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SAN FRANCISQUITO CREEK JOINT POWERS AUTHORITY

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10 **STATE WATER RESOURCES CONTROL BOARD**
11 **FOR THE STATE OF CALIFORNIA**

12 In the Matter of the Petition of
13 **SAN FRANCISQUITO CREEK**
14 **JOINT POWERS AUTHORITY**

15 For Review and Reconsideration of Action on
16 the Application for Section 401 Water Quality
17 Certification of the San Francisquito Creek
18 Flood Reduction, Ecosystem Restoration, and
Recreation Project, Santa Clara and San Mateo
Counties,

19 Petitioner,

20 vs.

21 **Regional Water Quality Control Board, San**
Francisco Bay Region,

22 Respondent.
23

**PETITION FOR REVIEW AND
RECONSIDERATION**

(California Water Code Section 13320
and California Code of Regulations,
Title 23, Sections 2050 and 3867)

24 **INTRODUCTION AND SUMMARY**

25
26 The San Francisquito Creek Joint Powers Authority (“the JPA” or “Petitioner”)
27 respectfully petitions the California State Water Resources Control Board (the “State Board”) for
28 review and reconsideration of the action of the San Francisco Bay Regional Water Quality Control

1 Board ("Regional Board") to deny without prejudice the federal Clean Water Act Section 401
2 water quality certification sought by application ("the Application") of the JPA. The JPA
3 submitted its Application to the Regional Board on March 12, 2013. The Regional Board
4 determined in writing that the Application was complete on September 4, 2013.

5 The Application pertains to the JPA's Flood Reduction, Ecosystem Restoration, and
6 Recreation Project in Santa Clara and San Mateo Counties ("the Project" or "the flood reduction
7 and restoration project"). The flood reduction and restoration project is intended to comply with
8 all state water quality standards and with the requirements of the U.S. Army Corps of Engineers
9 Guidelines. The JPA proposes to increase flood flow capacity to contain the one percent flood
10 while enhancing public safety, reducing erosion, facilitating sediment transport, and improving
11 water quality. Significant features of the Project include widening the San Francisquito Creek
12 channel to reduce the water surface elevation and flow velocities, creating and restoring 15 acres
13 of tidal marsh around the low flow channel within the Creek, and replacing a 1959 gas pipeline
14 behind East Palo Alto homes with a modern pipeline through the Palo Alto Municipal Golf Course
15 away from the residences. The Project allows for the future restoration and historic connection
16 between the Creek and marsh to sustain the marsh and promote resilience against Sea Level Rise.

17 Despite the completeness of the Application as confirmed by the Regional Board to the
18 JPA on September 4, 2013, staff to the Regional Board thereafter continued to request that the
19 JPA provide it with an ever changing menu of substantial, additional information. The dialogue
20 between the parties included meetings and conference calls on September 18, November 7, and
21 December 12, 2013; and February 3 and February 11, 2014. The conversations led to broad staff
22 requests whose lack of specificity made measurable compliance effectively impossible, such as the
23 request for a "complete set of technical reports and corresponding data." The conversations also
24 involved staff requests that the JPA analyze new and shifting Project alternatives – including those
25 that were impracticable on their face, such as a proposed alternative requiring reconfiguration of
26 the nearby airport runway, a hugely expensive undertaking to a facility under the dominion of the
27 FAA. Notably, these varying staff requests were not raised by, and were materially different from,
28 the Regional Board's specific comments of August 2012 on the JPA's Draft Environmental

1 Impact Report for the Project, and from the many staff requests for additional information at the
2 time the Application was deemed complete. Notwithstanding these difficulties, the JPA believed
3 that certification would be forthcoming. As late as February 26, 2014, the Executive Officer of
4 the Regional Board communicated to the JPA that the Regional Board would set up a meeting for
5 moving forward to get all permits, including the JPA's 401 water quality certification, issued.

6 However, on the following day, February 27, 2014, the Regional Board disrupted the
7 parties' ongoing dialogue. To the surprise of the JPA, the Executive Officer of the Regional
8 Board notified the JPA that the Regional Board was denying the Application "without prejudice."
9 The Executive Officer's letter also advised the JPA to reapply for water quality certification by
10 submitting a new application to the Regional Board. The letter did not advise the JPA that this
11 constituted a final decision subject to rights of appeal within the tight window of thirty days.

12 In separate communications between the Executive Officer, the General Counsel of the
13 Regional Board, and the JPA, the JPA learned that the Regional Board issued its denial as a
14 procedural precaution to avoid waiver and retain jurisdiction over the Application. The Executive
15 Officer and the General Counsel had acted on the belief that the not-to-exceed one-year standard
16 of the federal Clean Water Act within which the Regional Board must act on the Application
17 would expire on March 12, 2014. This belief was incorrect. Under federal and state regulations,
18 the one-year clock did not begin to run until the Application was complete. The one-year time
19 period to make a decision on the Application commenced on September 4, 2013 and will not
20 expire until September 3, 2014. The Regional Board's denial of the Application was improper.

21 In order to preserve its own rights and to ameliorate damage from further, unauthorized
22 delay, the JPA files this Petition for Review and Reconsideration pursuant to California Water
23 Code Section 13320 and California Code of Regulations, Title 23, Section 2050 and 3867. The
24 JPA requests that this Petition be held in abeyance pursuant to California Code of Regulations,
25 Title 23, Section 2050.5(d) and 3869(c). At such time, if any, as the Petition is removed from
26 abeyance, the JPA further requests a hearing before the State Board pursuant to California Code of
27 Regulations, Title 23, Section 2050.6 (b) and 3869(b) and the opportunity to present additional
28 written material, evidence, points and authorities and argument.

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1. CONTACT INFORMATION FOR PETITIONER

San Francisquito Creek Joint Powers Authority
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Menlo Park, CA 94025
Attention: Mr. Len Materman, Executive Director
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2. ACTION FOR WHICH PETITIONER SEEKS REVIEW

Petitioner seeks review of the premature and unauthorized action of the Regional Board to summarily deny the Application for water quality certification filed by the San Francisquito Creek Joint Powers Authority for its Project in Santa Clara and San Mateo Counties. This procedural denial was communicated to the JPA by a letter dated February 27, 2014 from the Executive Officer of the Regional Board. A true and correct copy of the letter of denial is attached to this Petition as Exhibit A and is incorporated into the Petition by this reference.

3. DATE ON WHICH THE REGIONAL BOARD ACTED

The Regional Board acted by and through the denial letter from its Executive Officer to the JPA, attached to this Petition as Exhibit A. The date of that action was February 27, 2014.

4. REASONS THE ACTION WAS INAPPROPRIATE OR IMPROPER

The procedural denial without prejudice issued to the JPA by the Regional Board was

1 predicated on an error of law. The Executive Officer and the General Counsel of the Regional
2 Board acted on the apparent position that the Regional Board was not fully ready to grant the JPA
3 Application and on the mistaken legal understanding that the jurisdiction of the Regional Board
4 over the Application would soon expire on March 12, 2014. The March 12, 2014 deadline was a
5 misapplication of the federal requirement that action on the Application be taken "within a
6 reasonable time (which shall not exceed one year)." 33 CFR Section 325.2(b)(1)(ii), Clean Water
7 Act. Both federal and state law make it clear that the one-year clock for action by the Regional
8 Board did not begin to run until the Application was determined to be complete on September 4,
9 2013. The procedural denial on the completed Application was therefore inappropriate and
10 unauthorized until September 3, 2014, which was still more than 6 months away.

11 The federal rule is clarified in the handbook of the Environmental Protection Agency,
12 entitled "Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection
13 Tool For States and Tribes". In describing the one year after which a certification agency will be
14 deemed to have waived its right to certify a water quality application, the handbook confirms that
15 "The amount of time allowed for action on a certification application is determined by the Federal
16 agency issuing the license or permit, while the certifying agency determines what constitutes a
17 'complete application' that starts the timeframe clock." Handbook, page 11. Moreover, state law
18 provides that, for the Regional Board and all other certification agencies in California, "A request
19 for certification shall be considered valid if and only if a complete application is received by the
20 certifying agency." California Code of Regulations, Title 23, Section 3835(d).

