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June 10, 2015

Adrianna Crowl
State Water Resources Control Board
Office of Chief Counsel
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Dear Members of the State Water Resource Board:

Sonoma-Marina Area Rail Transit District ("SMART") respectfully submits the attached Petition regarding Cleanup and Abatement Order No. R2-2015-0016 for the Mira Monte Mitigation Project signed and dated May 18, 2015 by Executive Officer Bruce H. Wolfe of the San Francisco Bay Regional Water Quality Control Board ("San Francisco Bay Regional Board").

SMART is committed to working cooperatively with the San Francisco Bay Regional Board and the California Department of Fish and Wildlife to expedite remediation of the failed California Department of Fish and Wildlife's owned and maintained berm (levee) and the subject of the Cleanup and Abatement Order. SMART shares the goal of protecting the seasonal freshwater wetlands of the Petaluma Marsh Wildlife Area from salt or brackish tidal inundation.

The fact is a berm (levee), owned and maintained by California Department of Fish and Wildlife, failed at two locations some 60 days after SMART finished their phase 1 restoration project at the former Mira Monte Marina. On May 4, 2015, the undersigned met with director of California Department of Fish and Wildlife Chuck Bonham and we both agreed that as two property owners (though disagreeing on the cause of the failure) we should, at a minimum, take immediate preventive measures on our respective properties. Towards that end, SMART has voluntarily and at its own expense installed a temporary dike and continues having discussions with California Department of Fish and Wildlife regarding a global resolution.

While SMART remains committed to resolving this matter, it is compelled to submit this Petition. SMART has serious concerns that the Cleanup and Abatement Order as written, exceeds the San Francisco Bay Regional Board's statutory authority, violates the Water Code's requirements regarding issuance of a Cleanup and Abatement Order and contains factual and legal errors. In addition, the Cleanup and Abatement Order sets infeasible requirements by requiring SMART to reconstruct a levee that it does not own, control or manage.

Under California law there is no authority that grants to Regional Boards the jurisdiction to adjudicate and determine legal disputes between property owners related to the legal responsibility for a failed berm. Furthermore, California law does not authorize a Regional Board to serve a Cleanup and Abatement Order on a party that has not discharged "waste" as such is defined by law. Under California law SMART is not the proper party to receive this Cleanup and Abatement Order because the alleged discharge of sediment and debris is from property owned, controlled and maintained by California Department of Fish and Wildlife not SMART.

The allegations and legal conclusions contained in the Cleanup and Abatement Order are not "evidence", in fact the photographs submitted with the attached Cleanup and Abatement Order favor SMART's position that the Cleanup and Abatement Order is inappropriate and improper. For example, attachment 4, photo 1 in the Cleanup and Abatement Order provides an exhibit that demonstrates the berm failure occurred on property owned, controlled and maintained by the California Department of Fish and Wildlife. Attachment 4, photo 2 provides an exhibit that the dominant vegetation type on the California Department of Fish and Wildlife berm and the lower elevation inboard side has historically contained salt marsh, not freshwater, vegetation. Attachment 4, photo 2 also provides that the tidal flow that allegedly escaped California Department of Fish and Wildlife's failed berm was contained within the lower elevation of the existing salt marsh vegetation area in the Petaluma Marsh Wildlife Area and did not migrate into the higher elevation of the freshwater vegetation area.

The issuance of the Cleanup and Abatement Order is beyond the jurisdiction of the San Francisco Bay Regional Board, inappropriate, improper and not supported by the evidence for the following reasons:

SMART is not a discharger of waste as defined in the California Water Code.

SMART does not dispute that a Regional Board is authorized pursuant to Water Code Section 13304 to issue a Cleanup and Abatement Order to any person who causes *waste* to be discharged into the waters of the State or creates a condition of pollution or nuisance. However, under the facts alleged in the Cleanup and Abatement Order, SMART has neither discharged waste nor created pollution or a nuisance.

The finding that SMART's mitigation project was the legal cause for the failure of the California Department of Fish and Wildlife berm exceeds the Regional Board's statutory authority.

The San Francisco Regional Board lacks any statutory authority to resolve the legal dispute or make legal findings regarding the responsibility for the California Department of Fish and Wildlife berm breach.

Generally, Regional Boards have primary responsibility for coordination and control over water quality issues. Regional Boards may adopt policies and procedures that govern the regulation, oversight, investigation and remediation of contaminated water for public use. Regional Boards are also authorized to formulate and adopt water quality control plans (Water Code section 13240 et seq).

However the Regional Boards administrative authority does not displace judicial authority. Regional Boards have neither statutory authority nor jurisdiction to adjudicate legal issues between third parties such as the legal cause and responsibility for California Department of Fish and Wildlife's berm failure. The CAO's unilateral and factually unsupported finding that SMART's project was the legal cause of the berm failure is beyond the Regional Board's statutory jurisdiction and should be set aside by the State Board.

The Cleanup and Abatement Order denied SMART due process and is factually and legally unsupported by the evidence.

Due process is a fundamental principle of fairness in all legal matters. All legal procedures set by statute, including notice and opportunity to be heard, must be followed to insure that no prejudicial or unequal treatment will result.

In this case, it is alleged in the Cleanup and Abatement Order that sediment, debris, and turbid water, was discharged into freshwater habitat. The Cleanup and Abatement Order provides no evidence of pollution or contamination as such is defined by law (Water code section 13050). The Cleanup and Abatement Order contains no allegation that a water system was threatened or that the alleged "discharge" created a public health hazard. The Cleanup and Abatement Order contains no acknowledgement that the "freshwater" habitat was already compromised by incursion of saline/brackish water unrelated to SMART's project. Moreover, the Cleanup and Abatement Order fails to acknowledge that SMART voluntarily undertook interim remedial measures to mitigate any impact to the Petaluma Marsh Wildlife Area pending discussions and resolution with California Department of Fish and Wildlife.

This Cleanup and Abatement Order was issued without any prior notice or opportunity to comment by SMART.

The issuing Executive Officer has failed to respond to telephonic messages and emails left by SMART's General Manager. Had the San Francisco Bay Regional Board consulted with SMART prior to issuing the Cleanup and Abatement Order it would have learned the following facts: (1) the

berm is not owned or controlled by SMART, (2) the berm was subject to tidal flow, seepage and overtopping prior to the Mira Monte Mitigation Project, (3) the berm had reportedly failed before, (4) the berm is in poor condition, (5) the Petaluma Marsh Wildlife Area already contained salt marsh vegetation, and (6) SMART has taken voluntary interim protective measures while attempting to resolve the issue with the California Department of Fish and Wildlife.

The sediment and debris allegedly being discharged from the failed berm is located on property that is not owned, maintained or controlled by SMART. SMART is not the proper party subject to this order under California Water Code Section 13304.

California Department of Fish and Wildlife's berm appears to have been built prior to construction of the Mira Monte Marina in the 1950s. It is in poor condition and appears inadequate for its intended purpose to protect the Petaluma Marsh Wildlife Area from brackish water incursion. The berm appears to be comprised of dredge silt spoil materials. It appears that the material was placed on the unprepared historic marsh plain, is generally un-compacted, not engineered and shows signs of surficial erosion. Animal burrows are present throughout the entire length of the berm. The berm also shows signs of both historic overtopping and seepage.

Prior to construction of Mira Monte Marina in the 1950s the California Department of Fish and Wildlife berm was subjected to tidal inundation and frequency from San Antonio Creek and the Petaluma River. Since construction of the Marina the berm has been historically subject to muted tidal inundation controlled by operation of the marina tidal gate. SMART's Mitigation Project completed in early 2015 returned the natural tidal flow to its pre-marina conditions.

It has been reported to SMART that the berm previously experienced a breach circa 1998 in the vicinity of the recent breach. That breach was reportedly repaired under the direction of the California Department of Fish and Wildlife.

Notwithstanding the significant questions of law and fact related to the cause of the current breach, the legal responsibility for such and the best method of repair, the Cleanup and Abatement Order purports to illegally and without any authority assign legal responsibility to SMART and orders SMART to expend its tax payer approved transit related funding on repair of California Department of Fish and Wildlife's berm.

