

California Regional Water Quality Control Board
San Francisco Bay Region

January 11, 2017, 9:05 a.m.

Elihu M. Harris Building
1515 Clay Street, Suite 1400
Oakland, CA 94612

Reported by:
Susan Palmer

APPEARANCES**Board Members**

Terry F. Young, Chair
James McGrath, Vice-Chair
Newsha Ajami
Jayne Battey
William D. Kissinger
Steve Lefkovits
Cecilia Ogbu

Staff

Dyan Whyte, Assistant Executive Officer
Tamarin Austin, Counsel to the Board
Marnie Ajello, Counsel to the Board
Tam Doduc, State Water Board Member
Stephen Hill, Division Chief, Toxics Cleanup Division
Susan Glendening, Environmental Scientist, Watershed
Management Division
Keith Lichten, Watershed Management Division
Setenay Frucht
Xavier Fernandez, Watershed Management Division
Nicole Fairley, Scientific Aide, Watershed Management
Division, North Bay Section
Dale Bowyer, Section Leader, Watershed Management Division
Lily Tu, Scientific Aide, Watershed Management Division
Ron Goulobow, Engineering Geologist, Toxics Cleanup
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Skyler Valle, Toxics Cleanup Division
Laurent Meillier, Senior Engineering Geologist, North Bay
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Sunny Grunloh, Scientific Aide, Toxics Cleanup Division,
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Bill Johnson, NPDES Wastewater Enforcement Division
Lena Germanario, Scientific Aide, Wastewater Enforcement
Division, Enforcement Section
Robert Schlipf, NPDES Permitting Section
Will Burrell, Water Resource Control Engineer
Jerry Su, Student Engineering Assistant

APPEARANCES (CONT.)**Public Comment**

Bill McNicholas, Clean Up Marinwood Plaza NOW Oversight Committee
Robert Graham, Clean Up Marinwood Plaza NOW Oversight Committee
Joseph Sanchez, Santa Clara Building and Construction Trade Council
Tom Kendall, Chief of Planning, San Francisco District, Corps of Engineers
Mary Goodenough, District Counsel, San Francisco District, Corps of Engineers.
Richard Santos, Chair, Santa Clara Water Board
Melanie Richardson, Interim COO, Watersheds for the Santa Clara Water District
Peter Prows, Outside Counsel, Santa Clara Valley Water District
James Manidakos, Enviro Planner, Santa Clara Valley Water District
Jack Xu, PE, CFM, Santa Clara County Valley Water District
Linda Locke, President, Berryessa Citizens Advisory Council
Frank Caneille, President, Berryessa Business Association, Real Estate Broker
Pastor Jethroe Moore, II, President, NAACP, POST Commission
Rita Chan, Assistant District Counsel

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1
2 **Item 7. Waste Discharge Requirements (WDRs)**

3 **Santa Clara Valley Water District and U.S.**
4 **Army Corps of Engineers, Upper Berryessa Creek**
5 **Flood Risk Management Project, Santa Clara County.**

6 CHAIR YOUNG: All right, we're going to --

7 MS. WHYTE: Okay, our next item is Item 7.

8 And these are proposed waste discharge
9 requirements, which also include a water quality
10 certification. And those would be issued to the
11 Army Corps of Engineers and Santa Clara Valley
12 Water District.

13 And Susan Glendening is going to make the
14 presentation for staff.

15 CHAIR YOUNG: All right.

16 MS. WHYTE: I'll also note we have a
17 supplement that Keith is handing out, now, with
18 some minor word changes. And we did receive a
19 comment letter last night, from the Santa Clara
20 Valley Water District. Staff has reviewed the
21 letter. We see nothing new in the letter, that
22 hasn't been put forward already, in comments. But
23 I'll bring that to your attention and we can let
24 the parties explain whether they think there's
25 anything new in there, as well. But staff's

1 recommendation is not to include the letter at this
2 time.

3 CHAIR YOUNG: All right.

4 MS. AUSTIN: And to clarify for the
5 record, there were actually three letters -- it's
6 my understanding that there were three letters have
7 the comment deadline. And Keith can provide us
8 with more information on the three. But two came
9 in some time ago, and the last one, that Dyan's
10 referring to, came in last night, at 4:55.

11 CHAIR YOUNG: All right. For
12 clarification -- while you're talking about this, I
13 am going to make an announcement. Some time ago,
14 Christie Stopaker (phonetic), from the Governor's
15 Office, called me because the Governor's Office had
16 received a couple of letters about this issue. And
17 they contacted me to say, what's going on? Is this
18 on your radar?

19 I said, yes, it's on our radar. I let the
20 Governor's Office know that our staff was almost
21 continually reaching out to all the interested
22 parties, and on this subject, to try to see how
23 much resolution they could get, you know, prior to
24 coming to the Board meeting.

25 My conversation with the Governor's staff

1 was purely procedural. I let them know that we
2 were -- our staff was working on it. I directed
3 her to information that was already on the website,
4 about the ongoing process. And I also sent an e-
5 mail to Ms. Stopaker, yesterday, to let her know,
6 in case she didn't, that this was going to be on
7 the agenda today.

8 But, again, all of the communications were
9 procedural, they were not substantive.

10 Now, shall we discuss the letters that
11 came in after the closure of the comment period?

12 MR. LICHTEN: Dr. Young, I'm Keith
13 Lichten, Marsh Management Division. I'm aware of
14 just the one letter that came in at 4:55 p.m., from
15 the Water District.

16 Largely, as Dyan had noted, reiterating
17 comments that had been made previously.

18 CHAIR YOUNG: And that was 4:55 p.m.,
19 yesterday?

20 MR. LICHTEN: That's right.

21 CHAIR YOUNG: All right.

22 MS. AUSTIN: And it's my understanding,
23 and I'm hearing this third-hand from Mr. Wolfe, who
24 isn't here. But it's my understanding there were
25 two other letters that came in after the comment

1 deadline, and it's my understanding that the
2 substance of those pertained to asking for an
3 additional -- additional time, to bump this off the
4 calendar.

5 So, that's the limit of my knowledge. But
6 I think staff's recommendation was to exclude all
7 three of those from the administrative record. And
8 that those who would like to comment on the content
9 of those letters are available here, today, and can
10 make those comments.

11 CHAIR YOUNG: All right, I'm going to
12 accept the staff recommendation. I'm going to
13 exclude all three letters from the record. Again,
14 if you want those issues to be discussed, you have
15 the opportunity to present them today.

16 My general approach to these matters is
17 that barring some other really, really good reason,
18 I do not like to accept things into evidence when
19 the other interested parties in the matter are --
20 will be provided insufficient time to react to
21 them. We don't want people to feel blindsided in
22 your procedures, and that's why we have deadlines.
23 So, I am going to exclude all three letters.

24 And with that, are we ready to proceed
25 with the staff presentation? Thank you.

1 MS. GLENDENING: All right. Testing.
2 Good morning, my name is Susan -- good morning,
3 Chair Young and Board Members. My name is Susan
4 Glendening. And I'm an Environmental Scientist
5 with the Watershed Management Division.

6 I'm pleased to present Item 7., the
7 Revised Tentative Order for Waste Discharge
8 Requirements and Water Quality Certification for
9 the Upper Berryessa Creek Flood Risk Management
10 Project.

11 During my presentation, I'll refer to this
12 as the Revised Tentative Order.

13 This is a capital improvement project to
14 increase flood protection along a portion of the
15 Upper Berryessa Creek. It will protect property,
16 including the new Milpitas BART Station.

17 For this presentation, I'll begin with the
18 project purpose, then I'll summarize the permitting
19 approach, as I'll explain. We issued a Clean Water
20 Act, Section 401 Water Quality Certification for
21 the project, in March 2016.

22 That certification allowed contracting and
23 construction to begin expeditiously, so that an
24 improved flood protection could be provided for the
25 anticipated BART Station opening. At that time, we

1 deferred more detailed permitting for a future
2 date.

3 The Revised Tentative Order, before you,
4 would complete that more detailed permitting by
5 issuing waste discharge requirements, and
6 rescinding and reissuing the existing -- the
7 initial Water Quality Certification from March.

8 I will then discuss the resources being
9 impacted by the project, including the existing and
10 potential beneficial uses, and the associated
11 project components that result in the impacts, and
12 the need for mitigation.

13 Finally, I'll touch on some of the
14 significant comments we received and our responses.

15 The project is on Berryessa Creek, in the
16 Cities of San Jose and Milpitas, in Santa Clara
17 County. I'll refer you to the map on the upper
18 right, to show you the general location in the San
19 Francisco Bay Area. Shown with the star in the
20 bottom right side of the small map.

21 The large map on the left shows the
22 project reach as a red line. The project's
23 upstream boundary is in San Jose, at Interstate
24 680, and the creek flows north into Milpitas, to
25 the project's downstream boundary at Calaveras

1 Boulevard.

2 It includes work along the reach and in
3 two tributaries, where they flow into Berryessa
4 Creek. Los Coches Creek, which is in the north, by
5 the northern star. Looking for anything else here.
6 And Piedmont Creek, which is just south of -- it's
7 the southern tributary, just below the purple.

8 Just one sec. I have a little bit of
9 technology because the lighting's out right here.

10 This is a 2.2 mile long reach. The
11 project is called the Upper Berryessa Creek
12 Project, to distinguish it from another flood
13 control project immediately downstream, referred to
14 as the Lower Berryessa Creek Project.

15 The Lower Berryessa Project has been
16 permitted and is currently under construction.

17 The project purpose is to modify Berryessa
18 Creek to contain the 100-year flood event. Under
19 existing conditions, the Creek overtops its banks
20 about every 10 to 20 years.

21 On the screen, the project reach is again
22 shown as a red line, with water flowing from
23 upstream, at the bottom of the map, to downstream
24 near the top of the map.

25 This image is a flood zone map from the

1 project EIR, showing where flooding would occur
2 during the 100-year flood event, without the
3 project. Flooding is shown by green, blue, and
4 yellow dots, plus a few red dots.

5 The green dot indicates areas where
6 flooding depth would -- during the 100-year flood
7 event, that would be up to 1-foot deep.

8 The blue dots represent areas that would
9 flood from 1 to 3 feet deep.

10 And the yellow dots, which are mainly in
11 the Lower Berryessa Creek Project area, in the
12 northern part of this map, would flood from about 3
13 to 5 feet deep.

14 And red dots would flood over 5 feet deep,
15 but they're pretty rare and they're difficult to
16 see on this map.

17 The project will give improved flood
18 protection to over 3,500 homes, businesses, and the
19 associated infrastructure, as well as the Milpitas
20 BART Station. The BART Station is currently under
21 construction and is shown in the west of the
22 project, by the BART Station logo, on the bottom of
23 this map.

24 The Revised Tentative Order names both the
25 U.S. Army Corps of Engineers and the Santa Clara

1 Valley Water District as dischargers, because they
2 are the project co-sponsors. The project could not
3 occur without each agency contributing to the
4 project, because the cost sharing and associated
5 collaborative work are required by the project's
6 Congressional authorization.

7 The order recognizes the division of tasks
8 between the Corps and the District to complete the
9 project. For example, the Corps is responsible for
10 construction, while the District is responsible for
11 providing the project right of way and property
12 acquisition.

13 The order would implement a two-phase
14 permitting approach, which we developed with the
15 Corps and the District about a year ago. The
16 approach recognizes the important public safety
17 need for the project, while ensuring it meets State
18 Water Quality Standards.

19 The first phase was to issue water quality
20 certification so that the Corps could begin
21 construction. This was necessary to meet the
22 urgent goal of improved flood protection for the
23 new, Milpitas BART Station, which is part of the
24 multi-billion dollar BART extension to San Jose.

25 As shown on the earlier map, the Station

1 is in the existing 100-year flood zone. And it is
2 scheduled to be open to the public in December
3 2017.

4 With the certification in hand, in March
5 2016, the Corps was able to begin its construction
6 process for the project. Including tasks, such as
7 contracting and equipment procurement. This led to
8 breaking ground in October 2016, for project
9 construction. And, now, the project is on track to
10 be completed by December 2017, in time for the BART
11 Station to open.

12 However, the certification recognized the
13 need for a second approval in order to ensure the
14 project's water quality impacts were fully
15 addressed. As a result, we're now completing phase
16 2 of this two-phase permitting approach.

17 Phase 2, which is your consideration of
18 the order, involves addressing the compensatory
19 mitigation requirements for project impacts, as
20 well as incorporates the plans and details that
21 have been finalized subsequent to the
22 certification's issuance, such as construction de-
23 watering.

24 The project will impact both
25 jurisdictional Waters of the U.S., and additional

1 Waters of the State that are outside of Federal
2 jurisdiction.

3 Now, before I describe the project's
4 impacts, I'll go over the beneficial uses provided
5 by the creeks, and associated riparian wetlands
6 that will be impacted by the project.

7 The creeks provide warm water habitat,
8 wildlife habitat, and water contact and non-contact
9 water recreation beneficial uses.

10 In addition, Los Coches Creek, a tributary
11 to the project reach, provides habitat for the
12 California Red-legged Frog, and has the
13 preservation of rare and endangered species
14 beneficial use.

15 To evaluate the beneficial uses, staff
16 inspected the site five times since April 2015, and
17 we observed a thriving creek ecosystem, which I'll
18 show you on the next few slides.

19 Here is a close up of the photograph on
20 the previous slide, which was taken in September
21 2015, during the peak of a severe drought. The
22 photo shows wildlife, ducks, and an egret, and an
23 immersion of vegetation in the creek channel.

24 This photo was taken in November 2016,
25 just a couple months ago. It shows a group of at

1 least 16 ducks using the creek. The riparian
2 vegetation on the banks not only provides cover
3 from predators, but it also serves as a food source
4 -- it can also serve as a food source.

5 This is another dry season photo, showing
6 an egret in the channel. During this inspection,
7 in September 2015, we observed ducks and egrets at
8 multiple locations along the length of the creek
9 that is being impacted by the project.

10 The green, emergent vegetation in the
11 water show that under pre-project conditions there
12 is perennial flow in the creek and, thus, it has
13 habitat functions and values even in the peak of
14 the drought.

15 This slide shows that the creek channel
16 has developed geomorphic complexity in the form of
17 a meandering, low-flow channel. This improves
18 habitat diversity and support of beneficial uses.

19 Emergent vegetation is growing across the
20 channel bed, and sediment deposits are likely,
21 periodically shifted as creek flows pick up the
22 sediment and redeposit it downstream.

23 The project reach now connects higher
24 quality habitats that currently exist upstream and
25 downstream. That connection helps to sustain

1 access to foraging habitat by fish, birds, and
2 other wildlife.

3 This slide shows higher quality habitat in
4 the Berryessa Creek's upper watershed, upstream of
5 the project reach. The slide shows that there's
6 diverse riparian vegetation, with multiple species
7 in the canopy, as well as the understory. You
8 know, my mouth is a little touchy right now.

9 But the picture on the left here shows --
10 this is the riparian corridor here, with a variety
11 of woody species here.

12 VICE CHAIR MCGRATH: Just for clarity, is
13 that in the portion of the stream that is proposed
14 for alteration?

15 MS. GLENDENING: No, this is in the --

16 VICE CHAIR MCGRATH: That's upstream.

17 MS. GLENDENING: Upstream of the project
18 reach.

19 BOARD MEMBER KISSINGER: But your earlier
20 photos --

21 MS. GLENDENING: Which has higher quality
22 habitat.

23 BOARD MEMBER KISSINGER: But the earlier
24 photos you showed were --

25 MS. GLENDENING: Were within the project

1 reach, yeah.

2 This one here is in the dry channel bed.
3 It's a sunny patch here, showing a variety of
4 vegetation on the banks.

5 Here's an example of Lower Berryessa
6 Creek, which is downstream of the project reach.
7 The photo shows a meandering, low-flow channel, and
8 inset flood plain benches, and adjacent woody
9 riparian vegetation. And these features contribute
10 to its higher quality for beneficial uses,
11 including wildlife habitat.

12 BOARD MEMBER KISSINGER: The Lower
13 Berryessa reach is also subject to the project, as
14 well?

15 MS. GLENDENING: Not in this project, it's
16 a separate one.

17 BOARD MEMBER KISSINGER: I understand.
18 But it's currently the subject of some kind of
19 work, as well?

20 MS. GLENDENING: Yes, it's under
21 construction, now.

22 BOARD MEMBER KISSINGER: And this is, I
23 take it, before construction? Or, is this what it
24 looks like following the construction that's being
25 done on the Lower Berryessa reach?

1 MS. GLENDENING: This photo is -- we took
2 this photo in September 2015, so I'm not sure if it
3 got reconstructed from this.

4 (Off-mic comments.)

5 MS. GLENDENING: This is pre-construction.
6 It's pre-construction of the project, but it still
7 has higher quality habitat than the existing
8 project reach.

9 The point is that in -- the point is
10 showing that the project reach has connectivity
11 between the upper watershed and the lower
12 watershed, which is beneficial to the biota and the
13 ecosystem within the project reach.