21 A publication issued by the Regional Board explains the correct application of the federal
22 one-year clock. See <http://www.waterboards.ca.gov/sanfranciscobay/certs.shtml>. As stated on
23 the opening page of the Regional Board's Section 401 Water Quality Certification Application
24 Instructions (Revised 12/09): "Please note that incomplete applications and/or lack of a deposit
25 fee will delay the processing of your application. The review period of 60 days as required by 33
26 CFR 325.2 (b)(ii) (*sic*) and notification of other resource agencies will commence when the Water
27 Board **receives a complete application package**. The 60-day review period can be extended up to
28 one year under special circumstances (emphasis in the original)." The other California regional

1 boards have published similarly clear explanations. See, e.g., Colorado River Basin, [http://www.](http://www.waterboards.ca.gov/coloradoriver/water_issues/programs/401_certification/faqs_401.shtml)
2 [waterboards.ca.gov/coloradoriver/water_issues/programs/401_certification/faqs_401.shtml](http://www.waterboards.ca.gov/coloradoriver/water_issues/programs/401_certification/faqs_401.shtml); North
3 Coast, http://www.waterboards.ca.gov/northcoast/water_issues/programs/water_quality
4 [certification.shtml](http://www.waterboards.ca.gov/northcoast/water_issues/programs/water_quality); Lahontan, http://www.waterboards.ca.gov/lahtontan/water_issues/programs/
5 [clean_water_act_401/docs/401instructions2app.pdf](http://www.waterboards.ca.gov/lahtontan/water_issues/programs/clean_water_act_401/docs/401instructions2app.pdf); and Santa Ana, <http://www.swrcb.ca.gov/>
6 [rwqcb8/water_issues/programs/401_certification/docs/401faq.pdf](http://www.swrcb.ca.gov/rwqcb8/water_issues/programs/401_certification/docs/401faq.pdf).

7 Accordingly, the request of the JPA for water quality certification was not valid until
8 September 3, 2013, at which time the Regional Board's one-year deadline to act began to run. For
9 this and the foregoing reasons: (1) the Regional Board abused its discretion and acted in an
10 arbitrary and capricious manner when it summarily denied the Application on February 27, 2014
11 on inapplicable procedural grounds; (2) the Regional Board abused its discretion by failing to
12 schedule and conduct a hearing on the merits of the complete Application pursuant to California
13 Code of Regulations, Title 23, Section 3858(b); and (3) the Regional Board abused its discretion
14 by failing to consider the readily available and substantial evidence presented by the JPA and by
15 failing to grant the water quality certification application of the JPA. The JPA proposes that the
16 Regional Board and the JPA now work expeditiously to achieve issuance of the water quality
17 certification for the JPA's important flood reduction and restoration project.

18
19 **5. THE MANNER IN WHICH THE JPA IS AGGRIEVED**

20 Summary denial of the Application of the JPA was not authorized by the facts or the law.
21 The JPA and the communities that it serves are harmed by this six-months' premature action.
22 Implementation of the Project, which is designed to withstand a 1% or 100-year flood event, will
23 significantly reduce the current and recurring threat to life and property. As recently as December
24 23, 2012, a flow estimated at less than a 20-year event caused flooding in East Palo Alto. Waters
25 overtopped and seeped through the existing levees in the Project area. The Project will protect
26 over 1,000 homes located below sea level, many with rooftops below the top of the levee, as well
27 as a school and regional U.S. Postal Service facility.

28 Because of the continuously degraded condition of the existing, uncertified levees, every

1 winter season that transpires before the Project is complete brings an increased risk of danger to
2 the JPA communities. Moreover, this danger extends beyond those most commonly associated
3 with the ever-present flood risk. The Regional Board's denial of the Application also threatens
4 local water quality. Under current conditions, flood flows pass through homes, garages,
5 businesses and streets before being discharged into the San Francisco Bay. After the Project is
6 built, these waters will flow over a broad new marsh constructed within the San Francisquito
7 Creek channel.

8 Despite the urgency and significance of the JPA's Project, the denial letter from the
9 Regional Board operates to restart the one-year period within which the Regional Board must act
10 on the JPA's water quality certification Application. Instead of anticipating imminent
11 certification, or in any event certification no later than September 3, 2014, unless the precipitous
12 denial letter is rescinded, the JPA must now return to square one in the application process. The
13 JPA would be required to file a new application and wait for that application to be deemed
14 complete. Thereafter, it would need to wait for up to an additional one year to receive its water
15 quality certification and to commence construction of the Project. The increased expense and
16 unrectified flood and water quality threat occasioned by this delay is not an appropriate outcome.
17 It is not justified under the law. It is not fitting for the residents and taxpayers of Santa Clara and
18 San Mateo Counties, who are the most impacted beneficiaries of the flood reduction and
19 restoration project.

20
21 **6. SPECIFIC ACTION THE JPA REQUESTS OF THE STATE BOARD**

22 The JPA respectfully requests that the State Board: (1) accept this Petition for Review and
23 Reconsideration; and (2) remand this matter to the Regional Board with instructions that the
24 Regional Board rescind its February 27, 2014 denial letter and issue the JPA's requested water
25 quality certification, together with such legally appropriate and necessary conditions and findings,
26 within thirty (30) days of the date of the remand. However, the JPA further respectfully requests
27 that the Petition be held in abeyance pursuant to California Code of Regulations, Title 23, Sections
28 2050.5(d) and 3869(c), and reserves its rights to a public hearing and to supplement this Petition.

1 **7. STATEMENT OF SUPPORTING POINTS AND AUTHORITIES**

2 The JPA's preliminary statement of points and authorities is set forth in the introductory
3 paragraphs of this Petition and in sections 4 and 5 above. The JPA's preliminary statement was
4 further set forth on March 12, 2014 in detailed responses by the JPA to the Regional Board's
5 denial letter of February 27, 2014. The JPA's comments are in bold and are interlineated into the
6 body of the Regional Board's February 27, 2014 letter. A true and correct copy of the JPA's
7 March 12, 2014 response is attached to this Petition as Exhibit B and is incorporated by this
8 reference.

9 In its March 12, 2014 response, the JPA expressed its willingness to continue working
10 diligently with the Regional Board toward water quality certification, including by providing any
11 additional information necessary and consistent with the 404(b) guidelines and requirements of the
12 Clean Water Act. However, the JPA also expressed frustration that, among other things, the
13 Regional Board's February 27, 2014 denial letter raised several new concerns regarding the
14 fundamental design of the Project that were not previously identified as issues in the many prior
15 communications of the parties. Most notable among these concerns were: 1) a newly proposed
16 Project alternative (referred to as "Example b") to construct a bypass channel that would divert
17 some of the flow in the San Francisquito Creek channel through both existing and potential ball
18 fields, continue along the southern boundary of the municipal golf course, then discharge into the
19 tidal marsh located at the southern end of the airport runway; 2) new questions regarding the
20 differential elevations of the two levees to be constructed along the golf course in the City of Palo
21 Alto and near homes in the City of East Palo Alto; 3) a new inquiry into the potential water quality
22 impacts to the Faber Tract marsh, including the increased volume and velocity of creek discharges
23 into the marsh; and 4) the new need for up-watershed detention/peak reduction alternatives,
24 including the implementation of Low Impact Developments measures consistent with Municipal
25 Regional Permit requirements that are beyond the control and timing of the JPA.

