expected to be complete until October 2013; the Veterans Memorial Bridge (crossing the Truckee River) was not expected to be complete until March 2014; and the entirety of "Phase I" was not expected to be complete until July 2014. *See* RTC SouthEast Connector Phase I Board, Mar. 23, 2013.

Members of the Coalition have visited the site of "Phase I" over the last several weeks and have observed earthmoving equipment, cranes, and other construction activity there.

Meanwhile, the RTC has not yet submitted new applications for Section 404/401 approval. According to documents presented to the public, the agency does not even plan to submit these applications until July 2013.

STATUTORY FRAMEWORK

I. Section 404 of the Clean Water Act.

The Clean Water Act prohibits the discharge of fill material into waters of the United States without first obtaining a permit from the Corps. *See* 33 U.S.C. §§ 1311(a), 1344(a); 33 C.F.R. 323.3(a). “Waters of the United States” or “WOUS” include a wide range of waterbodies, including “interstate wetlands,” wetlands adjacent to navigable waters, and all other waters the “degradation or destruction of which could affect interstate or foreign commerce.” 33 C.F.R. § 328.2. It is undisputed that construction of the SEC will require discharging fill into waters of the United States, and thus a Section 404 permit is required. *See generally* May 31, 2011 Application. As part of that permit process, the Corps may not issue a Section 404 permit “if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem.” 40 C.F.R. § 230.10(a). “[P]racticable alternatives include, but are not limited to, activities which do not involve a discharge of dredged or fill material into the waters of the United States.” *Id.* at § 230.10(a)(2).

An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

Id. at § 230.10(a)(2).

Where, as here, the proposed “discharge site” includes wetlands or other “special aquatic sites,” and the “activity associated with [the] discharge . . . does not require access or proximity to” wetlands to fulfill its basic purpose, the Corps must presume that practicable alternatives are available and will have less adverse impacts “unless clearly demonstrated otherwise.” *Id.* at § 230.10(a)(3). The Corps may not permit a discharge of dredged or fill material if it jeopardizes the continued existence of species listed as endangered or threatened under the ESA, or results in the destruction of critical habitat. *Id.* at § 230.10(b).

II. Other Federal Statutory Requirements Triggered by Issuance of Section 404 Permit.

The issuance of a Section 404 permit, in turn, triggers additional federal law requirements. *First*, the CWA requires any “applicant for a Federal license or permit to conduct activit[ies that] may result in any discharge into the navigable waters” to provide the permitting agency (here, the Corps) with a certification from the State in which the discharge will originate indicating that the discharge will comply with the effluent limitations and other requirements of the CWA. 33 U.S.C. § 1341(a)(1). In Nevada, such Section 401 certifications are processed by the Nevada Division of Environmental Protection. Because the SEC involves construction of 5.5 miles of new roadway adjacent to and across the Truckee River and Steamboat Creek, Section 401 certification is also required for the Project. *See generally* June 1, 2011 Application.

Second, the Corps’s decision to issue the permit is a “major federal action,” and thus the environmental impacts associated with the permit must be analyzed under NEPA. 42 U.S.C. § 4321 *et seq.*; 40 C.F.R. § 1500 *et seq.* “Major federal actions significantly affecting the quality of the human environment” require the preparation of an environmental impact statement (EIS). 42 U.S.C. § 4332(2)(C). Every EIS must describe the environmental impacts of the proposed action, unavoidable adverse environmental effects, and alternatives to the proposed action, among other issues. *Id.* Compliance with NEPA’s environmental review requirement alerts decisionmakers to the environmental impacts of their proposed action and thus allows them to prevent damage to the environment through changes to the project or alternatives. *See* 42 U.S.C. § 4321; 40 C.F.R. § 1502.1.

Third, because it is possible that the SEC could affect an endangered or threatened species, such as the Lahontan cutthroat trout and Cui-ui (*see* August 8, 2011 Letter from U.S. Fish & Wildlife Service, Pacific Southwest Region to U.S. Army Corps of Engineers at 2, attached as Exhibit A; July 29, 2011 Letter from Washoe-Storey Conservation District to U.S. Army Corps of Engineers at 7, attached as Exhibit B), the Corps must consult with the USFWS to ensure that issuing a Section 404 permit is “not likely to jeopardize the continued existence of [the] species or result in destruction or adverse modification of [their] habitat.” 16 U.S.C. § 1536(a).

Fourth, Section 106 of the NHPA prohibits a federal agency from engaging in any federal undertaking unless the agency first takes into account the effects of the undertaking on historic properties. 16 U.S.C. § 470(f). To comply with this mandate, the federal agency must consult with the relevant State Historic Preservation Officer and

affected Indian tribes. 36 C.F.R. § 800.2(c) (listing consulting parties). “It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.” 36 C.F.R. § 800.2(c)(2)(ii)(A).

All of these review and consultation requirements have one thing in common: they are designed to ensure that federal agencies, like the Corps, (a) consider the environmental impacts of the projects they permit and (b) do not approve projects with significant adverse environmental impacts if there are less damaging ways to achieve the projects’ goals.