14 BOARD MEMBER KISSINGER: I understand. I
15 guess the reason for my question is, one of the
16 criticisms that's latent throughout the materials
17 is the design of the Upper Berryessa reach is that
18 it's -- offers very low habitat value.

19 And I'm wondering whether the Lower
20 Berryessa reach has got comparably low
21 environmental quality after construction or if it
22 will have some higher quality design aspects?

23 MS. GLENDENING: I think I'm going to get
24 into -- I might be able to answer your question in
25 a few moments, to actually --

1 BOARD MEMBER KISSINGER: Okay, go ahead.

2 VICE CHAIR MCGRATH: Can I augment that?
3 Because one of the issues here is the ability of
4 restrictions on vegetation on the levees. And this
5 system shows mature riparian vegetation that
6 certainly wasn't planted as mitigation. It's
7 pretty old trees. Yet, there's not very much in
8 the current channel, in the area.

9 So, is a system of this width, and this
10 nature of levee capable of maintaining riparian
11 vegetation or, in fact, are these trees going to be
12 required to be removed under some of the
13 restrictions that occur with Federal money
14 Standards?

15 MR. LICHTEN: All right. Well, Mr.
16 McGrath, I think you're reading ahead. We do have
17 a picture showing what this part of the project --
18 or, this other project will look like in the
19 future.

20 VICE CHAIR MCGRATH: Well, yeah, that's
21 the kind of what we're trying to get to.

22 BOARD MEMBER KISSINGER: Yeah.

23 MR. LICHTEN: So, the short answer is,
24 yes, but we'll get to that later in the
25 presentation.

1 BOARD MEMBER KISSINGER: So, stop getting
2 ahead is the message.

3 (Laughter.)

4 CHAIR YOUNG: Yeah, just stop being so
5 smart.

6 BOARD MEMBER BATTEY: Just to ask a
7 question about this photo, are those bike trails on
8 either -- are those bike or pedestrian trails on
9 either side?

10 MS. GLENDENING: Yes, this is in a park
11 setting.

12 Now, I'll describe the project's impacts.
13 Through the Corps planning and budgeting processes,
14 the project was designed as a single-purpose
15 channel to provide flood control.

16 The design strays from the approach the
17 Board has promoted over the last 20 years for flood
18 control projects. The creek will be lined with
19 rock riprap for nearly two miles, on both the left
20 and right banks.

21 Three-quarters of the same section,
22 roughly one and a half miles, will have riprap
23 across the channel bed, as well. The riprap will
24 be covered by four inches of soil and hydro
25 seeding. But this will limit future creek

1 functions and beneficial uses.

2 The project will increase capacity in the
3 creek by widening the channel. Channel widening
4 will significantly alter the creek's hydrology.
5 This slide shows Station 176, where the cross-
6 section will increase by about 10 feet in width,
7 and 6 feet in depth from the existing conditions.
8 This likely will result in increased sedimentation
9 and reduced dry season flow.

10 Under existing conditions, during the dry
11 season the creek flow is in the soft portion of the
12 low-flow channel, that has formed naturally from
13 the sediment transporting deposition processes.

14 This low-flow channel is about 3 to 5 feet
15 wide and about 2 inches deep.

16 The dischargers acknowledge that this flow
17 is unlikely to persist in the project' wide, flat-
18 bottom channel, effectively removing the warm water
19 habitat, beneficial use during the dry season.

20 In addition, channel widening will
21 significantly reduce the creek flow velocities,
22 which likely will cause an increased rate of
23 sedimentation.

24 However, to maintain flood capacity, as
25 the channel fills in, there will be a need to

1 remove the sediment. This is likely to result in
2 recurring and more frequent sediment removal
3 impacts over time.

4 This slide shows a project map with the
5 locations for three, new concrete culverts that
6 will be constructed in the project, shown here with
7 the heavy X marks on the map.

8 The wooden trestle bridge here, at the
9 southernmost X mark, will be replaced by a double-
10 barreled concrete culvert, with wing walls, as
11 shown in the lower right.

12 The other two concrete culverts are at the
13 confluences of Piedmont and Los Coches Creeks, with
14 the Upper Berryessa Creek.

15 Although the project will remove about 250
16 linear feet of concrete lining, there will be a net
17 gain of 850 linear feet of concrete channel surface
18 from these culverts and other concrete structures,
19 such as ramps and transition structures under
20 bridge crossings.

21 CHAIR YOUNG: Could you go back to the
22 last slide?

23 MS. GLENDENING: Uh-hum.

24 CHAIR YOUNG: At the bottom of the
25 schematic, or of the map, there's a -- there are

1 two 90-degree turns. Can you tell us what's going
2 to happen at those 90-degree turns?

3 MS. GLENDENING: This is a railway
4 crossing, and it crosses over the creek channel
5 diagonally. And the creek comes in kind of at an
6 angle relative to the crossing, so these are wing
7 walls, which kind of divert the flow, keep the flow
8 in a straight line in the channel.

9 MR. LICHTEN: And let me add to that.

10 MS. GLENDENING: Oh, I'm sorry, I didn't
11 mean to --

12 MR. LICHTEN: Where the channels are
13 taking those two 90-turns, they'll remain in its
14 current alignment.

15 CHAIR YOUNG: Okay, thank you.

16 MS. GLENDENING: In addition to these
17 impacts, the project will reduce connectivity
18 between the better quality habitats, I showed you
19 earlier in the upper watershed and lower watershed
20 areas.

21 BOARD MEMBER KISSINGER: Why?

22 MS. GLENDENING: Why will it?

23 BOARD MEMBER KISSINGER: Yes.

24 MS. GLENDENING: Because the impacts on
25 the beneficial uses will be -- will result in less

1 quality habitat in the project reach, so there will
2 be less chance for biota to survive or be fit.

3 MR. FERNANDEZ: In addition, just to add,
4 in the EIR it indicated that during the summer
5 there would be reduction of flow such that fish,
6 and other organisms, would not be able to survive
7 in the project reach. So, that would reduce
8 connectivity significantly during the summertime.

9 VICE CHAIR MCGRATH: For context, can you
10 give us the design queue and the expected
11 velocities in this channel section?

12 MS. GLENDENING: I'm sorry, what was the
13 question? The design --

14 VICE CHAIR MCGRATH: The design flow, the
15 queue and estimated velocities. You did indicate
16 that velocities are going to be reduced. I'd kind
17 of like to know before and after.

18 MS. GLENDENING: The design flow at the
19 bottom of -- at the most downstream point is about
20 4,500 cubic feet per second. But it does vary
21 within the project reach.

22 VICE CHAIR MCGRATH: That's close enough.
23 That's close enough.

24 MS. GLENDENING: Okay. And velocities, I
25 don't have that data at my fingertips.

1 VICE CHAIR MCGRATH: I'll give you a --

2 MS. GLENDENING: But it's stated in the
3 EIR that --

4 MR. FERNANDEZ: We'll refer to the
5 District on that.

6 VICE CHAIR MCGRATH: Okay.

7 CHAIR YOUNG: Just for clarification, your
8 use of the term "connectivity" in this context, I'm
9 used to interpreting the concept of connectivity in
10 its ecological context. Which means that we are
11 concerned with whether riparian zones, with all of
12 their cover and vegetation, in other words the
13 habitat, is contiguous, all the way along.

14 And what I'm interpreting here is that
15 you're saying that there's a nice habitat upstream,
16 there's going to be a nice habitat downstream. In
17 the middle there's going to be rock riprap.
18 Water's going to be able to flow from one to the
19 other, so it's going to be connected in that sense,
20 and connected in the sense of capacity for water
21 flow during the high flow events.

22 But in terms of habitat, it's going to be
23 discontinuous, which is important to ecologists.

24 So, am I interpreting that correctly?

25 MR. FERNANDEZ: You're interpreting it

1 correctly. In the summertime, those photos showed
2 egrets currently using the habitat. We saw little
3 minnows, which is probably what the egrets were
4 feeding on. In the summertime, with the flows
5 diminished, according to the EIR, those fish won't
6 be there and there won't be food for the egret.
7 So, there's the loss of habitat according to the
8 EIR.

9 CHAIR YOUNG: Thank you.

10 BOARD MEMBER AJAMI: So, this happened
11 because the channel is being sort of deepened and
12 the flow, basically, does not make to the
13 downstream reach.

14 MR. FERNANDEZ: The EIR indicated that in
15 the summertime there would be a flow reduction
16 within the project reach.

17 BOARD MEMBER AJAMI: Okay, from original?

18 MR. FERNANDEZ: From the original.

19 BOARD MEMBER AJAMI: But is that because
20 of the deepening of the channel.

21 MR. FERNANDEZ: It's from the widening and
22 deepening.

23 BOARD MEMBER AJAMI: Okay.

24 BOARD MEMBER KISSINGER: But I think that
25 there's a -- the way the Board staff sees the

1 status quo, and the way the District and the Corps
2 sees it are sort of night and day. I mean, the way
3 I read the comments was that during the summer
4 there's no water at all in the reach, that there
5 are no minnows. that there is no water flow at
6 all. It's not perennial, to use the term that you
7 guys used a moment ago. Is that fair? There's a
8 difference of view, not --

9 MS. WHYTE: Yes. Yeah, I would say that
10 there is. And our view has been recognizing the
11 benefits that are provided by these low flow type
12 of channels. It narrows the way, but from a
13 geomorphic perspective, and also from the
14 perspective of having summer habitat, they do
15 provide value. And that's not something that's
16 been included in this design.

17 BOARD MEMBER KISSINGER: Yeah, okay.

18 MS. AUSTIN: Mr. McGrath had asked about
19 stream velocities. And I have the EIR on my
20 computer, so I'm going to hand that to him, as
21 opposed to reading it into the record. Which, if
22 anyone else is interested in stream velocities, we
23 can pass the computer down. But, otherwise, the
24 record should reflect he'll be looking at the
25 charts and information somewhere around page 2-65 -

1 - sorry, 2-15. It may be 65, I just lost my spot,
2 but in the EIR.

3 CHAIR YOUNG: Thank you. All right,
4 thanks. Please proceed.

5 MS. GLENDENING: So, as I mentioned
6 earlier, the project strays from the approach the
7 Board has promoted for flood control projects over
8 the last 20 years.

9 I'm going to show you a couple of examples
10 of projects that show how the project could have
11 been designed to better support beneficial uses,
12 and minimize the need for mitigation.

13 This example is in Lower Silver Creek,
14 taken during construction. This is also a District
15 project, which was Board approved in 2001. It
16 shows construction of a low flow channel to
17 efficiently transport sediment downstream, and
18 vegetative flood plains for higher flows to spread
19 out.

20 The space for the maintenance road, on the
21 right bank, doubles as a flood plain.

22 We anticipate this project will require a
23 little sediment maintenance, and it will only need
24 periodic vegetation maintenance.

25 The second example is also a District

1 project. It's the Lower Berryessa Project, which
2 is just downstream of the Upper Berryessa Project.
3 Like Silver Creek, Lower Berryessa will have a low
4 flow channel and vegetative flood plains.

5 The project design in Lower Berryessa
6 Creek is intended to help reduce the chronic
7 sediment maintenance needs that this reach has had,
8 while at the same time increasing the creek's
9 habitat functions and values.

10 We discussed this kind of approach for
11 Upper Berryessa with the District, and the Corps,
12 but they were unable to incorporate it in the
13 project design.

14 BOARD MEMBER KISSINGER: Has the Corps
15 developed -- constructing this for --

16 MS. GLENDENING: No, this is not a Corps
17 project.

18 BOARD MEMBER KISSINGER: Whose project is
19 it?

20 MS. GLENDENING: Just the Santa Clara
21 Valley Water District is the sponsor.

22 BOARD MEMBER KISSINGER: Okay. Is that a
23 function of just Congressional authorization?

24 MS. GLENDENING: No, this is funded
25 through their other funding mechanisms.

1 BOARD MEMBER AJAMI: So, why can't they
2 implement something like that?

3 MS. GLENDENING: I'm sorry?

4 BOARD MEMBER AJAMI: Why can't they do
5 something similar to this?

6 MS. GLENDENING: I think maybe the
7 District and Corps could speak to that point.

8 BOARD MEMBER BATTEY: Can I ask when you
9 had the conversations about this design, this
10 alternative?

11 MS. GLENDENING: We had a few meetings
12 starting around January -- excuse me, June 2015,
13 August 2015, and several meetings since that time.

14 MR. LICHTEN: And I'll just add to Susan's
15 comments that we had extensive discussions with
16 both the Corps and the Water District on
17 implementing exactly this kind of design and this
18 kind of intervention in the project that's before
19 you now. Due to various constraints, which I think
20 the Corps and the District can speak to, they
21 weren't able to add these.

22 BOARD MEMBER KISSINGER: When we provided
23 that input to the Corps, was that -- that's post-
24 EIR?

25 MR. LICHTEN: No, it was provided both in

1 advance of and during that particular EIR's
2 adoption.

3 BOARD MEMBER KISSINGER: Did they respond
4 in the EIR why it couldn't be incorporated?

5 MS. GLENDENING: Yes, they did.

6 BOARD MEMBER KISSINGER: And what was
7 there -- well, I guess we can -- we'll ask them.
8 Go ahead.

9 MS. GLENDENING: Okay. The Revised
10 Tentative Order provides water quality
11 certification and waste discharge requirements for
12 the original project design, and recognizes the
13 plans that were submitted after issuance of the
14 initial certification, such as the final design
15 plans and the de-watering plan.

16 To compensate for the project's
17 unavoidable impacts to beneficial uses and water
18 quality, the Revised Tentative Order requires the
19 dischargers to submit and implement a mitigation
20 and monitoring plan.

21 The mitigation will be constructed off
22 site and, at the earliest, at least a year from
23 existing resources that have already been impacted.

24 The mitigation ratios that would be
25 required by the order are consistent with Basin

1 Plan requirements, and with the mitigation we
2 required for similar impacts on other projects.

3 The ratios reflect issues included -- the
4 ratios reflect such issues as the offsite nature of
5 the mitigation, the delay in timing, and
6 uncertainty as to the success of mitigation.

7 In addition, the Revised Tentative Order
8 requires an Adaptive Management Plan to minimize
9 recurring impacts from sediment maintenance
10 activities. This is intended to ensure that
11 maintenance will follow similar procedures for
12 impact avoidance that the District is already
13 implementing, in accordance with the Board-
14 approved, Stream Maintenance Program.

15 We understand that the Corps is going to
16 develop an operations and maintenance manual, with
17 maintenance guidelines the District will be
18 required to follow.

19 The Tentative Order requires the
20 monitoring results and conclusions from the
21 Adaptive Management Plan to be incorporated into
22 the operations and maintenance manual.

23 As such, development of the manual will be
24 a public process that will allow for input from
25 agencies and interested parties.

1 Further, the Revised Tentative Order is
2 consistent with what we have required in the past
3 on other Corps and District projects.

4 The Revised Tentative Order, before you
5 today, is the culmination of over a year of
6 collaborating with the dischargers. Though we
7 initially planned to propose the order in late
8 spring of 2016, we postponed the item until now, at
9 the discharger's request.

10 We put this out for public comment on
11 August 19th, 2016, and we received comments from
12 the Corps, the District, the Guadalupe Resource --
13 excuse me, Guadalupe-Coyote Resource Conservation
14 District, and a joint letter from the Citizens
15 Committee to Complete the Refuge, Audubon Society,
16 and San Francisco Baykeeper.

17 We revised the Tentative Order and
18 distributed it for public comment on November 19th,
19 2016. And we received comments from the same
20 organizations, except for the Resource Conservation
21 District.

22 In response to comments, we modified the
23 order to rescind the certification and reissue it
24 with waste discharge requirements in the Revised
25 Tentative Order you are considering today.

1 These revisions have resulted in the
2 Revised Tentative Order being a more streamlined
3 permit that consolidates the certification and
4 waste discharge requirements, together, and
5 clarifies the roles of each discharger.

6 It also improves clarity about the Board's
7 expectations for avoiding, minimizing, and
8 compensating for project impacts.

9 Now, I'll discuss some of the key comments
10 we received and our responses.

11 The dischargers commented that adoption of
12 the Revised Tentative Order would impede the
13 project's construction. However, construction has
14 already started and we don't see the revised order
15 as an impediment. To the contrary, by issuing the
16 certification first, we helped ensure that the
17 project began on time.

18 Prior to today's Board meeting, we met and
19 spoke with the dischargers several times on this
20 issue, but they were unable to identify why the
21 Order's adoption could stop construction.

22 The Water Board implemented the same, two-
23 stage permit process in the past, for the Bay
24 Bridge East Span Seismic Safety Project.

25 Similar to the Upper Berryessa Flood

1 Control Project, the new Bay Bridge project needed
2 water quality certification to begin the pre-
3 construction procedures to meet the construction
4 schedule, and to avoid a public safety risk from
5 delayed construction.