26 Despite its frustration with the ever-changing requests of the Regional Board, the JPA
27 specifically addressed each of the new, as well as all other, Regional Board concerns in the JPA's
28 March 12, 2014 response. It is important to note that in regard to the Faber Tract, the JPA stated

1 **9. STATEMENT THAT THE PETITION WAS SENT TO THE REGIONAL BOARD**

2 A true and correct copy of this Petition for Review and Reconsideration was sent to the
3 Regional Board via electronic mail and facsimile on April 1, 2014, to the attention of Bruce H.
4 Wolfe, Executive Officer. A true and correct copy of the correspondence reflecting the
5 transmission is included and incorporated as Exhibit C to this Petition.

6
7 **10. STATEMENT THAT THE JPA RAISED**
8 **ITS SUBSTANTIVE ISSUES BEFORE THE REGIONAL BOARD**

9 This Petition challenges, in part, the procedural action of the Regional Board to deny the
10 JPA's water quality certification Application. These procedural irregularities were not raised in
11 advance of the Regional Board's action because they arose as the result of that action. This
12 Petition also challenges the inappropriate shifting or moving target presented by the changing
13 substantive responses of the Regional Board staff to the Application. The JPA has consistently
14 raised these substantive issues with the Regional Board, most recently in a meeting with the
15 Executive Officer on March 19, 2014. The JPA hopes and believes that the meeting of March 19
16 concluded with a consensus between the parties that limited the outstanding design issues and
17 defined the two specific alternatives to the Project that remain the subjects of additional analysis.
18 If this perceived progress holds, the Regional Board and the JPA may succeed in advancing this
19 matter without the intervention of the State Board. Nonetheless, this Petition is now filed to
20 preserve the JPA's rights, to ensure timely consideration of the merits of the Application, and to
21 obtain subsequent issuance of the requested water quality certification.

22 **11. COPY OF REQUEST FOR RECORD TO THE REGIONAL BOARD**

23 A request for preparation of the Regional Board's staff record was sent via electronic mail
24 and facsimile on April 1, 2014, to the attention of Bruce H. Wolfe, Executive Officer. A true and
25 correct copy of the correspondence reflecting the transmission is included and incorporated as
26 Exhibit C to this Petition. Because the JPA asks that the Petition be held in abeyance pursuant to
27 California Code of Regulations, Title 23, Sections 2050.5(d) and 3869(c), the JPA also asks that
28

1 its request for preparation of the record be held in abeyance at this time.

2
3 **12. SUMMARY OF JPA'S PARTICIPATION IN REGIONAL BOARD PROCESS**

4 The JPA availed itself of every opportunity to engage and participate with the staff of the
5 Regional Board. These efforts are more particularly described in the introductory passages of this
6 Petition. But this Petition has been filed because, despite the JPA's full and timely commitment to
7 this certification process, the Regional Board issued a summary denial letter in response to the
8 Application. The requested water quality certification has not been granted. The Regional Board
9 has not held a public hearing. While this Petition is held in abeyance, the JPA will work with the
10 Regional Board to promptly achieve the water quality certification requested in its Application.

11 Respectfully submitted via electronic mail by prior arrangement.

12
13 DATED: April 1, 2014

MUSICK, PEELER & GARRETT LLP

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16 By: 

William W. Carter

Attorneys for SAN FRANCISQUITO CREEK
JOINT POWERS AUTHORITY

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EXHIBIT A



San Francisco Bay Regional Water Quality Control Board

February 27, 2014
CIWQS Place No. 757384 (MB)

Sent via email: No hardcopy to follow

Board of Directors
San Francisquito Creek Joint Powers Authority
1231 Hoover Street
Menlo Park, CA 94025

SUBJECT: Response to the Application for Water Quality Certification for the San Francisquito Creek Flood Reduction, Ecosystem Restoration, and Recreation Project, Santa Clara and San Mateo Counties

Dear Board of Directors:

The San Francisquito Creek Joint Powers Authority (JPA) has applied for a federal Clean Water Act (CWA) section 401 water quality certification for the proposed San Francisquito Creek Flood Reduction, Ecosystem Restoration, and Recreation Project (Project). The JPA is proposing to increase flood flow capacity to contain the one percent flood by (1) excavating sediment within the channel; (2) installing flood walls; (3) rebuilding and, in some cases, setting back existing levees; (4) constructing a boardwalk at the existing Friendship Bridge; and (5) planting marshplain vegetation along the excavated sections of the creek.

This letter serves as notification that, at this time, the Regional Water Board has insufficient information on which to issue water quality certification, and, accordingly, cannot certify that the Project, as proposed, will not violate State water quality standards. Therefore, to preserve the Regional Water Board's ability to act on a certification for the Project, water quality certification for the Project is hereby denied without prejudice.

We recognize the significance of the Project to the community and the JPA's urgency in securing all permits for the Project and proceeding to construction. This letter is intended to provide guidance to the JPA on how best to move forward to secure permits from the Regional Water Board and other regulatory agencies. Further, the Regional Water Board is committed to working with the JPA on coordinating and streamlining the permitting process.

The Regional Water Board first received an application for certification for the Project on March 12, 2013. Our determination to deny water quality certification without prejudice is based on the CWA one-year statutory deadline approaching on March 12, 2014, and our inability to certify the Project by that date based on the information the Regional Water Board has received to date. When the JPA pursues water quality certification in the future, the Regional Water Board will need at least the following additional data to be able to

DR. TERRY F. YOUNG, CHAIR | BRUCE H. WOLFE, EXECUTIVE OFFICER

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consider certifying the Project: (1) a complete set of technical reports and corresponding data (e.g., hydrology and modeling reports); (2) an alternatives analysis consistent with U.S. EPA's Section 404(b)(1) Guidelines that demonstrates that the Project is the Least Environmentally Damaging Practicable Alternative (LEDPA) to the designated beneficial uses; and (3) an adequate description of water quality measures that will be implemented to address potentially polluted urban stormwater runoff entering the creek and the Faber Tract Marsh at higher flows. These materials are explained in further detail below.

Application History to Date

Due to the lack of design details contained in the initial application materials received by the Regional Water Board on March 12, 2013, we were not able to determine whether the Project as proposed would violate State water quality standards and sent a letter to the JPA on March 29, 2013, identifying the information the Regional Water Board would need to process the application. Regional Water Board staff also reviewed supplemental application materials submitted on August 1, 2013, and January 28, 2014, which responded to some of the deficiencies staff had noted. Regional Water Board staff discussed the remaining application deficiencies with the JPA and/or its staff during meetings/conference calls on August 29, September 18, November 7, and December 12, 2013; and February 3 and February 11, 2014.

Future Application Guidance

Hydraulic Design

The JPA must demonstrate that the Project design, as proposed, constitutes the LEDPA, consistent with U.S. EPA's Section 404(b)(1) Guidelines. There appear to be alternative designs not presented in the January 28, 2014, or prior application materials that could effectively reduce the threat of flooding with less adverse impact on the environment and endangered wildlife species. The future application should include a full evaluation of the feasibility of additional alternatives, some of which may have already been considered and possibly modeled by the JPA's consultants and staff. Examples of the types of alternatives that should be presented include: a) the feasibility of widening the hydraulic constriction at the north end of the airport and golf course to improve the hydraulic conveyance of flood flows to the Bay while reducing flood flow impacts on the Faber Marsh (refer to PWA's Alternative No. 3); and b) constructing a bypass channel that would divert some of the flow from the San Francisquito Creek channel to the ball fields near the upstream end of the proposed flood wall, continue on down along the southern boundary of the golf course, and discharge to the tidal marsh at the southern end of the airport runway.

Different modeling assumptions and techniques have been used by the two consulting firms hired by the JPA for the Project, Philip Williams and Associates (PWA) and HDR, Inc. (HDR). The modeling work provided by these two consulting firms has produced different results and conclusions. Future application materials should provide sufficient information regarding the various models that have been conducted to determine whether or not the proposed Project design avoids impacts to the extent practicable and constitutes the LEDPA.