SMART does not own or maintain the failed levee or the sediment or debris associated with the levee.

As evidenced by the Cleanup and Abatement Order's Attachment 4, photo 1 the failed levee is located approximately 100 feet south of SMART's property and is owned by California Department of Fish and Wildlife. In as much as the Cleanup and Abatement Order characterizes "waste consisting of sediment and debris from the failed levee" as being discharged into the freshwater habitat SMART is not the responsible "person" under Water Code Section 13304. The Cleanup and Abatement Order's unsupported conclusion that SMART is legally responsible for the breach is in excess of its jurisdiction and cannot form the basis to issue a Cleanup and Abatement Order to SMART for sediment and debris discharged from a property it does not own, maintain or control.

Attachment 4, Photo 2 to the Cleanup and Abatement Order purports to show the extent of inundation of tidal water adjacent to the berm failure location. That inundation is concentrated within the areas of low elevation in the managed marsh.

The dominate vegetation found in the previously inundated wetlands is salt marsh vegetation not freshwater seasonal wetland vegetation. The same is true for the vegetation growing on the “banks” of the borrow ditch on the inboard side of California Department of Fish and Wildlife’s berm. The wetlands in question and the banks of the borrow ditch support well established salt-tolerant plant species typical of salt marshes and brackish marches in the region, such as pickleweed, alkali heath, brass buttons and fat hen. The salt or brackish marsh plant species observed in these low elevation areas, particularly pickleweed and alkali heath, do not establish in a matter of one month or even several months.

The established condition of the observed salt marsh or brackish marsh vegetation indicates that these species have been growing in these low elevation areas of the California Department of Fish and Wildlife managed marsh for several years. Satellite imagery of California Department of Fish and Wildlife’s managed marsh shows signs of salt marsh vegetation type in the lower elevation areas and along remnant tidal channels in the managed marsh dating back to at least 2011. Establishment of the salt marsh vegetation in the Petaluma Marsh Wildlife Area is likely due to historic overtopping and seepage of California Department of Fish and Wildlife’s berm long before SMART acquired the Mira Monte site. The surrounding areas in the managed marsh, where elevation is higher relative to the inundated areas, support visibly different vegetation types that are most likely dominated by freshwater-dependent species that received seasonal flood water input from precipitation.

A portion of California Department of Fish and Wildlife’s managed marsh, particularly in the extensive areas of low elevation, that were inundated during the berm failure event, predominantly support well established, salt-tolerant vegetation that did not develop due to, or since, the berm failure. In other words, California Department of Fish and Wildlife’s managed Petaluma Marsh Wildlife Area already contained extensive salt marsh or brackish marsh conditions prior to the restoration of tidal hydrology associated with the Mira Monte Mitigation Project. Moreover, because the berm failure waters were contained within the existing salt marsh and brackish marsh area, there is no evidence to support the Cleanup and Abatement Order conclusion that “beneficial uses of palustrine wetlands” were threatened by SMART’s restoration of full tidal exchange project.

The attached petition and its attachments clearly demonstrates that pursuant to California Water Code section 13321 and CCR Title 23, Section 2053 there are “substantial questions of fact and law regarding this Clean up and Abatement Order and it should be vacated immediately”.

For all the reasons presented above, the Petitioner respectfully requests that the State Board set aside and vacate Cleanup and Abatement Order No. R2-2015-0016.

Finally, please note that notwithstanding the Request for a Stay and Petition For Review, SMART assures the members of the State Board that the filing of the Petition does not affect SMART's continuing efforts to resolve this matter with the California Department of Fish and Wildlife, as two adjacent property owners, but with differing opinions as to the cause of the berm failure.

Very truly yours,



Farhad Mansourian
General Manager

Enclosures

- C: Chuck Bonham – Director California Department of Fish & Wildlife
 Bruce Wolfe – Executive Officer – SF Regional Water Board
 Xavier Fernandez - SF Regional Water Board
 Bryan Matsumoto -U.S. Army Corps of Engineers
 Holly Costa - U.S. Army Corps of Engineers
 Jane Hicks - U.S. Army Corps of Engineers
 Joseph Terry – U.S. Fish & Wildlife Services
 Ryan Olah – U.S. Fish & Wildlife Services
 Timothy Dodson – California Department of Fish & Wildlife
 Greg Martinelli - California Department of Fish & Wildlife
 Scott Wilson- California Department of Fish & Wildlife
 Tom Lyons – SMART's General Counsel
 Bill Gamlen – SMART's Chief Engineer

ATTACHMENT 4 - PHOTOGRAPHS



Photo 1: Two breaches at First Levee Failure Location looking east. Power lines to left are located on access road that separates the Mira Monte site owned by SMART from CDFW property, which includes the salt marsh to the left of the levee and the channel and seasonal wetlands to the right of the levee shown in the photo. The condition of the levee separating the two breaches is severely comprised and will likely fail if not addressed before it is exposed to high tides.

ATTACHMENT 4 - PHOTOGRAPHS



Photo 2: Water in channel and seasonal wetlands adjacent to First Levee Failure location although there has been little rain this year.

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16 STATE OF CALIFORNIA

17 STATE WATER RESOURCES CONTROL BOARD

18 IN THE MATTER OF SAN FRANCISCO
19 REGIONAL WATER QUALITY CONTROL
20 BOARD CLEANUP AND ABATEMENT
21 ORDER NO. R2-2015-0016

22 REQUEST FOR AN IMMEDIATE STAY;
23 PETITION FOR REVIEW; MEMORANDUM
24 OF POINTS AND AUTHORITIES

25 This Petition is respectfully submitted to the California State Water Resources Control
26 Board ("State Board") on behalf of the Sonoma-Marín Area Rail Transit District ("SMART")
27 pursuant to California Water Code section 13320 (a) and California Code of Regulations Title 23,
28 section 2050 et seq. for review of Cleanup and Abatement Order No. R2-2015-0016 ("CAO"). A
copy is attached hereto as Attachment "A".

SMART remains committed to working collaboratively with the San Francisco Bay
Region Water Quality Control Board ("San Francisco Bay Regional Board") and the California
Department of Fish and Wildlife ("CDFW") to protect the seasonal freshwater wetlands in the

1 Petaluma Marsh Wildlife Area threatened by the failure of CDFW's berm. Notwithstanding,
2 SMART is compelled to file this Petition because the CAO is both inappropriate and improper
3 under California law.

4 Under California law there is no authority that grants Regional Boards the jurisdiction to
5 adjudicate and determine legal disputes between property owners related to the legal responsibility
6 for a failed berm. California law does not authorize a Regional Board to serve a CAO on a party
7 that has not discharged "waste" as such is defined by law. Under California law SMART is not the
8 proper party subject to this CAO because the alleged discharge of sediment and debris is from
9 property owned, controlled and maintained by CDFW not SMART.

10 The allegations and legal conclusions contained in the CAO are not evidence. The scant
11 evidence (i.e. photographs) attached to the CAO favors SMART's position that the CAO is
12 inappropriate and improper. Attachment 4, photo 1 provides evidence that the berm failure
13 occurred on property owned, controlled and maintained by the CDFW. Attachment 4, photo 2
14 provides evidence that the dominant vegetation type on the CDFW berm and lower elevation
15 inboard side has historically contained salt marsh, not freshwater, vegetation. Attachment 4, photo
16 2 also provides evidence that the tidal flow that allegedly escaped CDFW's failed berm was
17 contained within the lower elevation existing salt marsh vegetation area in the Petaluma Marsh
18 Wildlife Area and did not migrate into the higher elevation freshwater vegetation area.

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1. **NAME AND ADDRESS OF PETITIONER**

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1 With Copies to:

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17 **2. ACTION FOR WHICH THIS PETITION FOR REVIEW IS SOUGHT**

18 SMART requests review of the action of the San Francisco Bay Regional Board's Cleanup
19 and Abatement Order No. R2-2015-0016 dated May 18, 2015.