6 The dischargers also commented that the
7 project does not have the impacts requiring
8 compensatory mitigation beyond that provided by the
9 project design, itself.

10 The dischargers assert that by stabilizing
11 erosion hot spots, and covering the rock riprap
12 with a thin layer of soil, the project will provide
13 an overall net benefit.

14 However, as I've shown in this
15 presentation, the project has a geomorphically
16 complex channel. Altering that channel by
17 excavating and widening it, and placing rock riprap
18 along two miles of it will result in significant
19 impacts.

20 In addition, habit quality will not be
21 improved by a thin veneer of soil over the placed
22 rock. As a result, the project design will degrade
23 the creek's beneficial uses.

24 We are obligated, and authorized, under
25 the Clean Water Act, and the Water Code, to require

1 mitigation to compensate for these impacts.

2 The dischargers also commented that the
3 Adaptive Management Plan is unnecessary. We
4 disagree with this because the changes in the
5 channel dimensions are likely to result in
6 increased sediment deposition that has the
7 potential to increase maintenance activities, and
8 the associated recurring impacts.

9 The Adaptive Management Plan will allow a
10 better understanding of these processes and should
11 provide opportunities to minimize the associated
12 impacts.

13 We also received comments, expressing
14 concerns about the project's design and impacts,
15 from the Guadalupe-Coyote Resource Conservation
16 District and three environmental groups, the
17 Citizens Committee to Complete the Refuge, the
18 Audubon Society, and the San Francisco Baykeeper.

19 In response to that concern, we included a
20 due date for a final mitigation plan, of June 30th,
21 2017. And we expect that in the interim staff will
22 continue to collaborate with the dischargers as
23 they develop the plan by that due date.

24 In summary, we've prepared an efficient
25 permitting vehicle that supports this important

1 public safety project, and that meets State Water
2 Quality Standards. It recognizes the existing and
3 potential beneficial uses of the creek waters in
4 the project, and appropriately requires
5 compensatory mitigation for project impacts.

6 And that concludes my presentation, and
7 I'd be happy to answer any questions.

8 CHAIR YOUNG: All right, do we have
9 additional questions for staff, at this time?

10 VICE CHAIR MCGRATH: I've got two. Susan,
11 thank you. And at the appropriate point I'll talk
12 a little bit about the velocities and put that on
13 the record.

14 I had two questions for you. First, in
15 this section which is being modified, and has some
16 larger riparian vegetation, but not a tremendous
17 amount, can riparian vegetation be planted as part
18 of the mitigation system, or does that conflict
19 with the standards that the Corps of Engineers
20 might establish for protection of the levees that
21 are being constructed?

22 MS. GLENDENING: I'd like to defer that
23 question to the Corps.

24 VICE CHAIR MCGRATH: Okay, we'll leave
25 that for them.

1 MR. LICHTEN: But I think we can -- Mr.
2 McGrath, if I can just add, briefly, the short
3 answer is no. That the project consists of both a
4 set of physical interventions and then a set of
5 practices while it's in operation. And those
6 practices would preclude vegetation.

7 VICE CHAIR MCGRATH: Okay. The levee
8 standards was a very controversial item, it's
9 pretty well known, and this is a Corps project.
10 And I just wanted to make sure that we were all
11 clear in our understanding that there's no
12 potential for adding riparian -- mature riparian
13 vegetation.

14 The second point, clearly, there's a
15 disagreement about the qualitative amount of the
16 habitat. And while I did a lot of work on streams
17 in hydraulic function and sediment transport, I
18 didn't do a lot of work on habitat evaluation
19 systems.

20 I know, over the years, that we've
21 developed assessment methods for Title 11 systems,
22 (indiscernible) -- rapid assessment methods.

23 So, my question to you is, is there an
24 accepted methodology for assessing not simply the
25 acreage, where I think we understand that, but the

1 qualitative nature and the functions of the
2 riparian resource, both now and projected?

3 MR. FERNANDEZ: Mr. McGrath, there's
4 actually multiple methods to do this. There's the
5 Corps' hydro geomorphic method. There is a CRAM
6 assessment. There's also some Level 3 monitoring
7 that can be done, like such as pebble counts. You
8 can also do an assessment of just actually
9 measuring vegetation cover, undercut banks.

10 VICE CHAIR MCGRATH: And have those been
11 done for this project?

12 MR. FERNANDEZ: No.

13 VICE CHAIR MCGRATH: All right. And why
14 not?

15 MR. FERNANDEZ: For the EIR, they did do a
16 qualitative assessment, but it was more of going
17 out to the site and looking at it. It hasn't been,
18 what I would call, a standard methodology applied
19 to it. And I can't answer why it hasn't been done.

20 VICE CHAIR MCGRATH: I guess one -- well,
21 I see that there is a date for June, where a
22 Mitigation Monitoring Plan is to be submitted. Is
23 there the capacity to -- you know, the question
24 that we have, and there's always a certain amount
25 of uncertainty around wetlands, and that's why we

1 ended up with mitigation ratios when assessing
2 disturbed habitats. And this is a functioning
3 habitat, but it's disturbed, pretty clear. Is
4 what's the value and what's the level of risk
5 involved with a mitigation measure?

6 Is it possible to have a little more
7 robust discussion of the qualitative nature of the
8 habitat, before and after, as part of that
9 submittal, that might result in a better
10 understanding of, perhaps, some amount of value of
11 habitat here. Although, I'm not convinced at the
12 moment. Or, what kind of habitat permanent losses
13 we're looking at, that could be reestablished in
14 other systems?

15 It's not a lot of time, but at least in
16 theory is there the capacity to have more detailed
17 discussions, qualitatively?

18 MR. LICHTEN: Well, we can certainly have
19 that qualitative discussion. I think that, to a
20 certain degree, that's already incorporated into
21 the Revised Tentative Order's requirements, with
22 the concept of a mitigation to affect ratio.

23 And, so, what do I mean by that? When we
24 look at mitigation, we're often talking about
25 creation for permanent loss. So, with an acre of

1 wetland, we create more wetlands somewhere else.

2 In this case, we're talking about
3 degradation of existing habitat, a reach of creek.
4 And, so, what we've been trying to do is to work
5 with the dischargers to identify places where they
6 can improve other things that are already existing,
7 and a couple of those projects are mentioned in the
8 response to comments. Like, the District is
9 working on, for example, with (inaudible) -- so, I
10 think there are -- just thinking through, okay,
11 what does that mean in terms of what's being
12 degraded and what are the opportunities for
13 improving elsewhere? Well, that's the kind of
14 discussion that we anticipate having as a part of
15 the Order.

16 CHAIR YOUNG: If I could jump in just a
17 little bit, as the staff has mentioned, there are
18 multiple habitat and ecological quality assessment
19 methodologies. Your Chair developed one of them.

20 (Laughter.)

21 CHAIR YOUNG: They all, however,
22 incorporate some fundamentally the same type of
23 approach in terms of looking at both habitat
24 quality, which is kind of -- sometimes is sort of a
25 -- viewed as sort of a snapshot in time, but it's

1 really not. Because you have to look at the
2 ecological function, nutrient cycling, hydrogen
3 morphology, all of the rest. And those usually are
4 called out in an assessment of habitat.

5 In this case, I'm quite comfortable with
6 what the -- with the information that the staff has
7 had available. You don't have to get really
8 precise in order to see the kinds of changes that
9 are going to be occurring here, with this project,
10 between the before project and after project
11 designs, as well as looking at the connectivity
12 above and below. So, I'm not arguing against what
13 you asked for, but just trying to provide some
14 additional context to suggest that the kinds of
15 criteria that the staff has been explaining to us
16 are squarely within the realm of every habitat
17 assessment methodology that I have ever studied.

18 And, in addition to looking at very -- a
19 very small extent of habitat, which might be, you
20 know, just what's within the project reach, from an
21 ecological science viewpoint, it is totally
22 appropriate to look at the more landscape scale
23 effects and look at the effects above and below the
24 project.

25 Fair enough?

1 MS. GLENDENING: I agree.

2 CHAIR YOUNG: All right, thank you.

3 BOARD MEMBER KISSINGER: Just out of
4 curiosity, were the kinds of geomorphic assessments
5 that you described not being done here, were they
6 done on the Lower Berryessa?

7 MR. FERNANDEZ: We'll have to defer to the
8 District on that question.

9 MS. GLENDENING: The Sediment Transport
10 Model covers the Lower Berryessa Project, as well,
11 or accounts for it. In the Corps' Environmental
12 Impact Statement, there's an extensive Sediment
13 Transport Modeling appendix.

14 BOARD MEMBER KISSINGER: I guess what I'm
15 getting at is the habitat values. Were the kinds
16 of assessments, more detailed assessments, more
17 academic assessments made with regard, in the
18 context of the Lower Berryessa Creek, that were not
19 made in the context of the Upper Berryessa Creek?

20 I think one of the struggles here is we've
21 got a bunch of snapshots. They tell a story, but
22 they're a snapshot. An analysis wasn't done in a
23 detailed, rigorous way. And I'm curious, is it
24 useful, if a study was done on the Lower Berryessa
25 reach, to use as a baseline to further buttress the

1 conclusions that are here?

2 Maybe it's hydrologically distinct because
3 it has more inflows from Los Coches Creek, I don't
4 know. But I'm just curious, it's another data
5 point. When we talk about connectivity, it's
6 obviously connected, as well, so --

7 BOARD MEMBER AJAMI: Does the District
8 have any data on this creek at all? I mean, I
9 assume there are -- you know --

10 MS. GLENDENING: Yes, they do have data on
11 the creek. I just want to mention that the Lower
12 Berryessa Project is already certified. And what
13 we're attempting to do is to have waste discharge
14 requirements that are appropriate for this specific
15 project, which will be -- in which the beneficial
16 uses will be impacted.

17 BOARD MEMBER KISSINGER: So, that --

18 MS. GLENDENING: And, you know,
19 connectivity is not a beneficial use. However, it
20 is something that we looked at, related to the
21 impacts in beneficial uses of the project.

22 MR. LICHTEN: It's a good question to ask.
23 If we had more information, would we have a
24 different result here, or more support for the
25 result.

1 BOARD MEMBER KISSINGER: That's actually
2 what I'm getting at, yes.

3 MR. LICHTEN: But what I think is the --
4 what I would say is the design that we see, that's
5 before you today, is really a result of, in part,
6 of the Corps' internal process for a single-purpose
7 flood control channel. Which limits, to a certain
8 degree, I'll say, even what they're allowed to
9 think about as a part of -- or propose as a part of
10 project designs.

11 BOARD MEMBER KISSINGER: I'm a little bit
12 confused. You have a single stream. The Corps is
13 focused, and I'll ask them when they're up, they're
14 focused on this one reach. Why? Because they're
15 building it, okay. But it's connected to, and it's
16 subject to the same 100-year flood requirement
17 right downstream. And there are lots of houses
18 that are subject to the same issues, and lots of
19 businesses.

20 And, so, to look at this and say we're
21 just looking at this one stretch of 2.1 miles, but
22 we don't -- don't look downstream, don't have a
23 consistent design. It doesn't make any sense.
24 But, anyway, I'll -- to whoever the Corps person
25 is, you know where I'm going.

1 BOARD MEMBER BATTEY: So, I might add that
2 I have -- I have two questions. Can I just clarify
3 the wetland habitat, did we see photos of that,
4 already, as part of the stream channel? Is that
5 what you're referring to?

6 MS. GLENDENING: I'll let Xavier answer
7 that question.

8 MR. FERNANDEZ: Yes. I mean, they were in
9 the presentation. It's indicative of wetland
10 habitat. We also look at rivers as a wetland, as
11 our interpretation, which is different than the
12 Corps definition of wetland.

13 BOARD MEMBER BATTEY: But wetland
14 delineations were not done for the project.

15 MR. FERNANDEZ: Yes, wetland delineation
16 per the Army Corps guidelines was done.

17 BOARD MEMBER BATTEY: Okay.

18 MR. FERNANDEZ: For the Federal -- to
19 determine whether there were Federally delineated
20 wetlands.

21 BOARD MEMBER BATTEY: Okay. And I do --

22 MR. FERNANDEZ: And we do have questions
23 regarding that, in that the number -- for the
24 length of stream, there were very few soil picks
25 taken, on the order of just a handful, like three,

1 four. Typically, when we would look at something
2 this long, you would take many more soil picks in
3 order to look for, to see if the hydric soils had
4 developed.

5 BOARD MEMBER BATTEY: Okay. And am I --

6 MS. AUSTIN: Pardon me, one second.

7 There's actually that slide on the jurisdiction,
8 Xavier, and I'm wondering if that would actually be
9 helpful to explain, if the Chair will indulge
10 staff?

11 MS. GLENDENING: I don't -- and I think
12 the bottom line is we're talking about riparian
13 wetlands, which is slightly different and relates
14 to recognize of State Waters, and how we approach
15 beneficial use protection, as opposed to
16 jurisdictional Federal wetlands, which is,
17 basically, a different type of water in this
18 situation.

19 BOARD MEMBER BATTEY: Okay.

20 BOARD MEMBER AJAMI: I mean, they are
21 working on the State's Waters, right, if this is --

22 MS. AUSTIN: Yes, it is State Water.

23 BOARD MEMBER AJAMI: Doesn't that mean
24 that they need to follow State regulations because
25 of that?

1 MS. AUSTIN: We would argue yes.

2 BOARD MEMBER AJAMI: I would think so,
3 too.

4 MS. AUSTIN: So, you saw something like
5 this last month, in a different hearing, and this
6 is sort of a freshwater stream version of what we
7 talked about last month, as it relates to estuarine
8 waters.

9 MR. FERNANDEZ: So, the Revised Tentative
10 Order correctly identifies a reasonable estimate of
11 Waters of the State, which consists of any surface
12 or groundwater. Standard practice for Water Board
13 staff, in the field, is to identify the bed and
14 bank of a creek channel, and vegetation overhanging
15 the channel. Because this vegetation could affect
16 the quality of Waters of the State.

17 Staff then exerts jurisdiction up to the
18 top of the bank of the creek channel, and the areas
19 occupied by vegetation overhanging the channel.

20 This is justified by the Water Board's
21 authority to issue waste discharge requirements
22 under Water Code 13363, for any waste discharge
23 within any region that could affect the quality of
24 Waters of the State.

25 Further, Section 2.2.3, of the Basin Plan,

1 identifies wetlands as frequently including
2 floodplains and riparian woodlands.

3 Section 2.2.3 also notes that we rely on
4 protocols and naming conventions of the National
5 Wetlands Inventory, prepared by the U.S. Fish and
6 Wildlife Service. This figure was provided to us
7 by the District and is from the National Wetlands
8 Inventory. It shows that riverine and palustrine
9 wetlands occur from the low water mark to the high
10 water mark.

11 For the Upper Berryessa Creek, the high
12 water mark is approximately at top of bank. Thus,
13 for the Upper Berryessa Creek Flood Control
14 Project, we claim jurisdiction up to the top of the
15 bank.

16 BOARD MEMBER BATTEY: That's very helpful,
17 thank you. So, my bigger question I think I'm
18 struggling with a little bit is to understand the
19 EIR/what happened on the Federal side, and was
20 there an EIS, or something? And what -- can you
21 talk a little bit about the Board's engagement
22 during that process and communication?

23 MR. LICHTEN: Well, we were, I mean,
24 obviously, we've been engaged in the process with
25 the Water District and the Corps for a long time,

1 talking about flood control project design, about
2 protecting beneficial uses. And, to the extent we
3 can, doing both watershed planning and multi-
4 purpose design, not just for public safety
5 protection.

6 In fact, Bruce reminded us, yesterday,
7 that we're like calling juror number 5 --

8 (Laughter.)

9 MR. LICHTEN: He reminded us, yesterday,
10 that he was in a meeting with District managers and
11 Corps managers, talking about watershed planning on
12 this issue, back in 2004. So, there's that context
13 of the broader discussion.

14 We've also been engaged in this project,
15 at a staff level, since at least 2006. And, then,
16 were in discussions with Paul Amano, as the staff
17 at the time, and then more recently, over the last
18 couple of years, talking with the District prior to
19 their preparation of the EIR, exactly about issues
20 like this.

21 As noted in the response to comments, the
22 Army Corps of Engineers also prepared an EIS, an
23 Environmental Impact Statement. We didn't comment
24 on that because, as far as we can tell, we never
25 received a copy. We were finally able to get a

1 copy, after a long period of requesting it.

2 However, we did submit a lengthy comment
3 letter on the EIR, that was consistent with the
4 discussions we were having with the District at the
5 time.

6 So, I beg your pardon, I'm not sure where
7 else you wanted to go with your question about it?

8 BOARD MEMBER BATTEY: No, I just wanted to
9 understand. And, so, your comments on the --
10 sorry, your comments on the EIR at the time, were
11 reflective of the same conversations we're having
12 today?