HDR's modeling indicates that the discharge into the Faber Tract marsh will be maintained at an 8-year recurrence interval. Even though the design proposal submitted January 28, 2014, did not include a change in the elevation of the Faber Tract or northern levee, the upcoming addition of a fourth bore for San Francisquito Creek under Highway 101 will result in a substantial increase in flood flows in the creek channel downstream of Highway 101. Under the January 28, 2014, design proposal, flows that would overtop the Faber Tract levee and flow into the marsh would significantly increase. The January 28, 2014, design proposal would increase the discharge into the Faber Tract marsh for the 30 and 100 year discharges by 5 to 7 times, respectively.

HDR's modeling supporting the January 28, 2014, design proposal uses an extreme high tide event as a boundary condition and concludes that high fluvial flood flows into the Faber Tract marsh will have a negligible impact on the marsh's habitat because the marsh will be submerged under several feet of tidal water. While impacts to marsh habitat may be negligible during extreme high tide events, the future application must provide an evaluation of potential adverse impacts resulting from any increased discharges into the Faber Tract marsh during tidal events more commonly experienced.

In July 2009, JPA staff reported to the JPA's Board of Directors that the PWA model indicated that widening the levees in the downstream area and creating a wide marsh plain provided the flood benefit necessary to meet FEMA standards. In contrast, the 2014 HDR modeling indicates no benefits from widening the levees. The HDR model indicates that, under the current Project design, the flood water surface elevation of the creek rises through the golf course instead of falling in elevation. The future application must provide and explain all of the hydrologic and hydraulic modeling performed for the various alternatives evaluated for the Project. Additionally, the future application must provide a specific plan describing how habitat improvements will be realized by any increase in discharge into the Faber Tract marsh.

We are also concerned that the January 28, 2014, design proposal may not provide suitable protection to the residents of East Palo Alto. It appears that the levees on the East Palo Alto side and on the golf course side of the creek channel are designed to be approximately the same elevation, with the golf course levee potentially being a little higher than that on the East Palo Alto side. As such, the proposed Project seems to allow avoidable risks to the community of East Palo Alto. One of the possible alternatives that should be evaluated in the future application is to consider making the levee on the golf course side lower than on the East Palo Alto side.

Faber Tract Marsh

One of the beneficial uses of the waters of the State and the United States in and around the Project area is for endangered species habitat. The U.S. Fish and Wildlife Service (Service) has recently indicated to us that the tidal marsh of the Faber Tract has consistently supported the largest population of the endangered California clapper rail rangewide as well as a population of the endangered salt marsh harvest mouse. One of the primary threats to the California clapper rail and salt marsh harvest mouse is predation by mammal and avian predators, especially during flooding events when suitable marsh

and upland refugia cover is submerged and unavailable. Therefore, due to the current status of the California clapper rail (only about 1,500 individuals are present rangewide) and the salt marsh harvest mouse, the Service is concerned about any changes to the hydrology within the Faber Tract that would increase the frequency of inundation of the Faber Tract marsh and upland refugia vegetation or increase the quantity or velocity of flows into the Faber Tract marsh relative to the existing (pre-Caltrans Highway 101 culvert installation) conditions. Thus, the future application should present Project design alternatives that would minimize any increases in the frequency of inundation of marsh and upland refugia vegetation within the Faber Tract and avoid any increases in the quantity or velocity of flows into the Faber Tract marsh relative to the existing (pre-Caltrans Highway 101 culvert installation) conditions.

Water Quality

Any future application should address water quality impacts related to urban stormwater runoff into the creek and the adjacent Faber Tract marsh habitats. The January 28, 2014, design proposal would allow a significant increase in the discharge of fluvial discharges into the Faber Tract marsh. The increase in flow would also increase the loads of urban runoff pollutants, such as trash, pathogens, heavy metals, pesticides, petroleum hydrocarbons, fertilizers, and other pollutants of concern, into sensitive endangered species marsh habitat. The future application must include a proposal to implement effective measures designed to improve water quality both upstream and within the Project reach by reusing, detaining, infiltrating, and treating urban runoff.

In general, all successful flood control projects in the Bay Area over the past 15 to 20 years have included a mix of up-watershed detention/peak reduction, bypasses around major constrictions, expansion of the low-watershed floodplain, and channel modification where appropriate. The January 28, 2014, design proposal seems to rely predominately on channel modification with some expansion of the low-watershed floodplain. Since it does not appear possible to expand the Project's low-watershed floodplain into the Faber Tract, the future application should present significant up-watershed detention/peak reduction alternatives. LID and associated up-watershed detention/peak reduction appears necessary to be able to minimize both flow and its associated pollutants into the Faber Tract marsh while maintaining the same level of flood protection. Other alternatives may include the use of pump stations to reduce runoff and pollutant loads, such as diverting first flush flows to publicly owned treatment works (POTW).

The JPA has a unique opportunity to coordinate with the cities of Palo Alto, Menlo Park, and East Palo Alto; San Mateo County; and the Santa Clara Valley Water District to develop a plan to implement regional LID measures consistent with Municipal Regional Permit (MRP) requirements to address polluted urban stormwater runoff within the watershed upstream of Highway 101 and within the Project reach. The future application should indicate how such a plan would also identify the LID projects that have been implemented already, are in the process of being implemented, and will be implemented in the future to achieve flood control, water quality improvement, and habitat and species protection.

The Project as proposed in the January 28, 2014, design proposal reflected a single purpose design of conveying flood flows quickly to the Bay. The future application should

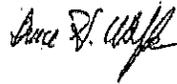
February 27, 2014

present alternatives for the Project that have multi-objective incorporating features that (1) convey flows in a manner that is protective of both the community and the environment, such as through the use of multiple conveyance features to split flows and reduce velocities; (2) protect water quality; (3) protect endangered species; and (4) protect habitat along San Francisco Creek and in the Faber Tract marsh.

The JPA should reapply for water quality certification by submitting a new application for CWA section 401 water quality certification to the Regional Water Board. In that application, please indicate what application materials previously submitted are part of the new application.

If you have any questions, please contact me at 510-622-2314 or (bwolfe@waterboards.ca.gov) or Maggie Beth at 510-622-2338 or (mabeth@waterboards.ca.gov).

Sincerely,



Bruce H. Wolfe
Executive Officer

Digitally signed by Bruce H. Wolfe
DN: cn=Bruce H. Wolfe,
o=SWRCB, ou=Region 2,
email=bwolfe@waterboards.ca.gov,
c=US
Date: 2014.02.27 12:33:39 -08'00'

Sent via email to the following:

Patrick Burt, SFCJPA Board Chair, Council Member - City of Palo Alto
Email: Patrick.Burt@cityofpaloalto.org

Kirsten Keith, SFCJPA Board Vice-Chair, Council Member - City of Menlo Park
Email: kkeith@menlopark.org

Ruben Abrica, SFCJPA Board of Directors, Mayor - City of East Palo Alto
Email: rabrica@cityofepa.org

Dave Pine, SFCJPA Board of Directors, Board of Supervisors – San Mateo County
Email: dpine@smcgov.org

Brian Schmidt, SFCJPA Board of Directors, Santa Clara Valley Water District
Email: BSchmidt@valleywater.org

Len Materman, SFCJPA Executive Director
Email: LMaterman@sfcjpa.org

Cc:

Kevin Murray, SFCJPA, kmurray@sfcjpa.org
Navroop Jassal, SCVWD, njassal@valleywater.org
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Anniken Lydon, BCDC, annikenl@bcdo.ca.gov
Tami Schane, CDFW, TSchane@wildlife.ca.gov
Matthew Jones, ICF, Matthew.Jones@icfi.com

EXHIBIT B

From: "Wolfe, Bruce@Waterboards" <Bruce.Wolfe@waterboards.ca.gov>
Subject: RE: Response to project application
Date: March 14, 2014 4:58:32 PM PDT
To: "Keene, James" <James.Keene@CityofPaloAlto.org>, Len Materman <len@sfcjpa.org>
Cc: Magda Gonzalez <mgonzalez@cityofepa.org>, Norma Camacho
<ncamacho@valleywater.org>

Len,

Thanks for this – I'll run it by staff.