20 **3. STATEMENT OF REASONS THE ACTION IS INAPPROPRIATE AND IMPROPER**

21 The issuance of the CAO is beyond the jurisdiction of the San Francisco Bay Regional
22 Board, inappropriate, improper and not supported by the evidence for the following reasons:

- 23 a. SMART is not a discharger of waste as such is defined in the California Water
24 Code.
- 25 b. The CAO's finding that SMART's mitigation project was the legal cause for the
26 failure of the CDFW berm exceeds the Regional Board's statutory authority.
- 27 c. The CAO denied SMART due process and is factually and legally unsupported by
28 the evidence.
- 29 d. The sediment and debris alleged to be discharged from the failed berm is located on
30 property that is not owned, maintained or controlled by SMART. SMART is not
31 the proper party subject to this order under California Water Code Section 13304.

32 **4. THE MANNER IN WHICH PETITIONER IS AGGRIEVED**

33 Petitioner is aggrieved because the CAO is not authorized by law and exceeds the statutory
34 authority of the San Francisco Bay Regional Board.

1 **5. PETITIONER'S REQUESTED ACTION BY THE STATE BOARD**

2 Petitioner respectfully requests that the State Board set aside and vacate Cleanup and
3 Abatement Order No. R2-2015-0016. In addition, Petitioner respectfully requests that the State
4 Board issue an immediate stay of Cleanup and Abatement Order No. R2-2015-0016.

5
6 **REQUEST FOR IMMEDIATE STAY**

7 Pursuant to California Water Code section 13321 and CCR Title 23, section 2053, SMART
8 requests an immediate stay of the CAO. A stay of a CAO shall be granted if Petitioner shows: (i)
9 There will be substantial harm to the Petitioner if the stay is not granted; (ii) There will be no
10 substantial harm if the stay is granted; (iii) There are substantial questions of fact and law
11 regarding the disputed action. This request for immediate stay is accompanied by the declarations
12 of Laura Giraud (Attachment "B") and Leslie Allen (Attachment "C").

13
14 **THERE WILL BE SUBSTANTIAL HARM TO SMART IF THE STAY IS NOT GRANTED**

15 If the CAO is not stayed, SMART will suffer substantial harm because compliance with
16 the CAO's requirements is infeasible and inconsistent with State law. The CAO is infeasible
17 because it orders SMART to implement control measures to prevent failure of CDFW's "levees".
18 Initially, SMART does not own or have legal access to CDFW's property such that it can prevent
19 failure of CDFW's levees. Secondly, compliance with the CAO is likely infeasible because of the
20 extensive permit requirements and construction limitations. Most importantly, the causes and
21 responsibility for the berm failure, alleged discharge of "waste" and responsibility to remedy such
22 have not been legally determined or resolved. SMART will suffer substantial harm if it is required
23 to expend significant financial resources to perform remedial work to reconstruct CDFW's failed
24 berm if it is ultimately determined to not be the party legally responsible for the berm failure.

25
26 **THERE WILL BE NO SUBSTANTIAL HARM TO THE PUBLIC IF THE STAY IS GRANTED**

27 The public interest will not be placed at risk if the stay is granted because SMART has
28 already voluntarily undertaken remedial measures on its property to contain the natural tidal flow

1 pending discussions with CDFW. In addition, the Petaluma Marsh Wildlife Area already contains
2 salt marsh vegetation and there is no evidence that the limited amount of tidal water introduced
3 from the CDFW berm breach has entered the freshwater vegetation portion of the marsh area.
4 Finally, there is no threat to drinking water systems or threat of public health hazard associated
5 with the berm breach.

6
7 **SUBSTANTIAL QUESTIONS OF LAW AND FACT EXIST**

8 As explained below there are substantial questions of law and fact regarding both the San
9 Francisco Bay Regional Board's CAO and the legal cause and responsibility for the CDFW berm
10 failure. For all of the foregoing reasons, SMART respectfully requests that the State Board grant
11 an immediate stay of the CAO until such time as final action is taken on this Petition.

12
13 **6. POINTS AND AUTHORITIES:**

14 **BACKGROUND**

15 SMART was created by Act of the California State Legislature in 2002 for the purpose of
16 constructing, maintaining and operating a passenger rail service and bicycle – pedestrian pathway
17 project in Sonoma and Marin counties. The rail passenger service will ultimately serve a 70 mile
18 corridor from Larkspur in Marin County to Cloverdale in Sonoma County. Phase 1 Construction
19 on 38.5 miles from downtown San Rafael to the airport in Santa Rosa commenced in May 2012.

20 To mitigate for permanent and temporary impacts to wetlands resulting from SMART's
21 construction activities SMART purchased approximately 62 acres of land in Novato, known as the
22 Mira Monte Marina. Subsequent to regulatory approvals, SMART commenced the Mira Monte
23 March Restoration Project ("Mire Monte") by decommissioning the marina and associated
24 buildings and restoring tidal exchange to enhance tidal marsh and tidal channel habitat. Located
25 immediately south of Mira Monte is a tidal marsh owned by CDFW extending south between the
26 approximate width of 200 feet to 100 feet to a berm owned by CDFW. The Petaluma Marsh
27 Wildlife Area is located immediately south of CDFW's berm.

28 The Mira Monte Marina was constructed in a tidal marsh in the early 1950s. The

1 construction included a tide gate connection that reduced but did not eliminate tidal flooding onto
2 Mira Monte and the CDFW marsh located to the south. Since the 1950s, both Mira Monte and the
3 CDFW marsh have experienced muted tidal hydrology and incursion of tidal waters. In fact,
4 during construction of the Mira Monte project SMART's contractor witnessed tidal waters
5 inundating CDFW's marsh and extending to CDFW's berm.

6 CDFW's berm appears to have been built prior to construction of the Mira Monte Marina
7 in the 1950s. It is in poor condition and appears inadequate for its intended purpose to protect the
8 Petaluma Marsh Wildlife Area from brackish water incursion. The berm appears to be comprised
9 of dredge silt spoil materials. It appears that the material was placed on the unprepared historic
10 marsh plain, is generally un-compacted and shows signs of surficial erosion. Animal burrows are
11 present throughout the entire length of the berm. The berm also shows signs of both historic
12 overtopping and seepage. Finally it does not appear that the berm has been maintained in quite
13 some time.

14 Prior to construction of Mira Monte Marina in the 1950s the CDFW berm was subjected to
15 tidal inundation depth and frequency from San Antonio Creek and the Petaluma River. Since
16 construction of the Marina the berm has been historically subject to muted tidal inundation
17 controlled by operation of the marina tidal gate. SMART's Mitigation Project completed in early
18 2015 returned the natural tidal flow to its pre-marina conditions.

19 It has been reported to SMART that the berm previously experienced a breach circa 1998
20 in the vicinity of the recent breach. That breach was reportedly repaired under CDFW direction.
21 Notwithstanding the significant questions of law and fact related to the cause of the current breach,
22 the legal responsibility for such and the best method of repair the CAO purports to assign legal
23 responsibility to SMART and orders SMART to expend its transit related funding on repair of
24 CDFW's berm.

25
26 **(a) SMART IS NOT A DISCHARGER OF WASTE AS THAT TERM IS DEFINED IN THE WATER CODE.**

27 SMART does dispute that a Regional Board is authorized pursuant to Water Code Section
28 13304 to issue a CAO to any person who causes waste to be discharged into the waters of the State

1 or creates a condition of pollution or nuisance. However, under the facts alleged in the CAO,
2 SMART has neither discharged waste nor created pollution or a nuisance.

3 By section 13050 (d) of the Water Code, "Waste" is defined as:

4 "Waste" includes sewage and any and all other waste substances, liquid, solid, gaseous, or
5 radioactive, associated with human habitation, or of human or animal origin, or from any
6 producing, manufacturing, or processing operation, including waste placed within
7 containers of whatever nature prior to, and for purposes of disposal.

8 By Section 13050 (l) of the Water Code, "Pollution" is defined as:

9 "Pollution" means an alteration of the quality of the waters of the state by **waste** (emphasis
10 added) to a degree which unreasonably affects either of the following:

- 11 (A) The waters for beneficial uses.
- 12 (B) Facilities which serve these beneficial uses.