13 MR. LICHTEN: That's right.

14 CHAIR YOUNG: Other questions of the
15 staff?

16 All right, I have some more questions.
17 You pointed out that we have used the two-phase
18 permitting approach before. It's my understanding,
19 from reading the responses to comments, that the
20 idea of using the two-phased permitting approach,
21 which would be to first do the certification and
22 then, secondly, do the WDR, was an approach that
23 was agreed upon by upper management from the Corps,
24 and the District, and the Regional Board,
25 specifically on January 4th, 2016. Is that

1 correct?

2 Microphone?

3 MS. WHYTE: Yes.

4 CHAIR YOUNG: And it's part of my
5 understanding that that is what allowed the Corps
6 to proceed, in a timely fashion, with the
7 construction that is ongoing now, because we got an
8 initial -- sorry, I'm having trouble today -- the
9 initial certification out in March of 2016. So,
10 the two-phased approach was designed to make sure
11 that there was no delay in construction and no
12 delay in protecting the BART Station, and the
13 homes, and the businesses around it. And that
14 worked, as far as I can tell. Is that correct?

15 MS. WHYTE: Correct.

16 CHAIR YOUNG: All right, thank you.

17 By the way, I appreciate staff being
18 willing to come up with ideas that work, like that,
19 and I appreciate the fact that you did that. Even
20 though we're here, today, with people complaining
21 about it.

22 So, I'm going to leave it at that, with
23 questions for staff, for the moment. Before we
24 take -- I'm sorry, go ahead.

25 BOARD MEMBER KISSINGER: Actually, I just

1 have one other question I meant to ask, and I'm
2 going to ask it, just to get it out there, to keep
3 off of what Chair Young raised.

4 I share the view that working in a way to
5 allow projects to move forward expeditiously, to
6 avoid being in the way of the right approach, and I
7 want to say that I embrace that, as well. I think
8 that's great that the staff is creative. It's not
9 novel, we've done it before, so it's all to the
10 good.

11 But I guess one thing that I do pause
12 about is the question of kind of the blank check
13 that I'm reading between the lines the District is
14 concerned about. This project went through some
15 cost benefit analysis on the Corps' front. They
16 penciled out on the basis of what they understood
17 the project to be.

18 It's clear from our certification, in the
19 first instance, there would be more to follow.

20 But the question is what? And that's the
21 unknown, based on the additional things that have
22 to be submitted.

23 So, how do we provide comfort beyond trust
24 me that this project won't become, by virtue of the
25 mitigation that's yet to be defined, something that

1 becomes, to use the Corps' terms, you know, not
2 cost effective relative to the benefits? How do
3 we, as a Board, sign off on that where it is
4 uncertain where the mitigation we may ultimately be
5 requiring is -- more than offsets the benefits that
6 come from it?

7 MS. WHYTE: Well, I can say that the
8 District, we feel like we've given them ample
9 opportunity to discuss the mitigation options with
10 us and propose mitigation, and we haven't received
11 anything. So, there would be far more certainty
12 if, indeed, that had already taken place. But we
13 haven't been able to get to that point in the
14 dialogue.

15 When we went into this, in January, we
16 thought we had made it clear that mitigation would
17 be required and the certification, from our
18 perspective, clearly reflects that.

19 So, there could be more certainty about
20 those costs, except that we haven't received
21 anything to help provide that certainty.

22 BOARD MEMBER KISSINGER: Is the reason why
23 the mitigation couldn't be made more certain
24 because the O&M manual hasn't been prepared? What
25 is it -- are the things that haven't been done,

1 that could have been done, that would allow the
2 Mitigation Plan to be crystalized, then?

3 MS. WHYTE: I think the District might
4 tell you they feel like they don't have to perform
5 any mitigation at all.

6 BOARD MEMBER KISSINGER: Well, very
7 clearly.

8 (Laughter.)

9 BOARD MEMBER KISSINGER: But what would
10 have had to have been done before we could then
11 provide clarity that could have been included in
12 the waste discharge requirements?

13 MS. WHYTE: Typically, we would get a
14 mitigation proposal and we'd go back and forth with
15 the discharger about the net environmental benefit
16 associated with that, and weight that in terms of
17 the impacts. And that's typically an iterative
18 process.

19 BOARD MEMBER KISSINGER: But isn't that
20 going to be dependent on the O&M manual that the
21 Corps has to prepare, given the number of things
22 that have to be done?

23 MS. WHYTE: Mitigation for operation and
24 maintenance is something that we haven't discussed,
25 yet. They currently do that, as part of the Stream

1 Maintenance Permit, throughout the watershed. And
2 we've been fairly flexible on working with them,
3 with that.

4 But there is uncertainty because, again,
5 we assert that there will be sediment deposition
6 and need for operation and maintenance, and they
7 disagree. So, in that regard, we'd have to wait
8 until the operation and maintenance activities
9 actually occur. I don't see that as the big ticket
10 item here.

11 The bigger ticket, really, is the
12 mitigation for the impacts associated with the
13 capital project, not the operation and maintenance.

14 So, I think we all agreed to deferring
15 that piece down the road, although we have raised
16 flags of caution that we feel that the design,
17 itself, is going to increase those costs because,
18 from our perspective, there will be excessive
19 sediment deposition, and there will be periodic --
20 more periodic maintenance that's going to be
21 needed.

22 BOARD MEMBER KISSINGER: So, staff's view
23 is -- yeah. Because if there's a source of the
24 problem, it's from the categorical positions that
25 have been staked out, either mitigation required or

1 no mitigation required.

2 MS. WHYTE: Right.

3 BOARD MEMBER KISSINGER: Okay, thank you.

4 CHAIR YOUNG: And just to follow that up,
5 just a little bit. When you were discussing, with
6 the District, your view that mitigation would be
7 required, then were there ideas that you threw out
8 as examples of appropriate mitigation projects that
9 would allow the District to have at least an idea
10 of what the requirements would be, prior to this
11 hearing?

12 MS. WHYTE: We did. From my perspective,
13 I believe we expressed very much a flexibility and
14 willingness to look at other projects that were
15 being done throughout the watershed, other work
16 that was either being contemplated or proposed that
17 would have enhancement to creek systems and
18 riparian systems.

19 We suggested a few ideas. We meet with
20 them regularly, so we do have a good understanding
21 of what's happening in the watershed. So, yes.

22 BOARD MEMBER AJAMI: Can I ask a question?
23 So, you had two examples in your presentation
24 today, one was the Lower Silver Creek, and one was
25 on Lower Berryessa. Are those reaches as long as

1 this project? Do we know the --

2 MS. GLENDENING: If I recall correctly,
3 the Lower Silver Creek Project is being done in
4 phases, and I think it's about six miles. Is that
5 correct?

6 BOARD MEMBER AJAMI: So, if they are not -

7 -

8 MS. GLENDENING: Four miles.

9 BOARD MEMBER AJAMI: -- neither of them
10 are finished. Are they finished, both those two?

11 MS. GLENDENING: Lower Silver Creek is
12 still under construction and -- they're both still
13 under construction.

14 BOARD MEMBER AJAMI: Okay.

15 MS. GLENDENING: So, the Lower Berryessa
16 Project is a little less, two miles.

17 BOARD MEMBER AJAMI: So, who financed
18 those two projects? Is that a District project?

19 MS. GLENDENING: Yes.

20 BOARD MEMBER AJAMI: And they actually had
21 to get a permit. And, then, this one is being
22 financed partly by the Corps?

23 MS. WHYTE: Yes.

24 BOARD MEMBER AJAMI: Okay, so the District
25 is putting some money forward and the Corps is

1 putting some.

2 MS. WHYTE: And, then, the District takes
3 on responsibility for the project down the road,
4 when the Corps finishes.

5 BOARD MEMBER AJAMI: So, they will do the
6 operation and maintenance?

7 MS. WHYTE: Yes, yes.

8 BOARD MEMBER AJAMI: So, my question is,
9 if they are the same size, sort of, right, those
10 projects and this project, and obviously we have
11 two different parties involved in the process, why
12 can't we just look and see, if those projects ended
13 up costing way more? I mean, I still cannot
14 understand why there's hesitation and resistance
15 toward using that model versus what they already
16 have in place.

17 So, trying to understand, is this like a
18 funding issue? Is it more like the style issue, or
19 the sort of preference issue? I don't know, like
20 trying -- style, you know, like we like to have
21 this kind or this is the requirement for us to do
22 it this way, right? So, it might be -- so, I'm
23 trying to understand why? And, also, if it's
24 significantly, if it's going to cost more or less?
25 I'm trying to see, also, if we have any examples

1 for how much it costs for the District to maintain
2 a system similar to what they are implementing in
3 Lower Berryessa and Silver Creek, compared to
4 something that we have already done a billion
5 times, which is what the Corps is doing right now.

6 MR. LICHTEN: Right. Well, this question
7 gets back -- here, we have three projects and they
8 have many similarities, but somehow the designs are
9 different, and why is that?

10 BOARD MEMBER AJAMI: Right.

11 MR. LICHTEN: And, then, as you note, Army
12 Corps of Engineers is involved in the Upper
13 Berryessa Project.

14 So, Tom Pendleton, of the Corps, is here.
15 I think he's put in a card to speak and he may be
16 able to speak more directly to what the Corps'
17 process is.

18 But, certainly, so the design happened out
19 of the Corps' Sacramento District. And I think
20 what he might tell you is that they are restricted
21 or constrained by the idea of a single-purpose
22 authorization. That limits what they can consider
23 as benefits.

24 So, for example, environmental benefits
25 don't help the project to get higher up on the

1 funding list for a single-purpose authorization.

2 And, I guess, from my perspective, there's
3 also a timing constraint. So, here, we have a
4 billion dollars in Federal Grant money to fund the
5 BART extension down to San Jose. That is in the
6 process. And, so, here comes the District, how can
7 they meet their mandate of providing flood
8 protection, in a timely manner, along the BART
9 extension?

10 And, so, one read would be that the Corps'
11 design process moved along at a certain point, at
12 which it was very difficult to make any changes,
13 given the constraints that we have. But, maybe Tom
14 can speak more to that.

15 BOARD MEMBER AJAMI: Okay. And, so, if
16 the -- so, the goal is to make sure that the BART
17 station is built and it's protected, right. I
18 still cannot sort of put my head around it, and I
19 think I'll probably ask Tom, as well. But I cannot
20 put my head around that why? Would this take a lot
21 longer? If, from the beginning, the design was
22 considering environmental purposes, would this take
23 a lot longer to implement, compared to what they're
24 implementing right now?

25 MR. LICHTEN: I think the Corps would be

1 well-positioned to speak to that.

2 BOARD MEMBER AJAMI: Okay.

3 BOARD MEMBER BATTEY: I just have to ask
4 one more about the environmental process, the
5 document process. Under both the State and
6 Federal, and you also have to look at cumulative
7 impact. So, was that done to be able to look at
8 this -- I have not used the word connectivity a
9 lot, but cumulative impacts. It seems like all the
10 projects should have been looked at in one picture.
11 Was that done in the environmental documents?

12 MS. GLENDENING: Yeah, there were
13 cumulative impacts analyses in the EIS and the EIR.
14 But one of the issues is that the beneficial uses
15 in the wildlife, in the project reach, are not
16 entirely recognized as a benefit, as something to
17 protect. So, the --

18 BOARD MEMBER BATTEY: Or, the wetland
19 habitat, or the --

20 MS. GLENDENING: The creek habitat,
21 correct.

22 MR. FERNANDEZ: They're asserting that
23 there are no wetlands on the site. So, that's a
24 difference of opinion that we have with them.

25 BOARD MEMBER BATTEY: And with the other

1 reaches, as well, no wetlands?

2 MR. FERNANDEZ: I don't know whether the
3 upstream or downstream reaches have wetlands.

4 MS. GLENDENING: The lower reach does have
5 jurisdictional wetlands based on the Federal
6 guidelines for delineating wetlands. The Lower
7 Berryessa Project, that is. The current, the Upper
8 Berryessa Project, does not have wetlands as
9 defined in the 1987 Delineation Manual.

10 BOARD MEMBER BATTEY: So, I just want to
11 clarify and maybe staff can just make sure I'm
12 thinking about this the right way, that the Corps
13 may have a mandate to, you know, create a flood
14 control channel, and that's their primary mission
15 of the project. But they also have to meet the
16 environmental requirements under NEPA and CEQA.
17 And, so, they still have to look at watershed
18 values and/or riverine values, or whatever
19 environmental values. Yes, that's still part of
20 the project design? It needs to be, yes?

21 MR. LICHTEN: Yes.

22 BOARD MEMBER BATTEY: Okay.

23 VICE CHAIR MCGRATH: I would hope we can
24 advance to the public comment process part of this.
25 But I spent 16 years getting entitlements for very

1 complicated projects. And when I was really good
2 and my staff was really, really good, we met with
3 all the potential permit agencies ahead of time,
4 and had a pretty good idea of what they wanted and
5 how to analyze it.

6 But you don't always do that perfectly.
7 And I think we made a good faith effort, and I know
8 the Chair and I, both encouraged the staff to try
9 to accommodate the schedule and recognize, first of
10 all, that this is an altered stream that could be
11 further altered with appropriate mitigation. And,
12 second, to accommodate the schedule.

13 That cannot be seen as a commitment to
14 give the project free of any mitigation
15 requirements. That would not be a reasonable
16 interpretation of what we tried to do. We tried to
17 accommodate an imperfect pre-project scheduling and
18 scoping, to try to make sure that they understood
19 all the potential hurdles they might run into.

20 We're still going to have to grapple with
21 whether or not the staff has asked for things which
22 are excessive, given the impacts of the project.
23 And that's what I would like to focus on.

24 And for that purpose, I would like to ask
25 -- I don't really want to hear any more about

1 jurisdiction. I read, or spent Friday, Saturday
2 and Sunday not just reading the staff report, but
3 going on the website and looking at the comment
4 letters. I read them all and I read the responses.
5 I don't want to hear about jurisdiction and that
6 you can't do this to us. I mean, you can do that,
7 if you want.

8 But the question here is what's the
9 appropriate mitigation for the remaining impacts
10 from that? And there's too little discussion in
11 the comment letters on that. There's pretty good
12 responses but -- and it's specific to whether the
13 biological values before and after, and what's the
14 sediment impacts of the project. And these are
15 important issues.

16 I mean, my specific study field was
17 sediment motion in streams. There are a number of
18 very famous projects, like the San Lorenzo River,
19 where they didn't show estimates for the Federal
20 projects, were two orders of magnitude less than
21 what actually deposited in the channel.

22 Methods are better, now. But I think
23 these are the relevant questions that we need to
24 get to is what's the -- what's the nature of the
25 habitat resources, and it's more than just

1 Federally jurisdictional wetlands. What will be
2 changed? And what can be done to make up for that?

3 CHAIR YOUNG: All right, I actually have
4 one follow-up question, before we keep going here.
5 And that was to follow up on the question that Mr.
6 Kissinger raised about the potential open-endedness
7 of the requirements that might be placed upon the
8 District, and perhaps even the Corps, in dealing
9 with the -- or responding to sedimentation.

10 So, where we stand now, as I understand
11 it, is that we have models that say one thing about
12 sedimentation, and the Corps and/or the District
13 seem to have models that say another thing about
14 sedimentation, and they don't overlap. You know,
15 the Corps and the District think that there's not
16 going to be any sedimentation and we think that
17 there is going to be.

18 So, the solution that the staff, or that
19 the proposal that we're discussing today puts
20 forward is a combination of two things. And I'm
21 stating this as a fact, but I'm really wanting to
22 ask this as a question, just to make sure I've got
23 this right. That the Corps has performance
24 standards that it refers to, and triggers that it
25 refers to when -- as to when maintenance is going

1 to be required, after a certain amount of
2 sedimentation occurs. So, a certain amount of
3 sedimentation occurs, it gets over their number,
4 and they say, okay, got to do something.

5 The way we have decided to deal with the
6 fact that our models don't agree is that we're just
7 going to let mother nature run the experiment, go
8 out and monitor how much sedimentation is
9 occurring. Refer back to the Corps requirements
10 for how much is acceptable. And then, at that
11 point, determine when and whether the maintenance
12 needs to be done in terms of clearing out the
13 sedimentation.

14 And that that is all wrapped up in our
15 Adaptive Management Report requirement.

16 So, is that a fair summary of what's going
17 on here in terms of dealing with the sedimentation
18 question?

19 MS. FRUCHT: I would just like to clear --

20 MS. WHYTE: Setenay, introduce yourself.

21 MS. FRUCHT: Yes. I'm Setenay Frucht. I
22 worked on the sediment assessment for this project.
23 I wouldn't characterize as our model's not
24 overlapping. We did not develop our own models for
25 sediment transport.

1 We have reviewed the EIS/EIR information
2 provided. We have reviewed other existing
3 documents on the geomorphology of the project
4 reach.