For our Wednesday meeting, I suggest that we go over the Water Board's permitting process, discuss what we'd expect to see in the JPA's application, and determine who needs to do/resolve what to complete the application.

Shin-Roei Lee will attend with me.

Thanks!

Bruce H. Wolfe, Executive Officer
SF Bay Regional Water Board
1515 Clay St., Suite 1400
Oakland, CA 94612-1482

510-622-2314 / 510-622-2460 - fax

From: Len Materman [mailto:len@sfcjpa.org]
Sent: Wednesday, March 12, 2014 3:58 PM
To: Wolfe, Bruce@Waterboards
Cc: Keene, James; Magda Gonzalez; Norma Camacho
Subject: Re: Response to project application

Hi Bruce:

Over the past two weeks, we spent a considerable amount of time looking at the contents of your February 27 letter. Attached is that letter, with our comments in bold italics relating to the many points you raised.

This is not intended to be a formal response, but a clarification of our thinking on these issues and hopefully it will make our discussion on Wednesday, March 19, in East Palo Alto very productive. I look forward to meeting you then.

Thanks,

Len



San Francisco Bay Regional Water Quality Control Board

**IN BOLD AND ITALICS BELOW ARE SFCJPA COMMENTS
ON THE REGIONAL WATER BOARD LETTER**

February 27, 2014
CIWQS Place No. 757384 (MB)

Sent via email: No hardcopy to follow

Board of Directors
San Francisquito Creek Joint Powers Authority 1231
Hoover Street
Menlo Park, CA 94025

SUBJECT: Response to the Application for Water Quality Certification for the San Francisquito Creek Flood Reduction, Ecosystem Restoration, and Recreation Project, Santa Clara and San Mateo Counties

Dear Board of Directors:

The San Francisquito Creek Joint Powers Authority (JPA) has applied for a federal Clean Water Act (CWA) section 401 water quality certification for the proposed San Francisquito Creek Flood Reduction, Ecosystem Restoration, and Recreation Project (Project). The JPA is proposing to increase flood flow capacity to contain the one percent flood by (1) excavating sediment within the channel; (2) installing flood walls; (3) rebuilding and, in some cases, setting back existing levees; (4) constructing a boardwalk at the existing Friendship Bridge; and (5) planting marshplain vegetation along the excavated sections of the creek.

SFCJPA comment: There are several important features of the SFCJPA project not mentioned that will enhance public safety, reduce erosion, facilitate sediment transport, and improve water quality. These include:

- 1. Widening the channel to reduce water surface elevation and flow velocities;***
- 2. Creation/restoration of 15 acres of tidal marsh around a low flow channel within the creek; and***
- 3. The replacement of a 1959 PG&E gas pipeline behind East Palo Alto homes with a modern pipeline through the Palo Alto Golf Course and away from residences.***

The project will also allow for the future restoration of the historic connection between the Creek and marsh that would sustain the marsh and promote resilience against Sea Level Rise.

This letter serves as notification that, at this time, the Regional Water Board has insufficient information on which to issue water quality certification, and, accordingly, cannot certify that the Project, as proposed, will not violate State water quality standards. Therefore, to preserve the Regional Water Board's ability to act on a certification for the Project, water quality certification for the Project is hereby denied without prejudice.

We recognize the significance of the Project to the community and the JPA's urgency in securing all permits for the Project and proceeding to construction. This letter is intended to provide guidance to the JPA on how best to move forward to secure permits from the Regional Water Board and other regulatory agencies. Further, the Regional Water Board is committed to working with the JPA on coordinating and streamlining the permitting process.

DR. TERRY F. YOUNG, CHAIR | BRUCE H. WOLFE, EXECUTIVE OFFICER
1515 Clay St., Suite 1400, Oakland, CA 94612 | www.waterboards.ca.gov/sanfranciscobay

SFCJPA comment: The U.S. Army Corps of Engineers, U.S. Fish & Wildlife Service, and Bay Conservation and Development Commission did not have concerns with the project design following our modification in January 2014. The SFCJPA understands that these agencies put their work on our permits on hold due to concerns expressed by the Regional Water Board. We welcome a commitment by the Regional Water Board to streamline the process by moving forward with its Section 401 water quality certification that would allow the other regulatory agencies to complete their permits.

The Regional Water Board first received an application for certification for the Project on March 12, 2013. Our determination to deny water quality certification without prejudice is based on the CWA one-year statutory deadline approaching on March 12, 2014, and our inability to certify the Project by that date based on the information the Regional Water Board has received to date. When the JPA pursues water quality certification in the future, the Regional Water Board will need at least the following additional data to be able to consider certifying the Project: (1) a complete set of technical reports and corresponding data (e.g., hydrology and modeling reports); (2) an alternatives analysis consistent with U.S. EPA's Section 404(b)(1) Guidelines that demonstrates that the Project is the Least Environmentally Damaging Practicable Alternative (LEDPA) to the designated beneficial uses; and (3) an adequate description of water quality measures that will be implemented to address potentially polluted urban stormwater runoff entering the creek and the Faber Tract Marsh at higher flows. These materials are explained in further detail below.

SFCJPA comment: Over the past year, the SFCJPA and its consultants have provided the Regional Water Board with hundreds of pages of technical information – and several in-person briefings – on the proposed project's ability to solve the flood problem in the least environmentally damaging practicable way. The Regional Water Board has committed to streamline the process; we suggest that future Regional Water Board requests are specific, rather than overly broad such as "complete set of technical reports and corresponding data." The SFCJPA will work with the Regional Water Board to submit requested new information and resubmit information that is consistent with Section 404(b) of the Clean Water Act.

Application History to Date

Due to the lack of design details contained in the initial application materials received by the Regional Water Board on March 12, 2013, we were not able to determine whether the Project as proposed would violate State water quality standards and sent a letter to the JPA on March 29, 2013, identifying the information the Regional Water Board would need to process the application. Regional Water Board staff also reviewed supplemental application materials submitted on August 1, 2013, and January 28, 2014, which responded to some of the deficiencies staff had noted. Regional Water Board staff discussed the remaining application deficiencies with the JPA and/or its staff during meetings/conference calls on August 29, September 18, November 7, and December 12, 2013; and February 3 and February 11, 2014.

SFCJPA comment: Missing from the above paragraph are two important facts related to the Regional Water Board's timeline and statement regarding application deficiencies:

- 1) In August 2012, the Regional Water Board provided specific comments on the SFCJPA's Draft Environmental Impact Report, an expansive document with a detailed analysis of the project. In those comments, the Regional Water Board did not indicate concerns with the project's fundamental design that are being expressed currently.***
- 2) On September 4, 2013, the Regional Water Board notified the SFCJPA in writing that the project application was complete. At that time, the Regional Water Board requested additional information on the alternatives analysis, which was provided by the SFCJPA. Again, the Regional Water Board did not express concerns about two key issues now being raised: impacts to water quality or impacts to the Faber Tract.***

The permit process is most efficient when expectations are clear and consistent throughout.

Future Application Guidance

Hydraulic Design

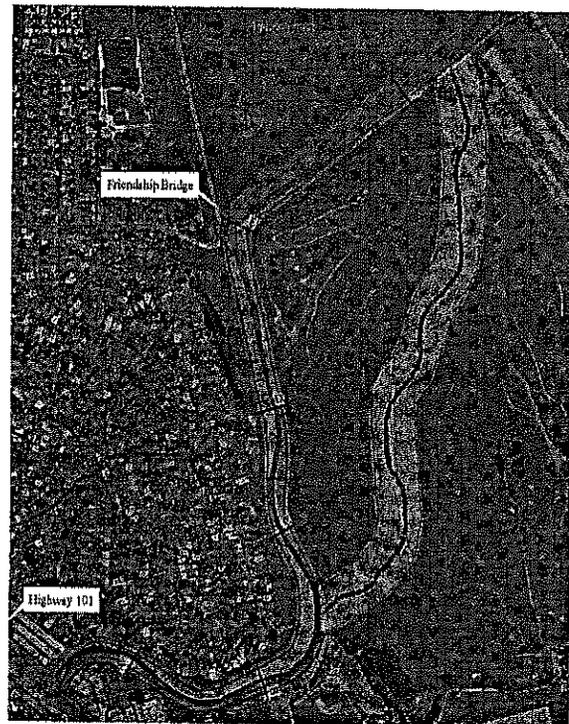
The JPA must demonstrate that the Project design, as proposed, constitutes the LEDPA, consistent with U.S.EPA's Section 404(b)(1) Guidelines. There appear to be alternative designs not presented in the January 28, 2014, or prior application materials that could effectively reduce the threat of flooding with less adverse impact on the environment and endangered wildlife species.