13 By Section 13050(m) of the Water Code, "Nuisance" is defined as:

14 "Nuisance" means anything which meets all of the following requirements:

- 15 (1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction
16 to the free use of property, so as to interfere with the comfortable enjoyment of
17 life or property.
- 18 (2) Affects at the same time an entire community or neighborhood, or any
19 considerable number of persons although the extent of the annoyance or
20 damage inflicted upon individuals may be unequal.
- 21 (3) Occurs during, or as a result of, the treatment or disposal of **wastes** (emphasis
22 added).

23 The Legislature has defined "waste" as sewage and other waste substances associated with
24 human habitation or from any producing, manufacturing or processing operation. Moreover, the
25 definitions of pollution and nuisance also require the discharge of "waste". The CAO is unclear if
26 the alleged "waste" is the discharge of tidal "saline and brackish water" or "sediment and debris
27 from the failed levee". Either way, the CAO is inconsistent with the above cited law.

28

1 Putting aside for the moment the fact that the substance identified as “sediment and debris
2 from a failed levee” does not come from property owned or controlled by SMART, such does not
3 constitute “waste” as defined by the legislature unless it contains waste associated with human
4 habitation or from any producing, manufacturing or processing operation. The CAO neither
5 alleges such nor provides any evidence of “waste” as defined by Water code section 13050(d)
6 found in the sediment or debris.

7 Similarly, the tidal “saline and brackish” water does not meet the legislative definition of
8 “waste”. SMART’s position is bolstered by the San Francisco Bay Regional Board’s September
9 29, 2014 Water Quality Certification. In that letter Executive Officer Wolfe certified that any
10 discharge from the Mira Monte Mitigation “project will comply with the applicable provisions of
11 Sections 301 (effluent limitations), 302 (water quality related effluent limitations), 303 (water
12 quality standards and implementation plans), 306 (National Standard of performance) and 307
13 (Toxic and pretreatment effluent standards of the CWA) and with other applicable requirements of
14 State Law. The restoration of the natural flow of non- polluted and non-contaminated State owned
15 navigable tidal waters does not constitute a discharge of “waste” under California law. The CAO
16 provides no evidence of “waste” as defined by Water Code section 13050(d) found in the tidal
17 water. The San Francisco Bay Regional Board lacks the authority to re-define the statutory
18 definition of “waste”. To the extent that the CAO attempts to do the Order should be set aside.

19 Finally, the CAO’s reference to a violation of the Basin Plan is misplaced. Even if the San
20 Francisco Bay Regional Board has legal standing to remedy an alleged violation of a Basin Plan
21 such cannot be the subject of a CAO under California Water Code section 13304 absent evidence
22 of a discharge of “waste” as such is defined by the legislature.

23
24 **(b) THE SAN FRANCISCO REGIONAL BOARD LACKS ANY STATUTORY AUTHORITY TO RESOLVE**
25 **THE LEGAL DISPUTE OR MAKE LEGAL FINDINGS REGARDING THE RESPONSIBILITY FOR THE**
CDFW BERM BREACH.

26 Generally, Regional Boards have primary responsibility for coordination and control over
27 water quality issues. Regional Boards may adopt policies and procedures that govern the
28 regulation, oversight, investigation and remediation of contaminated water for public use.

1 Regional Boards are also authorized to formulate and adopt water quality control plans (Water
2 Code section 13240 et seq).

3 However Regional Board's administrative authority does not displace judicial authority.
4 Regional Boards have neither statutory authority nor jurisdiction to adjudicate legal issues
5 between third parties such as the legal cause and responsibility for CDFW's levee failure. The
6 CAO's unilateral and factually unsupported finding that SMART's project was the legal cause of
7 the berm failure is beyond the Regional Board's statutory jurisdiction and should be set aside by
8 the State Board.

9
10 **(c) THE CAO VIOLATES SMART'S DUE PROCESS RIGHTS**

11 Due process is a fundamental principle of fairness in all legal matters. All legal procedures
12 set by statute, including notice and opportunity to be heard, must be followed to insure that no
13 prejudicial or unequal treatment will result.

14 Although most Regional Board actions are transparent and taken at public meetings
15 SMART recognizes that an Executive Officer may take same emergency actions, such as issuance
16 of a cleanup and abatement order, subject to review.

17 Hence, when exigent circumstances exist such as the discharge of sewage, oil, poison or
18 other waste resulting in a public health hazard issuance of a CAO is authorized and appropriate.
19 That is not what happened here. Rather, it is alleged in the CAO that sediment, debris, and turbid
20 water, was discharged into freshwater habitat. The CAO provides no evidence of pollution or
21 contamination as such is defined by law. The CAO contains no allegation that a water system was
22 threatened or that the alleged "discharge" created a public health hazard. The CAO contains no
23 acknowledgement that the "freshwater" habitat was already compromised by incursion of
24 saline/brackish water unrelated to SMART's project. Moreover, the CAO fails to acknowledge
25 that SMART voluntarily undertook interim remedial measure to mitigate any impact to the
26 Petaluma Marsh Wildlife Area pending discussions and resolution with CDFW.

27 This CAO was issued without any prior notice, or opportunity to comment, to SMART. In
28 addition, the issuing Executive Officer has failed to respond to telephonic messages and emails

1 left by SMART's General Manager. Had the San Francisco Bay Regional Board consulted with
2 SMART prior to issuing the CAO it would have learned the following facts: (1) the berm is not
3 owned or controlled by SMART, (2) the berm was subject to tidal flow, seepage and overtopping
4 prior to the Mira Monte Mitigation Project, (3) the berm had reportedly failed before, (4) the berm
5 is in poor condition, (5) the Petaluma Marsh Wildlife Area already contained salt marsh
6 vegetation, and (6) SMART has taken voluntary interim protective measures pending negotiations
7 with CDFW to resolve this issue.

8
9 **(d) SMART DOES NOT OWN OR MAINTAIN THE FAILED LEVEE OR THE SEDIMENT OR DEBRIS
ASSOCIATED WITH THE LEVEE.**

10 As evidenced by the CAO's Attachment 4, photo 1 the failed levee is located
11 approximately 100 feet south of SMART's property and is owned by CDFW. In as much as the
12 CAO characterizes "waste consisting of sediment and debris from the failed levee" as being
13 discharged into the freshwater habitat SMART is not the responsible "person" under Water Code
14 Section 13304. The CAO's unsupported conclusion that SMART is legally responsible for the
15 breach is in excess of its jurisdiction and cannot form the basis to issue a CAO to SMART for
16 sediment and debris discharged from a property it does not own, maintain or control.

17
18 **(e) THE CAO'S CONCLUSION THAT "THIS LEVEE FAILURE RESULTED IN DISCHARGE OF
19 SALINE/BRACKISH WATER TO SEASONAL FRESH WATER WETLANDS" IS NOT SUPPORTED BY
THE EVIDENCE.**

20 In the CAO the Water Board's use of the term "palustrine" in reference to the managed
21 wetlands on CDFW's property is based on a commonly used system of wetlands classification
22 known as the Classification of Wetlands and Deepwater Habitats of the United States. The
23 Palustrine System includes all non-tidal wetlands dominated by trees, shrubs, persistent emergent
24 (i.e., nonwoody) plants, mosses or lichens, and all such wetlands that occur in tidal areas where
25 salinity due to ocean-derived salts is below 0.5 parts per thousand (ppt). In other words,
26 "palustrine" is one classification for freshwater wetlands that are not directly associated with river
27 or stream flow. The CAO uses the terms palustrine wetlands and seasonal wetlands (i.e.,
28 freshwater) interchangeably in reference to the managed wetlands on CDFW's property on the

1 inboard side of CDFW's berm.

2 The salinity of ocean water averages 35 ppt. The salinity of brackish water ranges between
3 0.5 and 35 ppt. but is typically observed in the San Francisco Bay estuary at levels approximating
4 10-30 ppt depending on seasonal variability. Salinity data on the Petaluma River in the vicinity of
5 the Petaluma Marsh Wildlife Area has been at an annual average of 14ppt.