As a result, all of this analysis and consultation must be completed *before* any permit or certification is issued, not after the project has already been approved and is under construction. In fact, federal regulations are abundantly clear on this point. Once NEPA review has been initiated, “no action concerning the proposal shall be taken which would: [1] Have an adverse environmental impact; or [2] Limit the choice of reasonable alternatives.” 40 C.F.R. § 1506.1(a). Once ESA consultation is initiated, the federal agency and the permit applicant are *prohibited* from making an “irreversible or irretrievable commitment of resources . . . [that] has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives” that could avoid jeopardizing the listed species or their habitat. 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09. And the Section 106 process must be complete prior to the federal agency taking action (here, issuing a CWA Section 404 permit). 36 C.F.R. § 800.1(c).

III. Executive Orders Disfavoring Construction in Wetlands and Floodplains.

The Executive Branch has for decades recognized the value of wetlands to the nation as well as the dangers of development in floodplains. In Executive Order (“EO”) 11990, May 23, 1977, President Carter ordered federal agencies to take action to minimize destruction, loss, or degradation of wetlands, and to maintain natural wetland systems and species and habitat diversity. Agencies must implement NEPA and its public review process to ensure there are no practicable alternatives to new construction in wetlands, including dredging and filling, and that all practicable measures are adopted to minimize harm to wetlands.

In EO 11988, May 24, 1977, President Carter ordered federal agencies to take action to reduce the risk of flood impacts and restore and preserve floodplains' natural values through agencies' permitting activities. Agencies must implement NEPA and its public review process to avoid direct or indirect support of floodplain development wherever there is a practicable alternative, and to adopt all practicable measures to minimize potential harm to or within the floodplain. Furthermore, "[a]gencies shall [] encourage and provide appropriate guidance to applicants to evaluate the effects of their proposals in floodplains prior to submitting applications for Federal licenses, *permits*, loans or grants." EO 11988 (May 24, 1977) (emphasis added).

By avoiding environmental review of the SEC in its entirety, the RTC is violating the spirit and purpose of these Executive Orders and directly thwarting the Corps's mandate to implement them.

NOTICE OF VIOLATION

The RTC is violating the Clean Water Act, 33 U.S.C. §§ 1311(a), 1344(a); 33 C.F.R. § 323.3(a), by engaging in construction of the SEC roadway project prior to obtaining a Section 404 permit required for the Project. According to information supplied to the public by the RTC, "groundbreaking" for "Phase I" of the Project occurred in December 2012; and "construction" on "Phase I" began in February 2013. According to publicly available documents, the RTC plans to construct a one-mile stretch of the SEC, including a bridge over the Truckee River, before obtaining a Section 404 permit for the Project. This violation of the Clean Water Act will be ongoing as long as the RTC continues actively constructing any portion of the SEC without an approved Section 404 permit.

The construction of "Phase I" of the SEC will limit the choice of reasonable and practicable alternatives available to the Corps once it receives the RTC's application for a Section 404 permit. Moreover, the "Phase I" construction may have adverse environmental impacts that will escape environmental review when the Corps undertakes its NEPA analysis and ESA/NHPA consultation. Of particular concern are impacts to Cui-ui and Lahontan cutthroat trout caused by disturbance to the Truckee River during the building of the "Veterans Memorial Bridge." Carson Wandering Skipper (endangered) and Steamboat Buckwheat (federally Endangered and Critically Endangered in Nevada) could also be threatened by the "Phase I" construction.

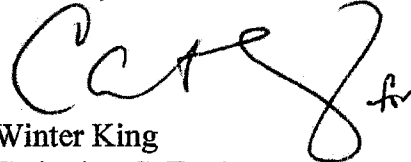
Courts have repeatedly overturned similar attempts to avoid full environmental analysis of a proposed project by “segmenting” it into smaller pieces. *See, e.g., Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1117 (9th Cir. 2005) (finding environmental group likely to succeed on merits of claim that Corps had “improperly constrained its NEPA analysis to the washes, rather than considering the development’s effect on the environment as a whole” in reviewing Section 404 permit application for housing development); *White Tanks Concerned Citizens, Inc. v. Strock* (9th Cir. 2009) 563 F.3d 1033, 1042 (enjoining issuance of Section 404 permit pending adequate environmental review of all environmental impacts associated with the entire housing project made “viab[le]” by the requested permit). *See also Maryland Conservation Council, Inc. v. Gilchrist* (4th Cir. 1986) 808 F.2d 1039 (NEPA review could not be avoided by designing highway segment to stop short of park containing jurisdictional wetlands); *Named Individual Members of San Antonio Conservation Society v. Texas Highway Dept.* (5th Cir. 1971) 446 F.2d 1013 (segmented review impermissible where middle section of proposed highway would cross park); *Swain v. Brinegar* (7th Cir. 1976) 542 F.2d 364 (en banc) (segmented review impermissible where EIS only included 15-mile segment of 42-mile project).

NOTICE OF INTENT TO SUE

If the RTC does not act within 60 days to correct this violation of the CWA, by ceasing all construction on “Phase I” of the SEC until the RTC obtains approval of a Section 404 permit and Section 401 certification following adequate environmental review under NEPA, consultation under ESA, and review under the NHPA, the Coalition will seek relief in federal district court under the Clean Water Act’s citizen suit provision, 33 U.S.C. § 1365(a).

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



Winter King
Catherine C. Engberg
Joseph D. Petta

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Regional Transportation Commission
May 29, 2013
Page 11

Exhibits:

- A. August 8, 2011 Letter from U.S. Fish & Wildlife Service, Pacific Southwest Region to U.S. Army Corps of Engineers
- B. July 29, 2011 Letter from Washoe-Storey Conservation District to U.S. Army Corps of Engineers

— Upper Southeast Communities Coalition

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