SFCJPA comment: The SFCJPA has provided information to the Regional Water Board on the water quality improvements that would result from the project. The Regional Water Board has not specified the project's "adverse impact(s) on the environment and endangered wildlife species". The project will improve water quality because stormwater going to the Bay will be filtered by a new 15 acre marshplain terrace within the widened creek channel. This is preferable to existing conditions where water overtops the channel just downstream of Highway 101, and flows over streets and through homes before being discharged to the Bay.

The future application should include a full evaluation of the feasibility of additional alternatives, some of which may have already been considered and possibly modeled by the JPA's consultants and staff. Examples of the types of alternatives that should be presented include: a) the feasibility of widening the hydraulic constriction at the north end of the airport and golf course to improve the hydraulic conveyance of flood flows to the Bay while reducing flood flow impacts on the Faber Marsh (refer to PWA's Alternative No. 3); and b) constructing a bypass channel that would divert some of the flow from the San Francisquito Creek channel to the ball fields near the upstream end of the proposed flood wall, continue on down along the southern boundary of the golf course, and discharge to the tidal marsh at the southern end of the airport runway.

SFCJPA comment: The SFCJPA will provide its evaluation of alternatives in a different format. Example "a" above describes two different but related alternatives. PWA Alternative 3 (see image at right from the PWA report) was found to be infeasible for the following reasons:

- ***it would require building four levees instead of two as both the existing and new channels would need to convey floodwater within certified structures;***
- ***elevations of the creek and golf course relative to sea level, would require large levees along the bypass channel to create enough water elevation to push water out against the tide within the bypass channel;***
- ***these levees would require closing the course, an unnecessary step the community was unwilling to consider, especially since the proposed project is superior in terms of hydraulics and ecosystem restoration; and***
- ***it would require importing and grading four times as much levee fill and cost over five times more than the proposed project.***



Example "a" above also suggests that the SFCJPA should further study widening the channel mouth at the north end of the Palo Alto Airport runway. This would require shortening the runway, limiting its use and effectively closing the airport. A previous letter provided to the Regional Water Board from the consultant to the Palo Alto Airport indicated that attempting to close the airport for the purpose of the project would likely result in legal action and blockage from the Federal Aviation Administration. This is due to the airport's role as a regional air traffic and emergency facility and the substantial federal investment in the facility. Suggestions by Regional Water Board staff to move the airport runway to the south or elevate it is not practical and would lead to enormous impacts to San Francisco Bay as a result of fill and construction in marsh lands or open water. By contrast, the project proposed by the SFCJPA has far fewer construction and permanent impacts on the environment.

All of the considerations that led the SCJPA to reject the Golf Course bypass alternative (except the closure of the golf course) also apply to example "b" suggested by the Regional Water Board. A bypass channel that follows an alignment south of the Golf Course would require building an engineered channel along a public road. A bypass would fill with Bay water unless an artificial flood basin with a tide gate was constructed at the Bay to manage tides and keep water levels artificially low. Example "b" is a much more costly and more structural alternative, and would have none of the environmental benefits of the SFCJPA's proposed project.

Different modeling assumptions and techniques have been used by the two consulting firms hired by the JPA for the Project, Philip Williams and Associates (PWA) and HDR, Inc. (HDR). The modeling work provided by these two consulting firms has produced different results and conclusions. Future application materials should provide sufficient information regarding the various models that have been conducted to determine whether or not the proposed Project design avoids impacts to the extent practicable and constitutes the LEDPA.

SFCJPA comment: The two models were created for different purposes and used different design criteria and event volumes. The PWA model was used to test the technical feasibility of a project concept, while the HDR model was used to test the hydraulic performance of a specific design. It would be expected that the two models would yield differing results. The Regional Water Board should more clearly explain how two models used for different reasons impact whether the proposed project is the LEDPA.

HDR's modeling indicates that the discharge into the Faber Tract marsh will be maintained at an 8-year recurrence interval. Even though the design proposal submitted January 28, 2014, did not include a change in the elevation of the Faber Tract or northern levee, the upcoming addition of a fourth bore for San Francisquito Creek under Highway 101 will result in a substantial increase in flood flows in the creek channel downstream of Highway 101. Under the January 28, 2014, design proposal, flows that would overtop the Faber Tract levee and flow into the marsh would significantly increase. The January 28, 2014, design proposal would increase the discharge into the Faber Tract marsh for the 30 and 100 year discharges by 5 to 7 times, respectively.

SFCJPA comment: Post-project, creek water will flow over a broad, new marshplain, which is far preferable to existing conditions, where excessive flows overtop the banks, flood developed areas, pick up contaminants, and then discharge into San Francisco Bay.

The Regional Water Board is correct that the January 28, 2014 SFCJPA submission described an increase in the volume of flows into the Faber Tract expected from a 30-year flow about three times per century. Since the January 28 submission, SFCJPA discussions with U.S. Fish & Wildlife Service staff have led to an additional design modification that would make uniform the differential settlement of the existing levee between the creek and Faber Tract.

The SFCJPA's design firm, HDR, has examined the hydraulic impacts of this potential modification under the maximum flow (7,400 cfs – seen once in the 84 years since the USGS began recording creek flows) that could reach the Faber Tract after the proposed project and

improvements upstream from Caltrans' work at Highway 101 to the Pope-Chaucer Bridge are constructed. HDR's analysis determined that there would be a decrease in the frequency, volume and velocity of flow into Faber Tract, which the SFCJPA can present to the Regional Water Board and other permitting agencies in March.

Following the completion of the proposed project, and of the foreseeable Caltrans and SFCJPA projects upstream of the proposed project, there will be no increase in the frequency, volume or velocity of creek flows into the Faber Tract.

HDR's modeling supporting the January 28, 2014, design proposal uses an extreme high tide event as a boundary condition and concludes that high fluvial flood flows into the Faber Tract marsh will have a negligible impact on the marsh's habitat because the marsh will be submerged under several feet of tidal water. While impacts to marsh habitat may be negligible during extreme high tide events, the future application must provide an evaluation of potential adverse impacts resulting from any increased discharges into the Faber Tract marsh during tidal events more commonly experienced.

SFCJPA comment: The Faber Tract is currently inundated by Bay tides much more frequently than it is by San Francisquito Creek flows, and this will remain the case after the project is built. Thus, the Faber Tract would continue to be a tidal wetland inundated by normal tidal events at least 20 times each year. Post-project and with the suggested modification described above, even during extreme creek flows occurring on average once every 30 years, there would be no freshwater input to affect the marsh habitat.

In July 2009, JPA staff reported to the JPA's Board of Directors that the PWA model indicated that widening the levees in the downstream area and creating a wide marsh plain provided the flood benefit necessary to meet FEMA standards. In contrast, the 2014 HDR modeling indicates no benefits from widening the levees. The HDR model indicates that, under the current Project design, the flood water surface elevation of the creek rises through the golf course instead of falling in elevation. The future application must provide and explain all of the hydrologic and hydraulic modeling performed for the various alternatives evaluated for the Project. Additionally, the future application must provide a specific plan describing how habitat improvements will be realized by any increase in discharge into the Faber Tract marsh.