6 Attachment 4, Photo 2 to the CAO purports to show the extent of inundation of tidal water
7 adjacent to the berm failure location. That inundation is concentrated within the areas of low
8 elevation in the managed marsh. The dominate vegetation found in the previously inundated
9 wetlands is salt marsh vegetation not freshwater seasonal wetland vegetation. The same is true for
10 the vegetation growing on the "banks" of the borrow ditch on the inboard side of CDFW's berm.
11 The wetlands in question and the banks of the borrow ditch support well established salt-tolerant
12 plant species typical of salt marshes and brackish marches in the region, such as pickleweed alkali
13 heath, brass buttons and fat hen. The salt or brackish marsh plant species observed in these low
14 elevation areas, particularly pickleweed and alkali heath, do not establish in a matter of one month
15 or even several months. The established condition of the observed salt marsh or brackish marsh
16 vegetation indicates that these species have been growing in these low elevation areas of the
17 CDFW managed marsh for several years. Satellite imagery of CDFW's managed marsh shows
18 signs of salt marsh vegetation type in the lower elevation areas and along remnant tidal channels in
19 the managed marsh dating back to at least 2011. Establishment of the salt marsh vegetation in the
20 Petaluma Marsh Wildlife Area is likely due to historic overtopping and seepage of CDFW's berm
21 long before SMART acquired the Mira Monte site. The surrounding areas in the managed marsh,
22 where elevation is higher relative to the inundated areas, support visibly different vegetation types
23 that are most likely dominated by freshwater-dependent species that received seasonal flood water
24 input from precipitation.

25 A portion of CDFW's managed marsh, particularly in the extensive areas of low elevation,
26 that were inundated during the berm failure event, predominantly support well established, salt-
27 tolerant vegetation that did not develop due to, or since, the berm failure. In other words,
28 CDFW's managed Petaluma Marsh Wildlife Area already contained extensive salt marsh or

1 brackish marsh conditions prior to the restoration of tidal hydrology associated with the Mira
2 Monte Mitigation Project. Moreover, because the berm failure waters were contained within the
3 existing salt marsh and brackish marsh area, there is no evidence to support the CAO's conclusion
4 that "beneficial uses of palustrine wetlands" were threatened by SMART's restoration of full tidal
5 exchange project.

6
7 **7. A COPY OF THIS PETITION HAS BEEN SENT TO THE SAN FRANCISCO BAY REGIONAL BOARD**

8 In accordance with CCR Title 23, section 2050(a) (8), the Petitioner mailed a true and
9 correct copy of this petition by First Class mail on June 8, 2015 to the San Francisco Regional
10 Board at the following address:

11 San Francisco Bay Regional Water Quality Control Board
12 Attn. Bruce H. Wolfe, Executive Officer
13 1515 Clay St., Suite 1400
14 Oakland, CA 94612

15 **8. PETITIONER WAS UNABLE TO RAISE THESE ISSUES BEFORE THE REGIONAL BOARD**

16 Petitioner was not notified prior to issuance of the CAO. Petitioner was never provided the
17 opportunity to review a draft Order or the opportunity to submit a comment letter. If Petitioner had
18 been presented those courtesies this matter likely would not have resulted in issuance of a CAO.
19 As previously noted, SMART's General Manager's telephonic and email (Attachment "D")
20 requests to discuss this matter to Executive Officer Mr. Wolfe have been ignored.

21
22 Respectfully Submitted:

DATE: June 10, 2015

23
24 

25
26 Thomas F. Lyons
27 General Counsel
28 Sonoma-Marin Area Rail Transit District

ATTACHMENT "A"

CLEANUP AND ABATEMENT ORDER NO. R2-2015-0016

STATE OF CALIFORNIA
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

CLEANUP AND ABATEMENT ORDER No. R2-2015-0016

SONOMA-MARIN AREA RAIL TRANSIT DISTRICT
MARIN AND SONOMA COUNTY

1. The Sonoma-Marín Area Rail Transit District (Discharger or SMART) owns approximately 62 acres of land at 8934 Redwood Highway, Novato, CA 94945, Marin County Parcel Number 125-160-14 and Sonoma County Parcel Number 019-370-004 (Site). The property is bounded by Redwood Landfill to the north, San Antonio Creek to the east, Petaluma Marsh Wildlife Area to the south, and the SMART rail alignment to the west.
2. The Discharger purchased the property and conducted wetland restoration and enhancement activities to compensate for unavoidable impacts to waters of the State and waters of the U.S. from construction of its rail line. The Site is commonly referred to as the Mira Monte Mitigation Site. The Discharger's restoration and enhancement activities included restoring full tidal exchange to the Marin County parcel.
3. On April 24, 2015, U.S. Army Corps of Engineers (Corps) staff notified the San Francisco Bay Regional Water Quality Control Board (Regional Water Board) that they had received reports that the Discharger's restoration and enhancement activities at the Site resulted in the failure of a levee protecting the Petaluma Marsh Wildlife Area to the south. This levee failure, in turn, resulted in the discharge of saline/brackish water to seasonal freshwater wetlands being managed by the California Department of Fish and Wildlife (CDFW) for wildlife values. The seasonal freshwater wetlands being managed by CDFW are waters of the State and are palustrine wetlands adjacent to San Antonio Creek.
4. The Discharger failed to account for reasonably foreseeable impacts and implement effective protective measures to the levee, which washed out while restoring full tidal exchange to the Site. As a result, waste consisting of sediment and debris from the failed levee and turbid water was discharged to waters of the State. The levee failure is also allowing brackish water to be discharged into freshwater wetland habitat.
5. The Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan) defines the existing and potential beneficial uses for waters within the Region. The Basin Plan designates the following existing and potential beneficial uses for San Antonio Creek: cold freshwater habitat, fish migration, fish spawning, warm freshwater habitat, wildlife habitat, and contact and noncontact water recreation. The Basin Plan designates the following existing beneficial uses for palustrine wetlands: agricultural supply, freshwater replenishment, groundwater recharge, cold freshwater habitat, preservation of rare and endangered species, fish spawning, warm freshwater habitat, wildlife habitat, contact and noncontact water recreation, and navigation.
6. On April 28, 2015, Regional Water Board and CDFW staff inspected the Site. Attachment 4 to this Order provides copies of photographs taken during this inspection.

7. The Discharger has unreasonably affected or threatened to affect water quality and beneficial uses of the palustrine wetlands as described in findings 3 and 4 above.
8. The Basin Plan, Table 4-1, prohibits the discharge of silt, sand, clay, or other earthen materials from any activity in quantities sufficient to cause deleterious bottom deposits, turbidity, or discoloration in surface waters, or to unreasonably affect or threaten to affect beneficial uses. The Discharger's restoration of full tidal exchange at the Site has resulted in the discharge of sediment and/or threatened discharge of sediment into palustrine wetlands, thereby unreasonably affecting or threatening to affect beneficial uses. Accordingly, the discharge is in violation of the Basin Plan.
9. California Water Code (CWC) section 13304 requires any person who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the State and creates, or threatens to create, a condition of pollution or nuisance, shall, upon order of the Regional Water Board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.
10. Based upon the above findings, the Regional Water Board finds that the Discharger has caused or permitted waste, or threatens to cause or permit waste, to be discharged or deposited where it is, or probably will be, discharged into waters of the State and has created, or threatens to continue to create, a condition of pollution. As such, pursuant to CWC sections 13267 and 13304, this Order requires the Discharger to submit technical reports to enable the Regional Water Board to understand the extent, scope, and character of the discharge and its impacts and requires the Discharger to undertake corrective action to clean up the waste it discharged and abate its effects.
11. This Order is an action to enforce the laws and regulations administered by the Regional Water Board. As such, this action is categorically exempt from the California Environmental Quality Act, pursuant to section 15321(a)(2) of Title 14 of the California Code of Regulations.
12. Pursuant to CWC section 13304, the Discharger is hereby notified that the Regional Water Board is entitled to, and may seek reimbursement for, all reasonable costs actually incurred by the Regional Water Board to investigate unauthorized discharges of waste and to oversee cleanup of such waste, abatement of the effect thereof, or other remedial action, required by this Order.