5 We also have reviewed the sediment
6 transport modeling that was developed by the
7 District's consultant.

8 We all agree that widening the creek will
9 result in increased sedimentation. However, where
10 we disagree is that they characterize the reach as
11 erosional, or somethings passing sediment to
12 downstream reaches.

13 Whereas, we say that the records show that
14 there has been sedimentation in the last 40 years,
15 and if we increase it, it will get worse, and you
16 will have to manage the system more than what's
17 going on right now.

18 We also looked at as-built plans, provided
19 by the District, that they were stamped and signed
20 documents. Which were later clarified that they
21 weren't as the plans.

22 However, those cross-section information,
23 what the river channel looked like in 1970s, were
24 provided to us. And the 1970s cross-section shows
25 that the creek channel, before the previous

1 project, looked exactly like what it looks like
2 now. Which indicates that before the 1960s -- '70s
3 projects were constructed the creek channel is
4 where it is now. And the creek, this is the
5 equilibrium condition for the creek, and that it is
6 not erosional at the moment.

7 There are erosional reaches, localized
8 points. However, we do not think that the creek,
9 overall, is showing any signs of, you know, long
10 reach length erosion or instability.

11 MR. LICHTEN: Dr. Young, as you point out,
12 the intent is to take a look at the built design
13 and how it's functioning, and to move forward from
14 there.

15 CHAIR YOUNG: Based on monitoring.

16 MR. LICHTEN: That's right.

17 CHAIR YOUNG: Through the course of the
18 project. All right.

19 MS. GLENDENING: And I wanted to add one
20 more point, is that the Corps' EIS states that they
21 are planning to do some monitoring of the creek
22 channel post-construction, to inform O&M. So,
23 we're piggybacking, so to speak, onto that same
24 monitoring to fold it into the Adaptive Management
25 Plan.

1 CHAIR YOUNG: Right. Very good. I think
2 that we don't have any more questions. Before we
3 take a break, I would like to further provide
4 anyone on the Board, who wishes to, the opportunity
5 to do what Jim just did, which is to highlight,
6 briefly, any issues that you are hoping that the
7 interested parties will particularly comment on.
8 We do this, hopefully, as a courtesy to the
9 interested parties, so that you can see where our
10 brains are going, and direct your arguments
11 accordingly.

12 So, is there anyone else who wants to do
13 that, at this point?

14 BOARD MEMBER AJAMI: So, I just want to
15 again reiterate what I mentioned earlier, which
16 Keith said that Tom, and the rest of the District
17 staff might discuss, which was the comparison
18 between these different projects and how we ended
19 up with such different designs, considering the
20 similarity of these projects. It's just
21 interesting to see why and how.

22 CHAIR YOUNG: All right.

23 BOARD MEMBER BATTEY: You know, I wrote a
24 few notes to myself here and, so, just in the
25 interest of maybe being helpful. I think it makes

1 sense to talk about what's a positive path forward
2 from where we are, so I agree with that.

3 But I also wrote a note about, just when I
4 look at the photographs, I would think that we
5 would come up with something that looks at least as
6 good a habitat or value, as it is now. Which is
7 not prime habitat, from my look at the photos. But
8 that we, you know, sort of leave things at least as
9 well as we found them.

10 BOARD MEMBER KISSINGER: And an issue or
11 two, points that have already been made. I'd like
12 to hear from the District and the Corps a little
13 bit more about what they understood was being
14 agreed to when the certification was issued. I
15 mean, in reading the comments, there's a whole
16 series of legal hurdles that have been erected.
17 Once the certification's issued, there's no
18 opportunity to go back and add anything further,
19 what's done is done and this is somehow unfair and
20 wrong.

21 But it's plain from the materials that
22 there was a robust discussion that went on between
23 all the parties, that there would be waste
24 discharge requirements coming. And I want to
25 understand the extent to which the Corps and the

1 District made plain, at the time, no, one shot at
2 this. We're going to do this, now, and that's it.
3 I'd like to understand that better.

4 CHAIR YOUNG: All right.

5 VICE CHAIR MCGRATH: Since we're going to
6 need to dig into sediment a little bit, I'm going
7 to put on the record what's in the EIR, and the
8 ultimate question. Streams are affected by not
9 just the 100-year flows. But, in fact, it tends to
10 be about the one-in-ten years flow that determines
11 what their morphologic looks like.

12 And those streams with thick, and
13 resistant vegetation don't erode so much, but a
14 certain amount does.

15 The District and the Corps have completed
16 an EIR that has really rapid velocities during the
17 100-year storm for this. They're all over 8 feet
18 per second. Most of them really don't go down
19 appreciably, accordingly. But that's just the 100-
20 year design.

21 So, I think what we need to do is have
22 some understanding of the value of the stream as it
23 changes in big storms. I mean, if everything
24 washes out in 100-year storms, in the existing
25 condition, in the proposed condition, that's

1 important to know.

2 But if it doesn't wash out until you get
3 to a very rare storm, then the interim habitat has
4 real value and real duration.

5 It's pretty clear to me that post-
6 construction, with the amount of rock in the
7 stream, although the stream's going to rearrange it
8 to some degree, it's not going to have the ability
9 to down cut and create the microtone that generally
10 gives it habitat value, gives it -- so, I'm not
11 going to believe anybody that tells me the stream's
12 going to have the same habitat value. But I do
13 want to understand how you expect it to evolve over
14 time. Velocities only in the 100-year storm don't
15 provide much of an answer about the evolution of
16 the habitat resource over time, and whether or not
17 it might re-evolve into at least some habitat
18 value. So, I'd like to hear some discussion of
19 that, just because I'm a sediment nerd.

20 (Laughter.)

21 CHAIR YOUNG: Yes, Ms. Austin?

22 MS. AUSTIN: I don't have a question. I
23 wanted to mention, while we're on a break, I was
24 going to make available to Mr. McGrath, the portion
25 of the EIR specifically regarding Impact Bio 3,

1 which identifies significant impacts to mature
2 vegetation. You had a question about that. And
3 then, also identifies the need for mitigation.

4 And, also, if Ms. Battey is curious or
5 interested in reading more about cumulative
6 impacts, I'm happy to make Section 4 of the EIR
7 available to her.

8 So, letting folks know that, on the
9 record, if anyone else would like to review any of
10 the EIR, I'm happy to let you have at it.

11 MS. WHYTE: Counsel for the Water District
12 just brought to my attention that there's one
13 commenter who has to leave fairly soon, and would
14 appreciate the opportunity to speak before the
15 break.

16 CHAIR YOUNG: Yeah, can you tell me your
17 name?

18 MR. SANCHEZ: Joseph Sanchez.

19 CHAIR YOUNG: And you are with -- sorry,
20 we have a number of cards.

21 MR. SANCHEZ: (Off-mic comment.)

22 CHAIR YOUNG: Okay. Yes, we're nice
23 people, we'll do this.

24 (Laughter.)

25 MR. SANCHEZ: Thank you, Madam Chair, and

1 the Board, for being considerate.

2 Hello, my name is Joseph Sanchez. I'm
3 here, representing the Santa Clara Building and
4 Construction Trade Council.

5 I would like to start off by saying that I
6 urge the Regional Board to authorize the
7 implementation of the Berryessa Project, without
8 the proposed WDR requirements.

9 Adoption of the Tentative Order could, at
10 a minimum, result in significant delays for the
11 project. And both the jobs and flood protection it
12 would provide lean to long-term waste of the public
13 funds.

14 This will be not just residents, schools,
15 businesses, and the new BART Station and rail lines
16 vulnerable to flood damages, but also would deprive
17 our community of critical jobs and impact our local
18 and regional economy.

19 Therefore, workers can't get to their jobs
20 because the BART Station is flooded.

21 Therefore, we can't afford attaching a
22 Tentative Order for waste discharge requirements
23 for the Milpitas BART, which could undermine the
24 project. Thank you.

25 CHAIR YOUNG: All right, are there

1 questions for Mr. Sanchez, from the Board?

2 Seeing none, all right. Thank you.

3 We will take a short break. And when we
4 reconvene, we'll try and have a game plan for
5 making sure everyone doesn't starve before we get
6 done with this item. Thank you.

7 Let's see, let's take at least 10 -- I
8 think it's going to take 15 minutes, so 20 to 12:00
9 by that clock.

10 (Off the record at 11:26 a.m.)

11 (On the record at 11:48 a.m.)

12 CHAIR YOUNG: Let's proceed, then. Let's
13 let the record show that we are all -- the Board
14 Members are all reassembled and we're going to go
15 ahead with the testimony, now.

16 Is there anything I need to know before I
17 start calling the first set of cards?

18 All right. We have a number of cards. We
19 have cards from the Corps, cards from the District,
20 and several cards from interested parties. So, I'm
21 going to go ahead and ask that Tom Kendall, from
22 the Corps of Engineers, who is the first card I
23 have, is he back in the room, yet?

24 VICE CHAIR MCGRATH: Go Bears.

25 (Laughter.)

1 VICE CHAIR MCGRATH: Tom knows.

2 MR. KENDALL: Hi, I'm going to make my
3 remarks very brief.

4 CHAIR YOUNG: I assure you, this never
5 affects his judgment on any particular issue.

6 (Laughter.)

7 VICE CHAIR MCGRATH: Beyond what it
8 should.

9 (Laughter.)

10 MR. KENDALL: No bias, okay.

11 CHAIR YOUNG: Thank you. Welcome.

12 MR. KENDALL: Yeah, my name's Tom Kendall.
13 I'm Chief of Planning, with the San Francisco
14 District of the Corps. We currently have the joy
15 of partnering with the Water District on this
16 project.

17 And I guess I'll just jump into my
18 remarks. Is that how this goes? Okay, so --

19 CHAIR YOUNG: And you're going to mention
20 that you took the oath?

21 MR. KENDALL: What?

22 CHAIR YOUNG: You're going to mention that
23 you took the oath. Right now. Yes?

24 MR. KENDALL: I'm still missing it.

25 CHAIR YOUNG: I'm sorry. Did you take the

1 oath?

2 MR. KENDALL: Did I?

3 CHAIR YOUNG: Take the oath?

4 MR. KENDALL: Oh, I did the hand raise
5 over here, yes. Yes.

6 CHAIR YOUNG: Perfect.

7 (Laughter.)

8 CHAIR YOUNG: Now, you may jump into your
9 remarks.

10 MR .KENDALL: Okay, thank you. Sorry, I'm
11 just not used to being asked about oaths.

12 (Laughter.)

13 MR. KENDALL: Okay. So, yeah, the Corps
14 is thankful that we do have the Water Quality Cert
15 we do. We appreciate the timeliness of the
16 issuance of that, and it is allowing us to proceed
17 with an important flood risk management project in
18 the area we've been talking about.

19 The Corps does not, though, see itself as
20 a party to the waste discharge requirements that
21 are mentioned in the Tentative Order. Our Legal
22 Counsel, Mary Goodenough, is here, if we really
23 want to have a discussion about the applicability.
24 I'm just going to gloss over it at this point,
25 though, unless there are questions for Mary.

1 So, we would propose continuing
2 construction per the Water Quality Cert. And,
3 then, if waste discharge requirements are necessary
4 for permitting of the subsequent operation and
5 maintenance of the project, then our sponsor, the
6 Water District, would obtain those in the future.

7 And, then, independent of seeking a waste
8 discharge requirement, we are supportive, and this
9 is something we talked about with the Board staff,
10 on Friday, of working with the Water District and
11 the Board on a memorandum of understanding that
12 would explore our environmental restoration
13 opportunities that are consistent with our
14 collective goals.

15 Again, I think you've heard the rest of
16 these bullets before, but I'll just state them for
17 the record. This is an important public
18 infrastructure project, supporting a very
19 substantial Federal -- by very substantial Federal
20 funding.

21 It would remove 650 parcels from the flood
22 plain, benefitting local residences, businesses,
23 and schools.

24 And without the project, the damages to
25 the area from a flood event could be as high as

1 over \$500 million.

2 And, then, of course, the project does
3 protect the \$2.3 billion BART Station.

4 So, that's my statement for the record.
5 And I know there were questions of the Corps that
6 came up during the Board discussion, so do you want
7 me to step into some of that?

8 CHAIR YOUNG: Please do.

9 MR. KENDALL: So, the one I noted was, you
10 know, why does some of the Corps projects have more
11 restorative cross-sections than others, in terms of
12 the way the rivers are shown being managed?

13 And there was a lot of talk about this
14 idea of single purpose. So, this project was done
15 not under my particular watch, but as a single-
16 purpose flood risk management project. Can we do
17 flood risk and ecosystem restoration? Absolutely.

18 We have different metrics that are used to
19 justify the restoration outputs, when we do those
20 kind of combined projects. And they do take,
21 generally, a little longer to formulate because
22 you're kind of answering to two metrics.

23 We can take those through a process,
24 recommend them to Congress, and get them
25 authorized.

1 For reasons that I can't speak to, this
2 one was not done that way. To go back and try to
3 do that now is clearly a time issue. We're already
4 in construction.

5 And, yeah, so what we would do with single
6 purpose, of course, is make sure that we have
7 either avoided, minimized, or mitigated any
8 impacts. And that's where much of the debate is.

9 And we're not going to get into that here.
10 We have the NEPA and CEQA processes that somewhat
11 address that up to this point. And I know some of
12 the Water Board presentations will speak more to
13 that.

14 But as a single-purpose project, the
15 conversation shifts to, you know, what is
16 appropriate avoidance, minimizing or mitigating.
17 Not opportunities to create additional habitat
18 going forward with something more restorative.

19 We do have a process that, again, but it's
20 not one that was done here.

21 I don't know if that answers the question
22 on that but --

23 BOARD MEMBER AJAMI: Chair, can I ask a
24 follow-up question?

25 CHAIR YOUNG: Yes.

1 BOARD MEMBER AJAMI: So, and this is just
2 for my understanding, based on what I read, as on
3 your comments. So, we got into this process late;
4 is that correct? So, by the time you got the EIS,
5 it was already done. Am I right or am I sort of
6 off?

7 MR. LICHTEN: Well, if I think about it
8 this way, you can say was there enough space in the
9 Corps process of getting budgets and approvals to
10 do the project, given the potentially several years
11 it can take to change course, to change the design
12 at the time the Water Board staff got involved in a
13 more detailed way.

14 So, given the multi-year process that it
15 can take the Corps to do that change, probably not.

16 BOARD MEMBER AJAMI: So, we did -- so, we
17 were not involved in that earlier process, that's
18 what I'm trying to ask, to tell the Corps what
19 would have been multi-purpose.

20 MR. LICHTEN: We were not sitting with
21 Corps staff as they were doing the design. We
22 provided input on the project, in a general way, as
23 early as 2006.

24 BOARD MEMBER AJAMI: Okay. And,
25 unfortunately, you mentioned that you haven't been

1 involved in the design of this project, so I think
2 maybe it's not fair to ask some of these questions
3 of you.

4 But I wonder if -- and I assume at this
5 point it's too late. So, I'm wondering like why --
6 this is a broader question, which is why this
7 coordination has not happened earlier, that we can
8 have that input into the process. That way, we
9 don't end up here having this conversation.

10 MR. KENDALL: And, again, it was our other
11 office, as far as did that. So, this is
12 secondhand. But what I've told is that
13 distribution did happen on the NEPA document, that
14 was inclusive of the Water Board. So, that's what
15 I've been told. I think our response here's pretty
16 spun up on that. They were part of that.

17 BOARD MEMBER AJAMI: And just for my
18 information, imagine if we were having this
19 conversation, I don't know, ten years ago, I guess,
20 and the State would have mentioned that this is the
21 requirements to build this reach, or do the flood
22 protection considering ecosystem requirements.
23 Would that be sort of considered as part of the
24 process or not?

25 MR. KENDALL: So, let me see if I

1 understand the question. So, had we been
2 approached a decade ago, during the planning
3 process for this study, to do more of a, whatever,
4 set back levees, and meandering channels, and so
5 on, could we have done that?

6 BOARD MEMBER AJAMI: Right.

7 MR. KENDALL: And I guess the -- I
8 apologize, but the answer is it depends. We would
9 look at whether we could justify that, either as
10 appropriate mitigation, which is in some ways a bit
11 of the form of the discussion we're still having
12 today. Or, could we justify it as a ecosystem
13 restoration investment, because we have benefits
14 both of the flood risk sort, and the restoration
15 sort. And like I said before, there are metrics
16 associated with those. And if you can show that
17 the benefits exceed the cost, we can make a
18 recommendation to Congress that that be the form of
19 investment that we participate with our sponsor in.

20 BOARD MEMBER KISSINGER: So, I have a few
21 questions. Let me just pick up a little bit on
22 Board Member Ajami's piece, but I won't belabor it.
23 And just to echo what I said earlier.

24 I mean, it's probably too late to do
25 anything more and probably, clearly, you've got

1 guys out there working. The design is what it is.
2 The train has left the station long ago.