SFCJPA comment: Both the PWA and HDR models demonstrate that the desired 100-year flood protection is provided by widening the channel into the golf course and degrading the existing levee on the Palo Alto side to create a wide marshplain. These essential elements of the project are supported by both the PWA and HDR models. In January 2014, in response to a Regional Water Board inquiry about the potential benefits of additional widening beyond the PWA and HDR recommendations, the SFCJPA asked HDR to analyze any flood protection benefit from such additional widening. HDR confirmed that the proposed project optimizes the flood protection benefits of channel widening, which also creates 15 acres of new marsh habitat.

We are also concerned that the January 28, 2014, design proposal may not provide suitable protection to the residents of East Palo Alto. It appears that the levees on the East Palo Alto side and on the golf course side of the creek channel are designed to be approximately the same elevation, with the golf course levee potentially being a little higher than that on the East Palo Alto side. As such, the proposed Project seems to allow avoidable risks to the community of East Palo Alto. One of the possible alternatives that should be evaluated in the future application is to consider making the levee on the golf course side lower than on the East Palo Alto side.

SFCJPA comment: The levee on the Palo Alto side will be built on golf course land that is far less compacted than the soil beneath the existing East Palo Alto levee. Geotechnical investigations and load calculations demonstrate that the new levee in Palo Alto will settle one foot more than the improved levee in East Palo Alto within two years after construction. The proposed project is designed to accommodate this differential settlement. The proposed project has the strong support of East Palo Alto because it will provide substantial flood protection to a neighborhood with a demonstrated recurring flood threat to life and property, which is exacerbated by delays to the construction schedule.

Faber Tract Marsh

One of the beneficial uses of the waters of the State and the United States in and around the Project area is for endangered species habitat. The U.S. Fish and Wildlife Service (Service) has recently indicated to us that the tidal marsh of the Faber Tract has consistently supported the largest population of the endangered California clapper rail rangewide as well as a population of the endangered salt marsh harvest mouse. One of the primary threats to the California clapper rail and salt marsh harvest mouse is predation by mammal and avian predators, especially during flooding events when suitable marsh and upland refugia cover is submerged and unavailable. Therefore, due to the current status of the California clapper rail (only about 1,500 individuals are present rangewide) and the salt marsh harvest mouse, the Service is concerned about any changes to the hydrology within the Faber Tract that would increase the frequency of inundation of the Faber Tract marsh and upland refugia vegetation or increase the quantity or velocity of flows into the Faber Tract marsh relative to the existing (pre-Caltrans Highway 101 culvert installation) conditions. Thus, the future application should present Project design alternatives that would minimize any increases in the frequency of inundation of marsh and upland refugia vegetation within the Faber Tract and avoid any increases in the quantity or velocity of flows into the Faber Tract marsh relative to the existing (pre-Caltrans Highway 101 culvert installation) conditions.

SFCJPA comment: The modified project design in the January 28, 2014 submission to the Regional Water Board does not degrade the levee between the creek and Faber Tract and will not increase the frequency of creek discharge into the Faber Tract. The U.S. Fish and Wildlife Service (US FWS) manages the Faber Tract and has responsibility for writing a Biological Opinion for the federal U.S. Army Corps of Engineers permit. The US FWS communicated to the SFCJPA and to the Corps of Engineers before mid-February that the SFCJPA's project design was acceptable. As noted previously, tides inundate the Faber Tract at a far greater frequency than creek flows under current or post-project conditions. The proposed project decreases the amount of pollution entering the Bay because floodwaters will be contained in a widened creek channel and flow over a new marshplain instead of over streets and through homes prior to being discharged to the Bay. The real threat to water quality is also a threat to life/safety – under current conditions large storm events flood East Palo Alto and Palo Alto homes, businesses and streets. Following the design modification discussed on page 4 to make the existing Faber more uniform, there will be no increase in flow frequency, volume or velocity of creek water entering the Faber Tract.

Water Quality

Any future application should address water quality impacts related to urban stormwater runoff into the creek and the adjacent Faber Tract marsh habitats. The January 28, 2014, design proposal would allow a significant increase in the discharge of fluvial discharges into the Faber Tract marsh. The increase in flow would also increase the loads of urban runoff pollutants, such as trash, pathogens, heavy metals, pesticides, petroleum hydrocarbons, fertilizers, and other pollutants of concern, into sensitive endangered species marsh habitat. The future application must include a proposal to implement effective measures designed to improve water quality both upstream and within the Project reach by reusing, detaining, infiltrating, and treating urban runoff.

In general, all successful flood control projects in the Bay Area over the past 15 to 20 years have included a mix of up-watershed detention/peak reduction, bypasses around major constrictions, expansion of the low-watershed floodplain, and channel modification where appropriate. The January 28, 2014, design proposal seems to rely predominately on channel modification with some expansion of the low-watershed floodplain. Since it does not appear possible to expand the Project's low-watershed floodplain into the Faber Tract, the future application should present significant up-watershed detention/peak reduction alternatives. LID and associated up-watershed detention/peak reduction appears necessary to be able to minimize both flow and its associated pollutants into the Faber Tract marsh while maintaining the same level of flood protection. Other alternatives may include the use of pump stations to reduce runoff and pollutant loads, such as diverting first flush flows to publicly owned treatment works (POTW).

SFCJPA comment: Reducing the scale of the proposed project for any reason would reduce many of the benefits described above, including flood protection and ecosystem restoration. Future projects west of the proposed project being planned for San Francisquito Creek include channel widening, bridge replacements, and – potentially – the detention of waters upstream. The proposed project is moving forward as a separate project at this time because of the current high risk to life and property, and the fact that any viable scenario for upstream detention requires the implementation of these projects downstream, especially the proposed project.

Detention that benefits flood control can only be effective within areas of the watershed that are at higher elevations than flood-prone areas, yet low enough to capture a significant percentage of the watershed's total discharge into the creek. The only such locations within the San Francisquito watershed are on the private property of Stanford University.

For the past five years, the SFCJPA has been working to include upstream detention as one strategy within a suite of solutions to the flood problem, and we continue to discuss upstream floodwater detention opportunities with Stanford University. Stanford has indicated that detention for water supply and flood control are two of several objectives in a long-term, and as of yet undefined, plan for Searsville Lake and other areas and facilities on their property.

There is no known off-stream site that could contain enough water to eliminate the need for the level of protection required by the proposed project. The 100-year level of protection is not only needed to provide this "gold standard" to a vulnerable underserved community, it is also needed to enable future projects in the floodplain area upstream of Highway 101. These future projects would increase the flow capacity in the floodplain area to 6,700 cfs. Reducing a 100-year flow to this amount through upstream detention would require the capture of more than the expected 2,500 cfs (or 27% of the 100-year flow) over a period of several hours, because the flow during a large storm would begin diverting into the detention site well before it reaches the 100-year flow rate. Thus, the detention site would need to be much larger than the one available and potentially effective site described by a SFCJPA consultant's report in 2009.

The only way for detention to achieve the level of flow reduction needed to reduce the flood protection benefits created by the proposed project would be to build and operate a new or existing in-stream reservoir(s) as a flood control facility. As part of its Searsville study, Stanford is considering this option among many options, but it would need the support of the University and regulatory permitting agencies, and its implementation is many years off.

To delay the proposed project to wait for a private entity to complete plans that may provide flood protection far off in the future is unfair and dangerous to a community that has experienced multiple floods, including one as recently as 14 months ago. In addition, reducing the scale of the proposed project is poor public policy given its environmental benefits to the interface between this critical creek and the Bay.

In summary, the SFCJPA supports the use of upstream detention in this watershed and it is part of our broader planning effort to realize 100-year flood protection in areas farther west in the floodplain. However, we must not hold up a proposed project that eliminates an immediate threat to life and property in an underserved community by waiting for an upstream detention project by a private entity that is far off in the future, or may never happen. Particularly when the proposed project also improves environmental conditions.