IT IS HEREBY ORDERED, pursuant to CWC sections 13267 and 13304, that the Discharger shall submit the required technical reports and clean up the waste discharged, abate its effects, and take other remedial actions as follows:

Prohibitions

1. Other than the materials used to reconstruct the levee(s), no silt, sand, clay, or other earthen material, green waste, debris, cement, concrete, or washings thereof, petroleum products, or other unauthorized construction-related materials or wastes shall be allowed to enter into or be placed where it may be washed by rainfall or runoff into waters of the State.

2. The discharge of sediment, waste products, hazardous materials, or other materials that will degrade, or threaten to degrade, water quality, or adversely affect, or threaten to adversely affect, existing or potential beneficial uses of the waters of the State is prohibited.
3. The discharge of sediments to waters of the State resulting from failure to implement effective Best Management Practices, including effective erosion and sediment control measures, is prohibited.
4. The take, or incidental take, of any special status species is prohibited. The Discharger shall use the appropriate protocols, as approved by CDFW, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service, to ensure that activities do not impact the beneficial use of the preservation of rare and endangered species.

Provisions

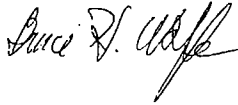
1. No later than 14 calendar days from the date of this Order, the Discharger shall implement control measures to prevent further erosion and failure of CDFW's levees. The Discharger shall collaborate with CDFW staff in designing and implementing these control measures.
2. No later than five (5) business days from implementing the measures required in Provision 1, the Discharger shall submit a report, acceptable to the Regional Water Board's Executive Officer, that documents the measures implemented to prevent further failure of CDFW's levees. The report shall include a description of the coordination activities with CDFW and other agencies, a list and description of the measures implemented to protect levees, and photographs of the levee protection measures and levee breach locations.
3. No later than July 1, 2015, the Discharger shall submit a Corrective Action Workplan, acceptable to the Executive Officer, designed to: (a) reconstruct the failing levee(s), (b) prevent future levee failure, and (c) compensate for any temporal losses of the functions and values provided by the palustrine wetland habitat that were impacted by the Discharger's failure to implement effective measures to protect the levee, which washed out while the Discharger was restoring full tidal exchange to the Site. This Corrective Action Workplan shall include interim and final success criteria and performance standards for assessing whether the corrective actions are achieving the intended goals. In addition, the Corrective Action Workplan shall include an implementation time schedule. Within sixty days of acceptance of the Corrective Action Workplan by the Executive Officer, the Discharger shall initiate implementation of the Corrective Action Plan in accordance with the accepted implementation time schedule.
4. No later than July 1, 2015, the Discharger shall submit a corrective action self-monitoring program, designed to monitor and evaluate the success of the corrective actions proposed for implementation in the Corrective Action Workplan, in accordance with the interim and final success criteria and performance standards. The corrective action self-monitoring program shall monitor the success of the corrective actions until the approved final success criteria and performance standards have been successfully achieved, but for not less than a period of five years following completion of the corrective actions and for not less than a period of two years after any irrigation of revegetation plantings has ceased.
5. No later than January 31 of each year following initiation of the corrective actions and continuing until the final success criteria and performance standards are successfully achieved,

the Discharger shall submit annual self-monitoring reports, acceptable to the Executive Officer, evaluating the progress of implementation and success of the corrective action restoration activities in accordance with the approved implementation time schedule and approved corrective action self-monitoring program proposal.

6. The Discharger shall submit with the final self-monitoring report a Notice of Completion, acceptable to the Executive Officer, demonstrating that the Corrective Action Workplan, as approved, has been successfully completed.
7. If the Discharger is delayed, interrupted, or prevented from meeting the work completion and report submittal deadlines specified in this Order, the Discharger shall promptly notify the Executive Officer in writing with recommended revised corrective action implementation or report submittal deadlines. Any extensions of the time deadlines specified in this Order must be approved in writing by the Executive Officer. The Executive Officer may consider revisions to this Order.
8. Regional Water Board staff shall be permitted reasonable access to the Site as necessary to oversee and verify compliance with this Order.
9. No later than 14 days from the date of this Order, the Discharger is required to acknowledge its responsibility to reimburse the State for cleanup oversight work as described in the Reimbursement Process for Regulatory Oversight fact sheet provided to the Discharger with this Order, by filling out and returning the Acknowledgement of Receipt of Oversight Cost Reimbursement Account Letter or its equivalent, also provided with this Order.
10. The technical reports and other submittals required under provisions 2, 3, 4, 5, and 6 above shall be complete, accurate, and otherwise adequate, as determined by the Executive Officer.
11. The Discharger's reliance on qualified professionals promotes proper planning, implementation, and long-term cost effectiveness of investigation and cleanup and abatement activities. Professionals shall be qualified, licensed where required, and competent and proficient in the fields pertinent to the required activities. Business and Professions Code sections 6735, 7835, and 7835.1 require that engineering and geologic evaluations and judgment be performed by or under the direction of licensed professionals.
12. None of the obligations imposed by this Order on the Discharger are intended to constitute a debt, damage claim, penalty, or other civil action that should be limited or discharged in a bankruptcy proceeding. All obligations are imposed pursuant to the police powers of the State of California intended to protect the public health, safety, welfare, and environment. A cleanup order that accomplishes the dual objectives of removing accumulated wastes and stopping or ameliorating ongoing pollution emanating from such wastes is not a dischargeable claim.

Failure to comply with the provisions of this Order may result in the imposition of civil liabilities, imposed either administratively by the Regional Water Board or judicially by the Superior Court in accordance with CWC sections 13268, 13304, 13308, and/or 13350, and/or referral to the Attorney General of the State of California for injunctive relief or civil or criminal liability. Failure to submit, late or inadequate submittal of technical reports and workplan proposals, or falsifying information therein, is a misdemeanor and may subject the Discharger to additional civil liabilities.

This Order does not preclude or otherwise limit in any way the Regional Water Board's ability to take appropriate enforcement action for the Discharger's violations of applicable laws, including, but not limited to, discharging without a permit and failing to comply with applicable State requirements.



Digitally signed by Bruce H. Wolfe
DN: cn=Bruce H. Wolfe,
o=SWRCB, ou=Region 2,
email=bwolfe@waterboards.ca.
gov, c=US
Date: 2015.05.18 17:57:49 -07'00'

Bruce H. Wolfe
Executive Officer

May 18, 2015
Date

Attachments

ATTACHMENT 1

REIMBURSEMENT PROCESS FOR REGULATORY OVERSIGHT

We have identified your facility or property as requiring regulatory cleanup oversight. Pursuant to the Porter-Cologne Water Quality Control Act, reasonable costs for such oversight can be recovered by the Regional Water Quality Control Board (Regional Water Board) from the responsible party. The purpose of this enclosure is to explain the oversight billing process structure.

Introduction

The Porter-Cologne Water Quality Control Act authorizes the State Water Resources Control Board (State Water Board) to set up Cost Recovery Programs. The Budget Act of 1993 authorized the State Water Board to establish a Cost Recovery Program for the Site Cleanup Program (SCP). The program is set up so that reasonable expenses incurred by the State Water Board and Regional Water Boards in overseeing cleanup of illegal discharges, contaminated properties, and other unregulated releases adversely impacting the State's waters can be reimbursed by the responsible party. Reasonable expenses will be billed to responsible parties and collected by the Fee Coordinator at the State Water Board in the Division of Financial Assistance.

The Billing System

Each cost recovery account has a unique charge number assigned to it. Whenever any oversight work is done, the hours worked are charged to the account number on the employee's time sheet. The cost of the hours worked is calculated by the State Accounting System based on the employee's salary and benefit rate and the State Water Board overhead rate.

State Water Board and Regional Water Board administrative charges for work such as accounting, billing preparation, general program meetings and program specific training cannot be charged directly to an account. This work will be charged to administrative accounting codes. The Accounting Office totals these administrative charges for the billing period and distributes them back to all of the accounts based on the number of hours charged to each account during that billing period. These charges show as State Water Board Program Administrative Charges and Regional Water Board Program Administrative Charges on the Invoice.