3 But I do find it remarkable that you have
4 one contiguous waterway, for lack of a better word,
5 and two vastly different approaches being
6 undertaken. And I guess I'm curious, and you may
7 not know the answer to it, what, if any,
8 coordination was there made between these two
9 different jurisdictions, doing work on exactly the
10 same waterway, presumably for the same purpose,
11 which ultimately includes flood control?

12 MR. KENDALL: Yeah, again, I wasn't part
13 of that. But, obviously, you know, a good planner
14 should be looking both upstream and downstream,
15 figure out what's connecting and the best way to do
16 that.

17 BOARD MEMBER KISSINGER: Yeah.

18 MR. KENDALL: Just a generic response,
19 sorry. Yeah.

20 BOARD MEMBER KISSINGER: It's amazing to
21 me, in 2016, that that still happens. But, okay.

22 Let me go back to the question that I
23 asked, that I'd like to understand better. I'm
24 looking at the 401 Certification, and it says, on
25 the second page, in I guess the second full

1 paragraph, "Subsequent to issuance of this
2 Certification, the Water Board will consider
3 adoption of waste discharge requirements, and the
4 District named as a permittee for the project."
5 And, then, it lists a series of things that would
6 be included in the WDR.

7 You said, at the outset, that the Corps'
8 position is that it's not subject to waste
9 discharge requirements. Are you speaking broadly,
10 or only in the context of the Tentative Order here?
11 Which is to say, had there been a singular process
12 at the outset, rather than this two-step process,
13 would the Corps have found itself bound by the WDR
14 then, or is it because of the two-step process that
15 it's not required or not bound by the WDR?

16 MR. KENDALL: Yeah, this is where I
17 probably want Mary to maybe step in, as our
18 counsel. But I think it's both. I think there
19 was, from a process stand point, not an
20 understanding that we would be named in a
21 subsequent WDR. And then, historically, we don't
22 view those as the appropriate vehicle to regulate
23 us. We have accepted them in the past, simply
24 because the content was somewhat noncontroversial,
25 and we were agreeable to what it was asking us to

1 do. But we probably would have taken issue with
2 the label on it. We prefer a Water Quality Cert.

3 So, that's my layman's answer. I don't
4 if, Mary, you want to --

5 MS. GOODENOUGH: I do just want to mention
6 that -- I'm sorry, for the record, yes, I took the
7 oath.

8 CHAIR YOUNG: And your full name and
9 position?

10 MS. GOODENOUGH: And my full name is Mary
11 Goodenough. Just like it sounds, opposite of
12 "Badenough."

13 (Laughter.)

14 MS. GOODENOUGH: And I'm the District
15 Counsel for the San Francisco District Corps of
16 Engineers.

17 And I do appreciate, for the record, what
18 the Water Board has done, because I advise on both
19 sides. It's kind of schizophrenic role. On the
20 one side, I advise our regulators and ensure that
21 they comply with the 404(b)(1) guidelines, and that
22 we promote the no net loss of wetlands, et cetera.
23 And I see how hard they've worked on this.

24 But on the other side, I also advise our
25 planners, and our builders, and our non-Federal

1 sponsors as to how we can comply with all the
2 Federal laws, and the waivers of sovereign
3 immunity.

4 In this -- I have to say, in the 26 years
5 I've been advising the District, I have never seen
6 an instance where we have been so far apart with
7 the Water Board. Usually, I look at them as our
8 partners and we generally resolve everything.

9 But it seems that we're not agreeing on
10 the law. We're not agreeing on the facts. And
11 we're not agreeing on the policy.

12 And I just want to repeat something I
13 learned in law school. If we've got bad facts, it
14 makes bad case law. So, let's not get into any
15 litigation here.

16 But for the record, also, we don't believe
17 we are subject to waste discharge requirements.
18 But if the conditions are reasonable, and in most
19 cases the Water Board has been very reasonable, we
20 accept them. And we say, we agree to disagree.

21 You call it WDR and I call it 401 Cert.
22 You call it tomato, I call it tomato. But we agree
23 with the principles of what's going on .

24 But in this case, the reason why we are
25 standing up and saying this time we're not taking a

1 WDR is because the conditions just do not appear to
2 be reasonable in this instance. But, anyway, any
3 questions of me?

4 CHAIR YOUNG: Um --

5 BOARD MEMBER KISSINGER: Go ahead. I'll
6 have more, but go ahead. No, I'm going to take a
7 break for now, I want to think about that.

8 CHAIR YOUNG: Can you elaborate on which
9 conditions you are particularly concerned about?

10 MS. GOODENOUGH: We're very concerned
11 about the mitigation. We see no Federal
12 jurisdictional waters, wetlands here. And,
13 therefore, there's no Federal no net loss to be
14 had. That, to me, is very problematic.

15 Also, from an authority stand point, kind
16 of touching on what Tom was talking about, to
17 propose a \$20 million plus mitigation, for a \$30
18 million project, is certainly outside the authority
19 of what Congress has ever contemplated.

20 We had a similar situation, actually not
21 with the State Resource Agency, but with NMPS
22 (phonetic), on the Russian River. They issued a
23 biological opinion, a few years ago, that was going
24 to require us to create a \$30 million plus project,
25 downstream of our Warm Springs Dam. We let them

1 know, in no uncertain terms, that that would not be
2 a reasonable and prudent measure because it was not
3 something that we're authorized to do.

4 So, likewise in this case, we can only do
5 what Congress authorizes us to do, and we are
6 authorized to do a single-purpose flood risk
7 management project. And to allow -- to add on a
8 \$20 million project, that is just \$10 million shy
9 of the total cost of what Congress contemplated, is
10 outside of any scope of authority that we have.

11 CHAIR YOUNG: Just to follow up on that,
12 the mitigation that is being required, in the
13 discussion that we had after and during the staff
14 presentation, Ms. Whyte was speaking in the context
15 of the District, actually, doing mitigation
16 projects, and rolling it into much of the other
17 work that they do.

18 And I'm wondering if there is an agreement
19 that you have with the District, that we haven't
20 seen, that says you guys are going to have to pay
21 for the mitigation or --

22 MS. GOODENOUGH: Well, we're named on the
23 WDR. That's one of the parts that's problematic.
24 Being named on the WDR inures that condition to
25 us, as well, and so it becomes subject --

1 CHAIR YOUNG: Only if the District does
2 not complete the compensatory mitigation, then
3 you're afraid that you would have to be the
4 backstop. Is that it, am I interpreting your
5 answer correctly?

6 MS. GOODENOUGH: Well, that's part of it.
7 But the other part of it is, as I said, it's an
8 authority issue. We've been authorized to only
9 construct the project that's already been analyzed
10 in the NEPA document, and in the decision
11 documents. We're too far down the road to be able
12 to reverse what we do under this project.

13 CHAIR YOUNG: Okay. And you just
14 mentioned a \$20 million price tag.

15 MS. GOODENOUGH: Right.

16 CHAIR YOUNG: That I think was also
17 mentioned in some comments from the District. I
18 didn't find anywhere else in the record, any
19 documentation of why the \$20 million was an
20 estimate. I mean, where that came from?

21 MS. GOODENOUGH: That's the 20 acres, plus
22 whatever project would be proposed. I can't speak
23 to the details of that. I think, perhaps --

24 CHAIR YOUNG: So, was that the District's
25 calculation, and now yours?

1 MS. GOODENOUGH: Yeah, I believe it is. I
2 hope I can be -- yes, that's the District's
3 calculation.

4 CHAIR YOUNG: Okay. We'll ask them about
5 that, then.

6 I'm going to have a -- as long as I'm on a
7 roll here, I'm going to go ahead and ask a couple
8 of other questions and then we'll turn it back to
9 the rest of the Board Members.

10 I noticed on your comment letter, of
11 September 19th, on the first page you -- at the
12 bottom of the page, and these are the comments that
13 our staff has labeled C4B and C4C. I think
14 everyone has a copy of that.

15 That's where you -- you, the Corps asserts
16 that the -- that if the Board adopts the proposal
17 today, the proposed combined cert and WDR, that you
18 might have to cancel the project right in the
19 middle. And taking your second argument, first,
20 the letter says, "The mandate to review the plans
21 and specifications for a project that is already in
22 construction could result in either a stop work
23 order or termination."

24 And I looked back to the list, for example
25 in finding 3, of the plans that were -- are being

1 required, and there's the Adaptive Management Plan.
2 There's the Mitigation and Monitoring Plan. And
3 there's the Post-Construction Stormwater Plan.
4 And, again, these are things that are all very
5 familiar to the District, and something that they
6 would ordinarily not be confused about, if they
7 came to the Water Board for a WDR.

8 I can't see why any of those three plans
9 would result in a stop work order. I just -- I
10 mean, they're plans for things that are going to
11 happen after construction, so I don't understand
12 why they could stop the project in the middle.

13 MS. GOODENOUGH: I --

14 MR. KENDALL: Do you want me to --

15 MS. GOODENOUGH: Yeah, please, Tom.

16 MR. KENDALL: I think that might be -- I'm
17 trying to be diplomatic. There might be a little
18 sensationalism with that.

19 (Laughter.)

20 MR. KENDALL: If we know that our project
21 has a new debt, shall we say, associated with it,
22 as soon as we identify that, we're supposed to tell
23 the appropriators and all that, that, you know,
24 things have changed. And, so, there is a scenario
25 whereby we'd be told, okay, you shouldn't be

1 spending that money. You're not, you know,
2 proceeding in good faith.

3 So, that's kind of what's behind that
4 comment. I think, as you describe it, those are
5 items that probably would not cause that big of an
6 impact. But, again, with the 20 acre number out
7 there, there was fear that that could have been the
8 way it would have played out.

9 BOARD MEMBER KISSINGER: Notwithstanding
10 the Corps' view that it's not subject --

11 MR. KENDALL: Well, exactly, right. Yeah,
12 that's a valid point. So, we're proceeding with
13 the idea that we've got a Water Quality Cert. So,
14 there really isn't anything going on in this
15 dialogue that should we reaching in and changing
16 how we've described the cost to finish the project.

17 BOARD MEMBER KISSINGER: So, it would be
18 fair to say that, having launched the project, it's
19 going to continue through conclusion, regardless of
20 what we do here today?

21 MR. KENDALL: We view this as a waste
22 discharge requirement function with our sponsor,
23 and we're here to support them.

24 BOARD MEMBER KISSINGER: The District.
25 Understood.

1 MR. KENDALL: Yeah.

2 BOARD MEMBER KISSINGER: I don't know if
3 either of you were participants in the meetings
4 that took place between the Water Board staff, and
5 the Corps, and the District, where this issue was
6 discussed, as I understand it. If you were, and
7 even if you weren't, did the Corps articulate its
8 views about the waste discharge requirements, then?
9 Was it, as has been characterized by the Water
10 Board staff, being -- was the Corps -- were the
11 Corps representatives urging Water Board staff to
12 take this two-step process, or embracing this two-
13 step process in order to meet the timelines
14 associated with the appropriations?

15 MR. KENDALL: And I wasn't in the actual
16 conversation that you're referring to. I do know
17 that we see -- you have it there, Mary, yeah.

18 MS. GOODENOUGH: Yeah.

19 MR. KENDALL: Yeah, so in March -- I think
20 the discussion you're referring to was in January.
21 And as I understand it, the people from the Corps
22 side of that conversation felt that, sure, there
23 was the possibility that, you know, is often is the
24 case, you know, with an O&M, you're going to have a
25 WDR discussion between your sponsor and the Water

1 Board.

2 So, I think the thinking was that any WDR
3 type requirements would be kind of consistent with
4 that, and/or whatever -- I mean, maybe there was
5 going to be some side deals between the sponsor and
6 the Water Board. But we were not planning to
7 change a Federally authorized project as a result
8 of some Phase 2.

9 And, then, yes, we do have, I guess, in
10 the correspondence that came out in March, the
11 statement that the Board will consider, and I
12 emphasize that word, adoption of waste discharge
13 requirements, with the District named as the
14 permittee for the project.

15 So, that was, you know, when we started
16 seeing some paper trail on that.

17 BOARD MEMBER KISSINGER: But you're not
18 suggesting -- are you suggesting that that language
19 was such that the Corps had no understanding that
20 the Water Board would, in fact, issue waste
21 discharge requirements? I guess --

22 MR. KENDALL: I think it was -- my
23 understanding was that we certainly would have
24 anticipated that that was going to happen. But
25 again, our perception would have been that it

1 wasn't something that would affect the Federal
2 Water Quality Cert.

3 BOARD MEMBER KISSINGER: Yeah.

4 MS. GOODENOUGH: Excuse me. And I think,
5 speaking to my subordinate, who is now out of the
6 office for a while, who really was dealing with
7 this case, she did tell me that it was somewhat of
8 a surprise to her that the Water Quality
9 Certification was going to be rescinded. And
10 that's something that we believe is not supported
11 by the case law or by Section 401 of the Clean
12 Water Act.

13 There are certain conditions that have to
14 be in place for the Water Board to have the
15 authority to rescind a Water Quality Certification.
16 And I think this is the first time, in my 26 years,
17 that a Water Quality Certification has ever been
18 rescinded.

19 BOARD MEMBER KISSINGER: Yeah. I mean,
20 it's a challenge. I mean, I take your point, it's
21 a challenging issue from a legal perspective. But
22 it's offset by what I understood was the need for
23 speed here, and the need to get this done. Which
24 all of the project sponsor, and the Corps, were
25 pushing for. So, it's a little bit difficult to

1 make that argument when the goal here was to
2 accomplish this project moving forward. So, I take
3 a little bit of issue on that score.

4 Ms. Goodenough, I don't know if you're in
5 a position to comment on it, but you raised it, so
6 I'll ask you. Why is there such a black and white
7 difference between the facts on the ground as
8 viewed by the staff and viewed by the Corps. I
9 mean, you were here for the presentation of the
10 photos. You know, they're a snapshot in time, it's
11 a moment.

12 But you look at these streambeds and they
13 certainly don't look to be the sort of a
14 desiccated, barren, waterways that are identified
15 in the materials that the Corps and the District
16 have submitted.

17 It's honestly like two different universes
18 out there and I can't make heads or tails of it.
19 Why is there such a difference?

20 MS. GOODENOUGH: I'm asking myself the
21 same question. I just started on this project on
22 Friday, and I read the comments last night, on the
23 website.

24 (Laughter.)

25 MS. GOODENOUGH: And I'm saying, why do we

1 have Kramer v. Kramer on such a small project.

2 (Laughter.)

3 MS. GOODENOUGH: It's baffling to me, as
4 well. And I think maybe the Water District can
5 speak better to the factual disputes, and the
6 science, and whether the pictures were the site
7 that's being constructed versus upstream and
8 downstream. But, I'm sorry, I don't know the
9 answer to that. I'm equally as puzzled.

10 BOARD MEMBER KISSINGER: Yeah, thank you.

11 CHAIR YOUNG: I would say you're doing
12 pretty well, as a quick study here.

13 (Laughter.)

14 CHAIR YOUNG: We all appreciate your
15 efforts.

16 I just wanted to clarify one thing that I
17 think I understood from your answer. With respect
18 to the mitigation requirements, your concern is
19 that if you would suddenly become responsible as
20 the Corps, for the mitigation requirements, that
21 you would then have to alert people up the chain.

22 I can't imagine a situation where, let's
23 say, this Board would adopt the proposal today, we
24 would all carry on and the Water District would
25 come back with a proposal for compensatory

1 mitigation, either as part of their one water plan,
2 or something that was in the works beforehand, and
3 is going to be enhanced, and the Corps never
4 actually does get put on the spot to be the backup
5 funder for the mitigation.

6 Under that circumstance, am I correct in
7 assuming that you wouldn't have to trigger a
8 notification up the chain until you actually are on
9 the hook for the money? Or, I mean, until you're
10 actually being asked?

11 MS. GOODENOUGH: We would probably still
12 have to notify them for full disclosure, because
13 that might change the balance of the benefit cost
14 ratio. And by law, under the Water Resources
15 Development Act of 1986, we are required to keep
16 our benefit cost ratios current, and report it not
17 only to our headquarters, but to Congress.

18 And, so, for full disclosure, whether we
19 end up on the hook or not, we would need to let
20 them know. Especially, if the non-Federal sponsor
21 comes back to us and says, these are shared project
22 costs. And, oh, by the way, we've got a -- is it
23 75/25 or is it 60 -- okay, well, anyway, whatever
24 the percentage is, Daddy Warbucks pays most of it
25 and the non-Federal sponsor pays less. But we

1 could be on a hook for a percentage of the
2 mitigation at the end of the day. There's still a
3 concern.

4 CHAIR YOUNG: Okay.

5 MS. GOODENOUGH: And, so, since my friends
6 inside the beltway are so risk adverse, I always
7 make sure I tell them everything so I won't get in
8 trouble later on down the line.