In the San Francisquito Creek watershed, very large flows develop rapidly within the creek. This is due in part to the fact that the vast majority of the watershed is undeveloped, and the creek reaches flood stage only after the soils of the watershed are saturated in which case open space acts similar to paved ground. While a worthy goal in many circumstances and a practice supported by our local jurisdictions, LID would not reduce the flow rate during large events to such a degree as to alter the project's design criteria for flood protection.

The JPA has a unique opportunity to coordinate with the cities of Palo Alto, Menlo Park, and East Palo Alto; San Mateo County; and the Santa Clara Valley Water District to develop a plan to implement regional LID measures consistent with Municipal Regional Permit (MRP) requirements to address polluted urban stormwater runoff within the watershed upstream of Highway 101 and within the Project reach. The future application should indicate how such a plan would also identify the LID projects that have been implemented already, are in the process of being implemented, and will be implemented in the future to achieve flood control, water quality improvement, and habitat and species protection.

SFCJPA comment: SFCJPA member agencies understand the importance of water quality related activities and are leaders on this topic. However, LID would not provide a useful flood protection benefit in the San Francisquito watershed. Water quality measures resulting from LID are regulated by separate Regional Water Board countywide/municipal permits, to which the SFCJPA is not a party. Also, with the proposed modification, the post-project creek will not send stormwater into the Faber Tract and the project has no negative impact on water quality.

The Project as proposed in the January 28, 2014, design proposal reflected a single purpose design of conveying flood flows quickly to the Bay. The future application should present alternatives for the Project that have multi-objective incorporating features that (1) convey flows in a manner that is protective of both the community and the environment, such as through the use of multiple conveyance features to split flows and reduce velocities; (2) protect water quality; (3) protect endangered species; and (4) protect habitat along San Francisquito Creek and in the Faber Tract marsh.

SFCJPA comment: It is widely understood that the proposed project reflects a multi-objective design rather than a "single purpose design of conveying flood flows quickly to the Bay" as stated above. The multi-purpose design is described on page one of this letter, and the multiple benefits in addition to flood protection were described on page one and elsewhere. The proposed project is both the Least Environmentally Damaging Practicable Alternative (LEDPA) and the best alternative available to meet the needs of the communities. Information making this plain can again be submitted to the Regional Water Board, in a manner that complies with Section 404(b) of the Clean Water Act.

The JPA should reapply for water quality certification by submitting a new application for CWA section 401 water quality certification to the Regional Water Board. In that application, please indicate what application materials previously submitted are part of the new application.

If you have any questions, please contact me at 510-622-2314 or (bwolfe@waterboards.ca.gov) or Maggie Beth at 510-622-2338 or (mabeth@waterboards.ca.gov).

Sincerely,

Bruce H. Wolfe
Executive Officer

Sent via email to the following:

Patrick Burt, SFCJPA Board, Council Member - City of Palo Alto
Kirsten Keith, SFCJPA Board, Council Member - City of Menlo Park
Ruben Abrica, SFCJPA Board, Mayor - City of East Palo Alto
Dave Pine, SFCJPA Board, Board of Supervisors - San Mateo County
Brian Schmidt, SFCJPA Board, Santa Clara Valley Water District Board
Len Materman, SFCJPA Executive Director

Cc: Kevin Murray, SFCJPA
Navroop Jassal, SCVWD
Michael Martin, SCVWD
Bill Springer, SCVWD
Ian Liffmann, USACE,
Ryan Olah, USFWS
Anne Morkill, USFWS
Eric Mruz, USFWS
Joseph Terry, USFWS
Cay Goude, USFWS
Joy Albertson, USFWS
Melisa Amato, USFWS
Gary Stern, NMFS
Ellie K., BCDC
Anniken Lydon, BCDC
Tami Schane, CDFW
Matthew Jones, ICF

EXHIBIT C

MUSICK, PEELER & GARRETT LLP
ATTORNEYS AT LAW

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(213) 629-7863

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TELEPHONE: (213) 629-7600
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LOS ANGELES
ORANGE COUNTY
SAN DIEGO
SAN FRANCISCO
SANTA BARBARA
WESTLAKE VILLAGE

April 1, 2014

VIA E-MAIL. NO HARD COPY TO FOLLOW.

Bruce H. Wolfe
Executive Officer
San Francisco Bay Regional Water Quality
Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Re: **San Francisquito Creek Joint Powers Authority Request for Preparation of the Record and Confirmation of Delivery of Petition for Review and Reconsideration;** San Francisquito Creek Flood Reduction, Ecosystem Restoration, and Recreation Project; CIWQS Place No. 757384 (MB)

Dear Mr. Wolfe:

As required by the California Code of Regulations, Title 23, sections 2050 and 3867, we provide this letter to: (1) request the preparation of the Regional Board's staff record in this matter; and (2) confirm that we have provided you with a true and correct copy of the Petition for Review and Reconsideration of the San Francisquito Creek Joint Powers Authority (SFCJPA).

The SFCJPA has asked that its Petition for Review and Reconsideration, and accordingly also its request for preparation of the record, be held in abeyance pursuant to California Code of Regulations, Title 23, Sections 2050.5(d) and 3869(c) at this time, while the parties work expeditiously to successfully complete the SFCJPA's water quality certification process.

We wish to assure you that the SFCJPA has taken these steps for the purpose of preserving its rights. The San Francisquito Creek Joint Powers Authority remains optimistic that the

MUSICK, PEELER & GARRETT LLP
ATTORNEYS AT LAW

Bruce H. Wolfe
April 1, 2014
Page 2

issues raised in its Petition can be resolved through timely work with the Regional Board, so that action on its Petition to the State Board will prove unnecessary.

Sincerely,



William W. Carter
for MUSICK, PEELER & GARRETT LLP

Enclosures:

Petition to the State Water Resources Control Board for Review and Reconsideration
Exhibits to Petition for Review and Reconsideration

Sent via electronic mail to:

Ms. Len Materman, Executive Director of the SFCJPA
(len@sfcjpa.org)

Mr. Kevin Murray, Project Manager of the SFCJPA
(kmurray@sfcjpa.org)

Mr. Greg Stepanicich, General Counsel to the SFCJPA
(gstepanicich@rwglaw.com)

Shin-Roei Lee, Chief, Watershed Division, Regional Board
(shin-roei.lee@waterboards.ca.gov)

Margarete "Maggie" Beth, Environmental Specialist, Regional Board
(mabeth@waterboards.ca.gov)

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is One Wilshire Boulevard, Suite 2000, Los Angeles, California 90017-3383.

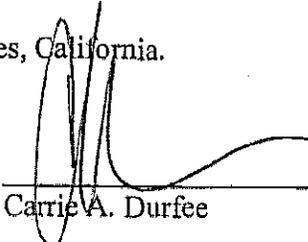
On April 1, 2014, I served true copies of the following document(s) described as **REQUEST FOR PREPARATION OF THE RECORD AND CONFIRMATION OF DELIVERY OF PETITION FOR REVIEW AND RECONSIDERATION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

- BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Musick, Peeler & Garrett LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- BY FAX TRANSMISSION:** I faxed a copy of the document(s) to the persons at the fax numbers listed in the Service List. The telephone number of the sending facsimile machine was 213-624-1376. No error was reported by the fax machine that I used.
- BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address c.durfee@mpglaw.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 1, 2014, at Los Angeles, California.



Carrie A. Durfee

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SERVICE LIST

Re CITY OF PALO ALTO

Bruce Wolfe
Executive Officer
San Francisco Bay Regional Water Quality
Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612
Phone: (510) 622-2300
Fax: (510) 622-2460
Email: bruce.wolfe@waterboards.ca.gov

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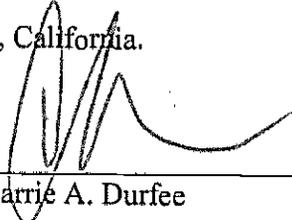
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