The Overhead Charges are based on the number of labor hours charged to the account. The overhead charges consist of rent, utilities, travel, supplies, training, and personnel services. If there is no labor charged to the account during the billing period, there will be no overhead charges for that billing period with the exception of the last month of each fiscal year. This is due to the fact that the labor charges end June 30 for the current fiscal year. However, several kinds of overhead charges, such as supply orders and travel expenses, are paid after the fiscal year ends. The State Water Board Accounting Office keeps track of these charges and distributes them back to all of the accounts based on the number of hours charged to each account for the whole fiscal year that has just ended. Therefore, the quarterly statements for the last month of the fiscal year could show no labor hours charged for the billing period, but some overhead charges could be charged to the account.

ATTACHMENT 1

Invoices are issued quarterly, one quarter in arrears. If a balance is owed, a check is to be remitted to the State Water Board with the invoice remittance stub within 30 days after receipt of the invoice. The Accounting Office sends a report of payments to the Fee Coordinator on a quarterly basis.

Copies of the invoices are sent to the appropriate Regional Water Boards so that they are aware of the oversight work invoiced. Questions regarding the work performed should be directed toward your Regional Water Board project manager.

Daily Logs

A detailed description (daily log) of the actual work being done at each specific site is kept by each employee in the Regional Water Board who works on cleanup oversight at the property. This information is provided on the quarterly invoice using standardized work activity codes to describe the work performed. *Upon request, a more detailed description of the work performed is available from Regional Water Board staff.*

Removal From The Billing System

After the cleanup is complete, the Regional Water Board will submit a closure form to the State Water Board to close the account. If a balance is due, the Fee Coordinator will send a final billing for the balance owed. The responsible party should then submit a check to the State Water Board to close the account.

Acknowledgement

The responsible party of the property is required to acknowledge that he/she understands the reimbursement process and billing procedures for appropriate cleanup oversight costs. You may wish to consult an attorney in this matter.

Regional Water Board Dispute Resolution

Based on the Regional Water Board's review and comment, the following section has been added as a San Francisco Bay Regional Water Board attachment to the SCP Cost Recovery Program's "Guide to the Billing Process" enclosure, "Reimbursement Process for Regulatory Oversight".

Regional Water Board staff proposes to provide each responsible party (upon request) with daily logs of actual oversight work done and supporting accounting information for the responsible party's site. If, upon the receipt of the billing statement, the responsible party disputes the amount due, the responsible party may follow the dispute resolution procedure described below. If the responsible party follows the procedure, the Regional Water Board will not initiate, except as noted, enforcement action for failure to reimburse the State Water Board. During this procedure, the responsible party is encouraged to confer with Regional Water Board staff at any time to discuss the areas in question and attempt to resolve the dispute.

1. The responsible party must notify the Regional Water Board in writing within 30 calendar days of receipt of the billing statement to indicate that it disputes the billing statement and requests a meeting with the Regional Water Board's Assistant Executive Officer. This

ATTACHMENT 1

notification must indicate the specific areas of dispute and provide all appropriate support documentation. Upon completion of the meeting, the Assistant Executive Officer will provide a recommendation to the Regional Water Board's Executive Officer on the dispute and recommend an amount due, based on documentation provided by both the responsible party and the Regional Water Board staff at the meeting. The Executive Officer will submit a written decision and resultant amount due to the responsible party and specify the new due date by which the resultant amount due must be paid to avoid enforcement action. This due date will be not less than ten working days from the date of the Executive Officer's written decision.

2. If, upon receipt of the Executive Officer's written decision, the responsible party still disputes the amount due and so notifies the Executive Officer by the new due date, the Executive Officer will schedule an appeal hearing of the decision before the Regional Water Board at the next appropriate monthly meeting. The Executive Officer may also consider recommending that the Regional Water Board take enforcement action for the responsible party's failure to pay the resultant amount due by the new due date if the Regional Water Board finds the responsible party's appeal without basis. Any amount due and not appealed to the Regional Water Board will be considered a violation of the Regional Water Board's order.

California Code of Regulations - Dispute Resolution

If a dispute regarding oversight charges cannot be resolved with the Regional Water Board, section 13320 of the California Water Code provides an appeal process to Regional Water Board decisions. Regulations implementing Water Code section 13320 are found in Title 23 of the California Code of Regulations, section 2050.

ATTACHMENT 2

STATE WATER RESOURCES CONTROL BOARD
SITE CLEANUP PROGRAM (SCP)
BILLING COST EXPLANATION
Fiscal Year 2014-2015

<u>Employee Salary and Benefits by Classification</u> ¹	<u>ABR</u>	<u>SALARY/ BENEFITS RANGE</u>
7500 - AEO CEA	CEA	\$9,017 - \$20,133
4558 - Admin Officer II	ADMNOffII	\$6,752 - \$8,389
5871 - Assistant Chief Counsel	ACC	\$13,044 - \$15,110
5393 - Associate Governmental Program Analyst (Statewide)	AGPA	\$6,427 - \$8,046
4707 - Business Serv Asst (Spec)	BSA	\$3,645 - \$5,579
3756 - Engineering Geologist (SWRCB)	EG	\$6,731 - \$12,671
0760 - Environmental Program Manager I (Managerial) (SWRCB)	EPMIM	\$10,136 - \$11,510
0756 - Environmental Program Manager I (Supervisory) (SWRCB)	EPMIS	\$9,166 - \$11,397
0769 - Environmental Program Manager II (SWRCB)	EPMII	\$11,695 - \$13,285
0762 - Environmental Scientist (SWRCB)	ES	\$4,495 - \$8,593
3842 - Exec Officer II	EO II	\$14,632 - \$16,315
5601 - Information Officer I (Spec)	IO	\$6,427 - \$8,046
1419 - Key Data Operator	KDO	\$3,145 - \$4,476
1282 - Legal Secretary	LS	\$4,438 - \$5,835
1441 - Office Assistant (General) (Statewide)	OA	\$3,030 - \$4,168
1379 - Office Assistant (Typing) (Statewide)	OA	\$3,130 - \$4,252
1138 - Office Technician (General) (Statewide)	OT	\$3,853 - \$4,828
1139 - Office Technician (Typing) (Statewide)	OT	\$3,924 - \$4,911
3851 - Principal Water Resources Control Engineer (SWRCB)	PWRCE	\$14,377 - \$16,329
5373 - Public Participation Specialist	PPS	\$6,427 - \$8,046
3826 - Sanitary Engineering Associate (Statewide)	SEA	\$7,245 - \$9,068
3782 - Sanitary Engineering Technician (Statewide)	SET	\$4,990 - \$7,171
3751 - Senior Engineering Geologist (Statewide)	SEG	\$10,776 - \$14,850
0764 - Senior Environmental Scientist (SWRCB)	SRES	\$7,961 - \$9,897
3224 - Senior Legal Typist	SLT	\$3,782 - \$5,290
3844 - Senior Water Resources Control Engineer (SWRCB)	SWRCE	\$10,776 - \$14,850
5778 - Staff Counsel (Statewide)	STCOUN	\$6,828 - \$11,892
5795 - Staff Counsel III (Statewide)	STCOUNIII	\$11,221 - \$14,399
5815 - Staff Counsel III (Sup)	STCOUNIII	\$11,227 - \$14,408
5780 - Staff Counsel IV (Statewide)	STCOUNIV	\$12,396 - \$15,916
0765 - Staff Environmental Scientist (SWRCB)	SES	\$7,954 - \$9,893
5157 - Staff Services Analyst (General)	SSA	\$4,115 - \$6,689
4800 - Staff Services Manager I	SSM I	\$7,954 - \$9,218
3748 - Supervising Engineering Geologist (Statewide)	SUEG	\$11,828 - \$14,808
3849 - Supervising Water Resources Control Engineer (SWRCB)	SUWRCE	\$11,828 - \$14,808
3846 - Water Resources Control Engineer (SWRCB)	WRCE	\$6,731 - \$12,607

Note: The State is currently negotiating with the unions, so the upper limits of the above ranges may be subject to change.

¹ The name and classification of employees performing oversight work will be listed on the invoice you receive.

ATTACHMENT 2

Intermittent Employees:

1120 – Seasonal Clerk	SC	8.68/hr. – 9.85/hr.
1931 – Scientific Aid	SAID	11.58/hr. – 13.34/hr.
4871 - Student Assistant - Engineering (Statewide)	SAE	11.55/hr. – 17.28/hr.