9 CHAIR YOUNG: I understand your position.

10 You do have an agreement with the District
11 about who's going to pay what?

12 MS. GOODENOUGH: Yes, we do.

13 CHAIR YOUNG: I read, I skimmed, probably
14 not as fast a skimmer as you are. I skimmed that,
15 I believe on the website, that must have been where
16 I found it. And I actually didn't see that you had
17 -- you and the District had talked about who was
18 going to pay for the mitigation, even though the
19 discussions, clearly from our staff, is it's that
20 it's our staff's understanding is that the District
21 is going to be the agent for that.

22 And I'm trying to figure out why wasn't
23 that part of your memorandum of understanding, or
24 whatever it was, that you had as between your two
25 agencies?

1 MS. GOODENOUGH: As a matter of
2 expediency, our inside-the-beltway experts craft
3 these contracts almost like adhesion contracts, and
4 they're very broad and general to cover everything.

5 But there is a section called "Total
6 Project Costs," and there's also a section on how
7 we split costs. If it doesn't have the word
8 "mitigation" in there, I'll bet you, you can find a
9 term in there that somebody could submit a bill to
10 us and say, well, this mitigation was part of the
11 construction and, therefore, should be part of the
12 total construction cost.

13 I haven't looked at a project partnership
14 agreement for a while, but it's amazing the kind of
15 costs that our non-Federal sponsors try to get out
16 of us.

17 (Laughter.)

18 MS. GOODENOUGH: And the way those
19 contracts are written, sometimes they catch us at
20 our own game, and we end up writing the check.

21 CHAIR YOUNG: Okay, I understand.

22 All right. Jim, I believe you had a
23 question.

24 VICE CHAIR MCGRATH: Well, you asked my
25 biggest question, which was the source of the \$20

1 million, and we'll get to that later.

2 I went back and looked at the response to
3 the question of where, and we have a -- we have a
4 precedential issue, which I think is extremely
5 important, because this is not the only flood
6 control project that will face us, as we begin to
7 deal with sea level rise, and habitat, and
8 implementation of TMDLs. And there are other
9 Federal channels.

10 And it's an issue that's also raised in
11 the current disagreement between the Corps and the
12 State of California over dredging, which is -- has
13 to do with protection of State resources, as
14 opposed to Federal resources.

15 The EIR on this project does identify a
16 number of significant impacts that are not
17 recognized, apparently, by the Federal Government,
18 in a single-purpose project. And that would be
19 loss of significant riparian vegetation, mature
20 trees. There's some, certainly some mature trees
21 on this project site.

22 I reread the section on the Red-Legged
23 Frog. It's not clear to me whether it is on the
24 site or potentially on the site.

25 But I guess my question to you is, let's

1 assume for a moment that the Red-Legged Frog was on
2 a site and you were, in fact, had a project that
3 would destroy habitat for the Red-Legged Frog, and
4 would not be amenable to the reemergence of that
5 because of the maintenance needs, and the nature of
6 the hydrologic regime.

7 Are you taking the position that you have
8 no responsibility for mitigation of significant
9 impacts under the California Environmental Quality
10 Act, and your responsibilities are limited to those
11 that come only out of NEPA?

12 MS. GOODENOUGH: Well, specific to the --
13 well, we have responsibility under NEPA. And as a
14 matter of -- the fact that the Magna Carta of
15 environmental law was written very broadly, we do
16 look at all impacts, whether a species is listed or
17 not.

18 But we do rely on the resource agencies
19 that have that mandate. So, if Cal Fish and
20 Wildlife were to tell us that we need to mitigate
21 for the Red-Legged Frog, or some State listed
22 species, that's not Federally listed, we do take
23 that into consideration.

24 Sometimes, under NEPA, we will look at
25 other impacts. But we do look to the resource

1 agency that is responsible for that resource. So,
2 we look to Fish and Wildlife. We look to NMPS.
3 And that's why we, under Section 7, of the
4 Endangered Species Act, we make sure we comply with
5 all the reasonable and prudent measures, and
6 alternatives of the biological opinion. So --

7 VICE CHAIR MCGRATH: I'm not sure that
8 you're answering my question. If something is
9 identified as a significant impact, which is a term
10 of art under the California Environmental Quality
11 Act, and it entails, for assumption purposes here,
12 a State endangered species, which is not a Federal
13 endangered species, and it's identified clearly
14 enough as a significant impact in the CEQA
15 documents, are you going to recognize it only if
16 the Department of Fish and Wildlife calls your
17 attention to it and asks for mitigation? I don't
18 understand that. But maybe I misunderstood what
19 you said.

20 MS. GOODENOUGH: I'm sorry if I wasn't
21 clear. By law, we are only required to comply with
22 NEPA. However, what I'm saying, in partnership
23 with our non-Federal sponsors, there are other
24 impacts that we do look at. And if it's within
25 what's been authorized, if we have the wherewithal

1 to enhance a project within certain dollar limits,
2 we accommodate that and try to do the best that we
3 can to reduce all impacts.

4 But we are bound by what we're authorized
5 to do.

6 So, I have yet to find a case, and
7 strictly legally, I have not found a case where we
8 were charged with violating CEQA, or a State
9 Endangered Species Act. So, there is not the same
10 risk with State species, as there is with Federal
11 species.

12 And because we have to be judicious with
13 the funds that are authorized by Congress, we are
14 careful. We pick and choose the impacts that we
15 can mitigate for, even if it is State. But it
16 really is not something that we're legally bound to
17 do. But we have accommodated it, and we try to
18 work the best we can with the State, when they are
19 concerned.

20 I know we've bought mitigation credits for
21 compensating for State species on some of our
22 dredging projects, for example, when it wasn't a
23 Federally listed species. But it was within our
24 budget and we could make a justification to do it.

25 So, on a case-by-case basis, we do spend

1 Federal funds complying with State laws, where we
2 are able to do so.

3 MS. AUSTIN: I wonder, Madam Chair, if I
4 could interject that might be helpful for Mr.
5 McGrath, which is the recent Army Corps of
6 Engineers Maintenance Dredging Permit, that this
7 Board adopted. Which was, in fact, another
8 EDR/401.

9 So, and previously to that was only a WDR.
10 It did not have a 401 certification attached to it.

11 But on the issue of the Department of Fish
12 and Wildlife, this might be helpful. In the case
13 of maintenance dredging, Department of Fish and
14 Wildlife issued a letter to Mr. Wolfe, basically
15 establishing their opinion that the impact of the
16 hopper dredging in the proposed project, the
17 proposed maintenance dredging would cause a
18 significant impact to State listed species, as well
19 as Federal listed species.

20 The ultimate document, environmental
21 document, which was the combined EA/EIR, so Federal
22 and State document, there was a finding of
23 significant impacts under CEQA, but there was a
24 finding of no significant impacts under NEPA.

25 And, so, we can take this same

1 information, the same data, letter from Department
2 of Fish and Wildlife, which was taken into
3 consideration but, ultimately, NEPA had a different
4 threshold for significance.

5 And, so, I think that may be the
6 distinction that Ms. Goodenough is talking about,
7 where we're coming up with a more stringent
8 requirement or set of mitigation requirements based
9 upon what CEQA requires.

10 Whereas, NEPA would not necessarily
11 require the same outcome.

12 So, hopefully, that's a helpful example.

13 VICE CHAIR MCGRATH: Right. But, equally,
14 would not CEQA -- because when a significant impact
15 is identified under CEQA, those entities bound by
16 it, which I believe would include the District, and
17 this Board, are committed to mitigate either below
18 a significance threshold, or to the extent
19 feasible, and to articulate a rationale and a
20 reasoning on feasibility.

21 I'm actually with the Corps on the
22 questions of feasibility. I understand there are
23 limitations of feasibility, and we'll get into
24 those when I switch sides.

25 (Laughter.)

1 VICE CHAIR MCGRATH: But, you know, the
2 question here is whether or not there is some
3 shared responsibility or State agency controlled
4 responsibility of mitigation of significant
5 impacts, that may be significant under CEQA, but
6 not significant under State. And it is of far more
7 importance than just this project, by far.

8 MS. AUSTIN: Yes, and I think your correct
9 in that CEQA does direct us to seek out mitigation
10 alternatives that are going to minimize impacts.
11 And, so, the question that we are looking at right
12 now, we are not the lead agency in this case. The
13 District has evaluated the project, they have
14 written the EIR.

15 The project then comes to us for
16 subsequent discretionary action, which is the
17 Board's approval today.

18 And, so, we go to the section of CEQA
19 guidelines that deal with the process for a
20 responsible agency. And the directive to this
21 agency is that the responsible agency shall not
22 approve the project as proposed, if the agency
23 finds any feasible alternative, or feasible
24 mitigation measures within its power that would
25 substantially lessen or avoid any significant

1 effect the project would have on the environment.

2 You've gone to the next step from there,
3 which is the situation of what if the mitigation
4 simply isn't possible?

5 And, so, in those particular instances,
6 the responsible agency or the lead agency would
7 make a finding of overriding considerations. In
8 other words we would say, this project is so
9 important to public safety that -- and because the
10 mitigation is simply impossible, that we are making
11 a finding that the project must go forward. And
12 we're really sorry about that.

13 VICE CHAIR MCGRATH: But a focus --

14 MS. AUSTIN: But that's not what we have
15 proposed -- or what staff has proposed in this
16 proposed order, but the Board does have the ability
17 to waive all mitigation, and to find -- make a
18 finding of overriding considerations.

19 VICE CHAIR MCGRATH: That's why, at some
20 point, the question of feasibility, which is not
21 strictly a financial issue, but has strong elements
22 of financial, is an extremely important issue which
23 is -- and the one piece of that is, is there within
24 the budget, and some discretionary elements of the
25 budget, an opportunity for the Federal Government,

1 or responsibility for the Federal Government to
2 share in some of those costs, if there are feasible
3 mitigations.

4 CHAIR YOUNG: I want to make sure that you
5 are comfortable with the discussion that Tamarin
6 Austin just provided to us. I kind of assume you
7 are. You're both lawyers, you're both looking at
8 the same books.

9 (Laughter.)

10 CHAIR YOUNG: But I just want to make sure
11 we're not --

12 VICE CHAIR MCGRATH: The lawyers always
13 agree with --

14 (Laughter.)

15 CHAIR YOUNG: I can say that because I've
16 been married to a lawyer for 22 years. I have a
17 little tongue in cheek.

18 You don't have to respond, but I want to
19 make sure you felt comfortable with what was on the
20 record here.

21 MS. GOODENOUGH: Well, what I heard
22 sounded accurate to me. I've never met her and I
23 didn't realize she was a lawyer, but it sounded
24 reasonable to me.

25 BOARD MEMBER KISSINGER: She's reading

1 from the same book, so --

2 (Laughter.)

3 CHAIR YOUNG: They do have additional
4 questions on this end of the table.

5 MR. LICHTEN: Dr. Young, may I --

6 CHAIR YOUNG: Question, please.

7 MR. LICHTEN: May I interject, just while
8 Tom is still there, and thinking on the room to
9 move. I know that the Corps EIS for the project
10 looked at a cost, or a benefit cost ratio, and
11 identified that it was about eight to one, if I'm
12 reading my notes correctly.

13 And, obviously -- and Mary had mentioned,
14 well, in some cases, we try and see, well, what can
15 we do. And the benefit cost ratio is obviously one
16 measure of whether a project can get over the
17 finish line in D.C.

18 So, some of the "better alternatives" had
19 reduced numbers of, you know, two to one, or three
20 to one. I wonder if you -- so, I just wonder if
21 you had information on how that might play in sort
22 of the D.C. scene of looking at those ratios?

23 MR. KENDALL: If I understand your
24 question, it's sort of a hypothetical. Had we
25 decided that, when this was being formulated, that

1 we would want to procure the 20 acres or whatever,
2 and that took the BC ratio to half of its pretty
3 high value --

4 MR. LICHTEN: Right.

5 MR. KENDALL: -- would we have been able
6 to proceed? And I guess, hypothetically, as long
7 as the Bs exceed the Cs, the answer's always going
8 to be yes. But there's a lot of devil in the
9 detail as to how we got to those Bs and Cs. And it
10 kind of gets back to the fundamental issue that I
11 know the Water Board -- the Water District, rather,
12 is going to want to get to. Which is, you know,
13 are those appropriate mitigation investments to be
14 made with this project, given the believed impact.

15 But, yes, if there was, you know,
16 agreement on the impacts, and the way to mitigate
17 those was agreed upon, and it ended up, you know,
18 reducing, but not eliminating the net benefits, you
19 know, then it would still be conceivably a project.

20 I guess one of the little details to bring
21 out is just having the benefits greater than the
22 costs, by some thin margin, does impact how strong
23 you compete for Federal dollars. So, having a nice
24 one allows you to be higher on that list.

25 CHAIR YOUNG: All right. Are there other

1 Board Member questions for --

2 MR. KENDALL: I'm sorry, one more little
3 footnote on that --

4 CHAIR YOUNG: Sure.

5 MR. KENDALL: -- because this does confuse
6 a lot of people, you know, when we say, well, you
7 know, we're trying to figure out who's responsible
8 for what, and the Water District might take on more
9 work as part of how this all plays out. If we're
10 doing our job, as the people who make the Federal
11 investment recommendation, even if somebody
12 volunteers to spend their own money on something,
13 but it's part of the deal we've struck with them,
14 or some third party is impacted in a way that
15 doesn't actually involve a cash transfer, we still
16 have to talk about associated costs. And, so,
17 those are actually in that benefit cost ratio.

18 So, it's you can't really push some of
19 these things off the books unless it's really being
20 done for a totally separate purpose. Which is,
21 frankly, behind the MOU discussion we were having
22 with staff on Friday, is can we agree to do some
23 nice things that aren't strictly affiliated with
24 this, and then we don't have to get into all this
25 bookkeeping discussion. But, anyhow, that's a --

1 MR. LICHTEN: Dr. Young, may I --

2 CHAIR YOUNG: Yes.

3 MR. LICHTEN: Just on the subject of cost,
4 if I can add a bit of information. And I'd refer
5 to the District and the Corps on the latest costs,
6 but my understanding from the District's project
7 webpage is the project cost is around \$75 million.
8 And the District, the Water District shares about
9 \$38 million of funding from their Unsafe Creeks
10 Program. And just when we think about what the
11 project cost is.

12 CHAIR YOUNG: Okay.

13 BOARD MEMBER KISSINGER: \$70 million, did
14 you say.

15 CHAIR YOUNG: \$75 --

16 MR. LICHTEN: \$75 million.

17 BOARD MEMBER KISSINGER: For the Corps --
18 I'm sorry, math wasn't my strong suit. So, the
19 Corps share is?

20 MR. LICHTEN: It was about \$37 million.

21 BOARD MEMBER AJAMI: Yeah, 37 --

22 MR. LICHTEN: Well, I'm just subtracting,
23 yeah.

24 BOARD MEMBER AJAMI: Yes.

25 (Laughter.)

1 CHAIR YOUNG: Thank you both, very much.
2 All right, next I would like to call Mr.
3 Richard Santos, with the Water District. And I
4 note that we have six cards for people from the
5 Water District. I have them in a certain order,
6 but if you would like to alter the order, it's
7 okay.

8 MR. SANTOS: Good afternoon. Because my
9 notes start out with good morning, but we're in the
10 afternoon. So, good afternoon, Madam Chair young,
11 and Vice-Chair McGrath and, of course, Honorable
12 Board Members. Congratulations on your being
13 reelected.

14 My name is Richard Santos and I'm the
15 Chair of the Santa Clara Valley Water District
16 Board of Directors. I've had the privilege of
17 representing the people of Berryessa and Milpitas
18 communities, who will benefit from this important
19 project.

20 And, yes, I've taken the oath and approved
21 by 200,000 people.

22 So, I appreciate the opportunity of
23 appearing before you today, personally, on behalf
24 of the Board, to express our strong concerns with
25 the waste discharge requirements being considered.

1 This project will protect hundreds of
2 residents, business owners, and schools in the
3 District from more than half-a-million dollars
4 potential flood damages.

5 It will also protect the long-awaited,
6 regionally significant, new BART Station. Part of
7 the system in which the Federal Government has
8 already invested about \$1 billion. And it's
9 thousands of daily riders.

10 And, of course, you know, when you go in
11 that area, the congestion of traffic is
12 unbelievable. So, this is very, very important,
13 not just for our community, for the whole Santa
14 Clara County.

15 It is a well-known fact that the
16 disadvantaged communities of concern often reside
17 in flood prone areas. And this area is no
18 exception.

19 Making this project not just critical to
20 the resolving the flood issue, but also the social
21 justice issue. These folks have waited a long
22 time for this protection, protection that is
23 already provided to those in higher income
24 brackets, who can afford to live outside the flood
25 plain.

1 Your staff is asking you to impose a new,
2 unnecessary water discharge requirements on this
3 project, including new conditions that conflict
4 with the ongoing construction of this project.

5 In simple terms, your adoption of this
6 Tentative Order would endanger this entire project,
7 denying the people I serve and the community, as a
8 whole, for their Board protection they need and
9 deserve.