Operating Expenses:

(Both State and Regional Water Board offices):

Indirect Costs (Overhead = cost of doing business) 120%

Billing Example

3846 - Water Resources Control Engineer:

Salary and Benefits:	\$	12,607
Overhead (indirect costs):	\$	15,128
Total Cost per month	\$	27,735

Divided by 173 hours per month equals per hour: \$ 160.32

(Due to the various classifications that expend SCP resources, an average of \$ 150.00 per hour is used for projection purposes.)

ATTACHMENT 3

**ACKNOWLEDGMENT OF RECEIPT OF
OVERSIGHT COST REIMBURSEMENT ACCOUNT LETTER**

I, Farhad Mansourian, acting within the authority vested in me as an authorized representative of the property located at 8934 Redwood Highway, Novato, CA 94945, Marin County Parcel Number 125-160-14, acknowledge that I have received and read a copy of the attached *REIMBURSEMENT PROCESS FOR REGULATORY OVERSIGHT* and the transmittal letter, dated May 18, 2015 concerning cost reimbursement for Regional Water Board staff costs involved with oversight of cleanup and abatement efforts at 8934 Redwood Highway in Marin County. The address for this site is 8934 Redwood Highway, Novato, CA 94945.

I understand the reimbursement process and billing procedures as explained in the letter. I also understand that signing this form does not constitute any admission of liability. Billings for payment of oversight costs should be mailed to the following individual and address:

BILLING CONTACT Farhad Mansourian

BILLING ADDRESS 5401 Old Redwood Highway

Petaluma, CA 94954

TELEPHONE NO. _____

RESPONSIBLE PARTY'S SIGNATURE _____
(Signature)

(Title)

DATE: _____

ATTACHMENT 4 - PHOTOGRAPHS



Photo 1: Two breaches at First Levee Failure Location looking east. Power lines to left are located on access road that separates the Mira Monte site owned by SMART from CDFW property, which includes the salt marsh to the left of the levee and the channel and seasonal wetlands to the right of the levee shown in the photo. The condition of the levee separating the two breaches is severely comprised and will likely fail if not addressed before it is exposed to high tides.

ATTACHMENT 4 - PHOTOGRAPHS



Photo 2: Water in channel and seasonal wetlands adjacent to First Levee Failure location although there has been little rain this year.

ATTACHMENT 4 - PHOTOGRAPHS

Breach 2 located here



Photo 3: Breach 1 at First Levee Failure Location looking east. Water is discharging from the salt marsh on the left to the channel and seasonal wetlands to the right as it would during high tides.

ATTACHMENT 4 - PHOTOGRAPHS



Photo 4: Breach 1 at First Levee Failure Location looking west at discolored water discharging from salt marsh into channel located on CDFW property.

ATTACHMENT 4 - PHOTOGRAPHS



Photo 5: Breach 2 at First Levee Failure Location looking south at discharge of discolored water.

ATTACHMENT 4 - PHOTOGRAPHS



Photo 6: Breach 2 at First Levee Failure Location looking west at discolored water discharging from salt marsh to channel on CDFW property.

ATTACHMENT 4 - PHOTOGRAPHS



Photo 7: First Levee Failure Location looking west at backside of failed levee (i.e., the side not exposed to the tides).

ATTACHMENT 4 - PHOTOGRAPHS



Photo 8: Second Levee Failure Location looking west at eroded backside indicating that water overtopping the levee is causing it to fail.

ATTACHMENT 4 - PHOTOGRAPHS



Photo 9: Second Levee Failure Location looking at erosion caused by overtopping of levee.

ATTACHMENT 4 - PHOTOGRAPHS



Photo 10: Second Levee Failure Location looking at eroded backside.

ATTACHMENT "B"

DECLARATION OF LAURA GIRAUD

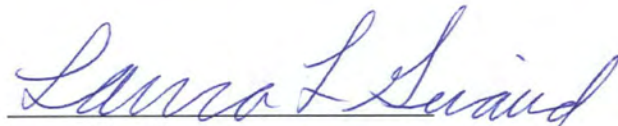
**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

Cleanup and Abatement Order No. R2-2015-0016

I, Laura Giraud declare as follows:

1. I am employed by the Sonoma-Marina Area Rail Train District as the Real Estate Manager.
2. I oversee SMART's Real Estate Division. My duties include negotiating agreements for the purchase of property, reviewing legal descriptions, plats and drawings, providing support for appraisals and various other real estate support activities.
3. As part of my duties I assisted in the negotiation and purchase of the Mira Monte Marina property described in the Cleanup and Abatement Order No. R2-2015-0016 ("CAO").
4. In preparation for this declaration I reviewed the CAO Attachment 4, Photo 1. That photo accurately shows the southern portion of the Mira Monte property access road as the boundary between the respective properties owned by SMART and the Department of Fish and Wildlife ("CDFW"). SMART's southern-most property line is located approximately 100 feet from CDFW's berm and is separated by the CDFW's salt marsh depicted in the photo.
5. I have reviewed SMART's Real Estate Records and can find no easement or other document granting SMART any access rights to CDFW's berm in the vicinity of the breach.
6. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 10th day of June, 2015, at Petaluma California.



Laura Giraud

ATTACHMENT "C"

DECLARATION OF LESLIE ALLEN

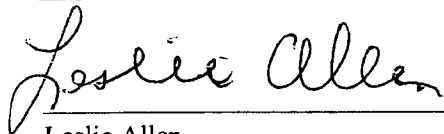
**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

Cleanup and Abatement Order No. R2-2015-0016

I, Leslie Allen, declare as follows:

1. I am employed by ICF International as a Senior Biologist/Environmental Regulatory Specialist. My duties include project management in environmental permitting and mitigation, environmental monitoring, and environmental compliance for construction.
2. My qualifications include a bachelor's degree in biology, and a master's degree in biology with an emphasis on marine and estuarine science. Prior to my employment at ICF International, I was employed by the National Park Service as a wetlands ecologist, and by LSA Associates, Inc., as a wetlands scientist. I have conducted extensive field monitoring and research in tidal marshes and other wetland habitats in the San Francisco Bay Area.
3. SMART has retained ICF International to assist SMART in the environmental permitting and mitigation process, including the Mira Monte Marsh Restoration Project.
4. On May 26, 2015, I visited the area of the California Department of Fish and Wildlife's ("CDFW") berm failure. I observed that extensive areas of lower elevation in the Petaluma Marsh Wildlife Area support well-established, salt-tolerant vegetation that could not have developed in the short time since the CDFW's berm breached.
5. These extensive salt marsh and brackish marsh conditions in the Petaluma Marsh Wildlife Area are evidence that salt and/or brackish water entered that area over, at least, the past several years.
6. It appears that the tidal waters entering the Petaluma Marsh Wildlife Area during the CDFW berm breach event were contained within the pre-existing salt marsh or brackish marsh areas and did not enter surrounding palustrine wetlands. This conclusion is supported by attachment 4, photo 2 of the Cleanup and Abatement Order No. R2-2015-0016 ("CAO") which shows the inundation to be concentrated within the areas of low elevation relative to the higher palustrine areas found in the managed marsh.
7. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 10 day of June, 2015, at San Francisco, California.



Leslie Allen

ATTACHMENT "D"

Farhad Mansourian

From: Farhad Mansourian
Sent: Wednesday, May 27, 2015 2:42 PM
To: 'Bruce.wolfe@waterboards.ca.gov'
Subject: Cleanup & Abatement order R2-2015-0016

Greetings Bruce

I am following up on a voice mail I left you last week. SMART is receipt of a cleanup and abatement order (R2-2015-0016) and we were frankly surprised (blind-sided) by the executive order, particularly since SMART was not afforded any due process/notice or even given the opportunity to provide you with the facts regarding Mira Monte site prior to the issuance of the executive order.

Please give me a call at 415-717-1519 so we can resolve this matter prior to SMART filing a formal response with the State Board.

Best,

Farhad Mansourian
General Manager
Sonoma-Marín Area Rail Transit District
5401 Old Redwood Hwy., 2nd Floor
Petaluma, CA 94954
707-794-3057 (direct)
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