10 Even worse, the Tentative Order could
11 result in the project's cancellation by our Federal
12 partner, the U.S. Army Corps of Engineers.

13 That will leave not just my district, but
14 this district, businesses, residents, schools
15 without flood protection at all, and it could
16 jeopardize the new BART Station outright, wasting
17 millions of Federal dollars that would otherwise go
18 to our community.

19 I come here with a lot of folks that are
20 elected officials, community leaders, regional
21 transportation organizations, industry leaders,
22 labor, business people, and all kinds of folks.
23 And here's the letters of support for this project.

24 Together, we urge you not to adopt the
25 Tentative Order. Instead, allow this project to

1 proceed to the benefit of our residents,
2 businesses, and new Regional BART Station, and the
3 thousands of commuters every day.

4 Give the community, our community, equal
5 treatment by providing the same flood protection
6 already enjoyed by others outside the flood plain.

7 Just this morning, going by there, and
8 last night, and Saturday and Sunday, my whole
9 district is doing this delayed El Nino that we're
10 having right now. And, yes, we all want water, but
11 not all at one time.

12 Those creeks and those rivers are full.
13 And I can tell you, as a former soldier, as a
14 former fire captain of the San Jose Fire Department
15 for 33 years, I responded to all kinds of
16 emergencies. I lost my personal home in 1955, as a
17 child, 1958, 1993, lost everything I own. That's
18 why I'm in the position I'm in today, to see if I
19 can do better.

20 We owe it to these folks. And I've been
21 through all these emergencies and there's nothing
22 worse than a flood. And I've been to Katrina.

23 We need to protect not just the Regional
24 BART Station, but the enormous Federal investment
25 by keeping this critical project on track.

1 Please do the right thing. You know, what
2 I don't understand is that this is not just my
3 constituents, this is California. You folks are
4 not a different State. So, we all have the same
5 constituents. We should be together in everything
6 we do, in working and trying to compromise in
7 collaborative fashion to help the people, who pay
8 the tax, and are affected by this wonderful project
9 that's going to be delayed. And we no longer can
10 do that. And I just ask you, and urge you, please,
11 let's work together. Thank you.

12 BOARD MEMBER KISSINGER: Can I just -- you
13 know, I understand you have a whole series of folks
14 that are going to speak to this point. But can we
15 frame the issue that is really before us today?

16 Unless I misheard the Corps, this work is
17 going on. It's going to be done. It's not going
18 to be stopped based on the issuance or non-issuance
19 of these waste discharge requirements.

20 And, so, I want to be -- you know, someone
21 who's just coming to it for the first time today,
22 but reflecting what the Water Board staff has done
23 for years, now, is working with the parties to get
24 this project done.

25 The whole process of doing the

1 certification, followed by waste discharge
2 requirements, was premised on being able for this
3 project to move forward. And the project is moving
4 forward. And there are people out there working
5 away, you know, between the clouds right now,
6 probably, to get this job done.

7 So, this is not a question of whether or
8 not this community is going to get flood
9 protection. It's going to get flood protection.

10 The question is what has to be done to
11 mitigate the effects of the work.

12 So, this isn't directed solely at you, but
13 I understand the other folks that are going to come
14 up here and testify, we are not standing in the way
15 of this project. We are just making sure that it
16 gets done right. And it is going to get done. So,
17 the question is making sure it gets done right, or
18 as well as can be done within the design framework
19 that we have.

20 So, anyway, I just -- this is for the
21 benefit of other people that come up. I don't want
22 to hear about how we're going to be deciding
23 whether to do this project or not. This project is
24 going forward.

25 MR. SANTOS: Mr. Kissinger, I totally

1 agree with you. But it's raining now, and in that
2 area, when I was a fire captain, I evacuated those
3 areas in the past, back in 1989 and so on.

4 But if we have a delay, the people suffer.
5 So, let's don't have a delay. And I agree with
6 you, I think you're on the right track. But it's a
7 collaboration. Again, we're all Californians,
8 let's work together. But we cannot wait six months
9 or a year to get this done.

10 BOARD MEMBER KISSINGER: But where is the
11 delay? Tell me, what is the delay? I mean, that's
12 the question I asked --

13 MR. SANTOS: Just cooperate with our
14 staff, in this Tentative Order, and let's not go
15 forward with that, or do something, maybe I don't
16 know about. But, you know, just Monday night, you
17 weren't there, I was there with the City of
18 Milpitas, and those residents were upset because
19 they had a little, partial flood, let along what's
20 coming right now. And it's just not Milpitas.
21 That river, like you said, is just not in one area,
22 it's all the way down to the Penitencia Creek, that
23 affects 200 and something thousand folks. We don't
24 need a delay. We need to work together to solve it
25 now. But the delays only hurts the people who pay

1 the tax.

2 Do you know what flood protection is
3 today, for young people trying to get a home? It's
4 out of this world. So, we have to do something
5 because we're in the FEMA flood zone. Very
6 serious.

7 BOARD MEMBER KISSINGER: Yeah, my only
8 point is issuance of these waste discharge
9 requirements, as I understand it, are not going to
10 occasion any delay. They may cause additional
11 costs, but not additional delay. That's what I
12 heard.

13 MR. SANTOS: But where do we get the
14 money? Out of the sky? We don't get that money.
15 Right now, we're working on a couple of things
16 right now that we're on the hook for. We pay a lot
17 of taxpayer money. We have a 72 percent rating in
18 getting different tax measures in Santa Clara
19 County, that no other water district has gotten.
20 But we can't keep on going to the well. They
21 expect us to come on time and get this done, and
22 that's our commitment.

23 BOARD MEMBER KISSINGER: No, that I
24 understand. Thank you very much.

25 MR. SANTOS: Thank you.

1 CHAIR YOUNG: All right. Now, I think we
2 have Melanie Richardson from the Water District.

3 MS. RICHARDSON: Yes, that's correct.
4 Thank you very much. And thank you, Members of the
5 Board, and Chair Young.

6 My name is Melanie Richardson. I'm the A
7 Room Chief Operating Officer of Watersheds for the
8 Santa Clara Valley Water District.

9 And you have all heard about the
10 importance and the significance of this project to
11 Santa Clara County, particularly to those most
12 vulnerable to flooding. And I believe that you all
13 understand that, it's become apparent to me.

14 But I just wanted to explain a little bit
15 about the funding situation and why that is
16 problematic to us. This particular project, as you
17 know, is a joint project with the U.S. Army Corps
18 of Engineers. But our local funding comes from our
19 Safe Clean Water Measure, the one that originally
20 passed in 2000, and then passed, again, in November
21 2012. It's a special parcel tax. Dollars are
22 specifically allocated for measurables, or
23 deliverables that we have to complete by a time
24 frame. Upper Berryessa is one of those projects.
25 We have a specific amount of money allocated for

1 that project. And to the extent we use more than
2 that money, we cannot complete another project.

3 So, we really have to be careful with our
4 taxpayer money, and we have to do what's required
5 by law, do the mitigation that's required, and give
6 the people the flood protection in, your know, a
7 reasonable period of time.

8 The Water District fundamentally disagrees
9 with the Revised Tentative Order because we do
10 believe that we've gone through the EIS process,
11 we've gone through the EIR process. We have
12 identified significant impacts. We've proposed
13 mitigation that adequately addresses those impacts.

14 And the Regional Board staff has entered
15 the process fairly late. It's been kind of a late
16 time frame.

17 Back in the late 1990s is when we first --
18 this project was first authorized by Congress, and
19 when the Corps first became involved with this.

20 I was in the room years ago. Mr. Kendall
21 talked about not being involved in original
22 discussions. I was in the room, years ago, when we
23 talked about this project and the need to move
24 forward. And at the time, a decision was made to
25 go with the Corps National Economic Development

1 Project. They refer to that as an NED, and that's
2 their project that has the highest benefit to cost
3 ratio and it's the project that you can move
4 forward with the quickest.

5 So, if we were to go with any other
6 alternative, such as one where we did a locally
7 preferred project, it would take extra time. And
8 at the time, we agreed that we needed to move this
9 project forward quickly.

10 And that's how we ended up where we are
11 today, moving forward with the National Economic
12 Development.

13 So, I also wanted to address the question
14 that was raised about the two-phase approach. I
15 also was in the meeting where we talked about a
16 two-phase approach to permitting. I do remember
17 that discussion. And, yes, the District did agree,
18 in concept, to a two-phased approach. But I think
19 the details are in the interpretation of that two-
20 phased approach.

21 What we thought two-phased approach was,
22 was issue a 401 Water Quality Cert to the Corps,
23 who is the constructor of the project, to do the
24 construction. And all related mitigation for the
25 construction would be taken care of with that.

1 The second phase would be for operations
2 and maintenance, which we clearly know is our
3 responsibility. And we believed that we would come
4 back at the appropriate time, when needed, to apply
5 for a WDR to do O&M.

6 And one thing I did want to say is we
7 fully agree with the idea of Adaptive Management
8 Plan. I know someone on your Board talked about
9 that. We, too, brought that concept to the
10 Regional Board staff at a meeting, recently. We're
11 fully in agreement with that approach for
12 maintenance.

13 But the two-phased approach that we
14 believed was workable is not the two-phased
15 approach that's currently being proposed.

16 The two-phased approach that's currently
17 being proposed is to rescind the existing 401 Cert,
18 that's already been given to the Corps, alone, and
19 to replace that with a joint 401 WDR, with both
20 parties named. And that's fundamentally different
21 than what we thought we were talking about.

22 One other point. We have met with the
23 Regional Board staff several times. We have talked
24 about mitigation projects. We have talked about
25 other types of projects that the District could do

1 to, you know, help with moving forward with Upper
2 Berryessa. But the Water District fundamentally
3 disagrees that a mitigation project is required for
4 Upper Berryessa.

5 However, we are not in disagreement that
6 we want to work with the Regional Board to do great
7 environmental enhancement projects.

8 VICE CHAIR MCGRATH: Can I stop you there?

9 MS. RICHARDSON: Sure.

10 VICE CHAIR MCGRATH: We've seen pictures
11 of what the stream looks like today, and it's not
12 an undisturbed stream. But by you telling me that
13 increased amount of concrete channel, the loss of
14 soft bottom virtually through the entire channel,
15 and the fixing of all channel dynamics is of
16 equivalent value and requires no mitigation. Is
17 that your position?

18 MS. RICHARDSON: Yes, and we have a
19 speaker, later, that will address this in detail.
20 But we're saying that we have mitigated for all the
21 impacts raised in the --

22 VICE CHAIR MCGRATH: No, I asked you a
23 different question, which are you saying that it
24 has equivalent value?

25 MS. RICHARDSON: I am going to defer that

1 to our environmental staff, who will be up here,
2 speaking, shortly.

3 VICE CHAIR MCGRATH: We've been talking
4 about procedures, and process, and politics. I
5 really want to know if the District is trying to
6 seriously tell the Water Board to ignore our eyes
7 and decide that the channel, with a riprap bottom,
8 is going to be just as valuable as the existing
9 channel. And I find that an unreasonable
10 proposition.

11 MS. RICHARDSON: Understood. And we will
12 address that with a subsequent speaker.

13 CHAIR YOUNG: I think he's the next
14 speaker to come up.

15 MS. RICHARDSON: Yes, you're right. So,
16 that will be coming very quickly.

17 So, I will just wrap up, I guess, by
18 saying that we fundamentally, I think, want the
19 same thing the Regional Board staff wants. We want
20 to do projects that are good for the environment.
21 We want to do restoration projects.

22 And to that end, I think someone did refer
23 to our One Water Plan, that we currently have
24 underway. We are working on that, and the first
25 watershed that we're working on is Coyote, and we

1 do expect to have that, a draft of that completed
2 this spring.

3 In addition to that, however, our Board
4 just recently approved accelerating several
5 environmental enhancement projects, primarily fish
6 passage projects in the Coyote Watershed, the same
7 watershed. And they did that because they want to
8 show more environmental presence.

9 So, we've actually added feasibility
10 studies to remove fish passage at Osier ponds, at
11 Metcalf pond, and also to do some fish passage on
12 Stevens Creek, to our CIP, which went to the Board
13 for the first time last night.

14 So, we are very serious about that. We
15 want to do this. We just don't feel this project
16 is the right forum to do that.

17 And, then, lastly, just to sort of discuss
18 what Director Santos talked about, the public
19 really relies on us to get these flood projection
20 projects done in a timely manner. And they expect
21 us to do this within a budget.

22 And we have spent a significant amount of
23 time, just since this draft order was posted, on
24 dealing with some of the flooding in our County. I
25 mean, I don't know that any of you have experienced

1 being in the Emergency Operation Center, while
2 flooding is going on, but that is very much a real
3 part of our daily jobs. So, we really care about
4 getting adequate flood protection in for all of the
5 residents in our County.

6 And we feel that this project is one that
7 we can't afford to delay any longer. And as the
8 Corps told you, it could cause a delay if the
9 mitigation was added to this project.

10 Our preference is to do separate and
11 independent projects that restore the habitat. And
12 with that, I will step down and let Mr. Manidakos
13 speak.

14 BOARD MEMBER KISSINGER: Before you --

15 CHAIR YOUNG: All right, we many have some
16 more questions from the Board.

17 MS. RICHARDSON: Sure.

18 BOARD MEMBER KISSINGER: Yeah, before you
19 go, I want to take you back to the conversations
20 that you did participate in, with regard to this
21 two-step process. And I want to make sure I
22 understood you correctly.

23 What I heard you say was you understood
24 that there may be WDRs sometime down the line for
25 operation and maintenance, and adaptive management,

1 but that there wouldn't be any mitigation
2 associated with the capital project's impacts or,
3 if there were, that would be the Corps'
4 responsibility. Is that what I heard you say?

5 MS. RICHARDSON: I said that the
6 understanding we had of the two-phased permitting
7 approach was that the first phase was for
8 construction of the project, with the 401 Water
9 Quality Cert. And the Corps was the only named
10 party on that.

11 That we, the Water District, would be
12 responsible for the second phase, which is the
13 operations and maintenance, when and if that was
14 needed.

15 Because as you've heard here today, we're
16 not convinced it is needed. But we're absolutely
17 open to the Adaptive Management Type Plan, because
18 we want to do the right thing. So, that is the
19 understanding that we had.

20 BOARD MEMBER KISSINGER: So, in the 401
21 Certification letter that I read from before, it
22 says, "With regard to the prospect that the Water
23 Board will consider adoption of waste discharge
24 requirements with the District named as a permittee
25 for the project."

1 It goes on to say, "The following is a
2 partial list of items the WDR will address." And
3 one of them is a plan to compensate for capital
4 project's impacts.

5 Right? So, for what the impacts are of
6 the project. Not the adaptive management, not the
7 O&M. These are other items that are listed.

8 So, did you understand that to be
9 referring to what would be an obligation put on the
10 Corps, because the Corps was the only one that was
11 a named party in the 401? I don't understand what
12 your point is with regard to how the District might
13 not be subject to WDRs because of the capital
14 project's impacts, when it's right there in the 401
15 Certification.

16 MS. RICHARDSON: I think we fundamentally
17 disagreed with that from the very beginning. We
18 never agreed that additional impacts for
19 construction were needed, above and beyond what we
20 had proposed, and above and beyond what the
21 original 401 Water Quality Cert was given for.

22 BOARD MEMBER KISSINGER: And, so, is it
23 the District's view that the Water Board never said
24 that, at these meetings, or that -- go ahead.

25 VICE CHAIR MCGRATH: If you --

1 BOARD MEMBER KISSINGER: Hold on a second,
2 she's consulting. Do you want to amend that at
3 all?

4 MS. RICHARDSON: No. I'm sorry, could you
5 please repeat that?

6 BOARD MEMBER KISSINGER: I guess I'm still
7 trying to understand. Was there just a
8 miscommunication and you didn't understand that the
9 Water Board was saying there would be additional
10 mitigation, or there would be mitigation associated
11 with the project impacts?

12 MS. RICHARDSON: No, we did not, we never
13 did agree to that. We never agreed that there
14 would be additional mitigation required of us.

15 BOARD MEMBER KISSINGER: Fair enough, you
16 didn't agree to it. But did you understand the
17 Board was telling you there would be, in the waste
18 discharge requirements that were to follow?

19 MS. RICHARDSON: I understood that they
20 said, used the word "consider," that they would be
21 considering that in a future WDR.

22 BOARD MEMBER KISSINGER: And did the
23 District say, well, we don't agree?

24 MS. RICHARDSON: I think we always said we
25 didn't agree. And I think we had a series of

1 discussions where we talked about perhaps other
2 ways to come to, you know, agreement. Other ways,
3 like working on other efforts or other projects.
4 And it was always our idea that that would be
5 independent from Berryessa. And I think the
6 Regional Board staff would prefer to tie it.

7 I don't think that we have any agreement
8 that it's we wouldn't like to work with the
9 Regional Board staff to do these other good
10 projects. We just never believed that it should be
11 tied to this particular permit.

12 BOARD MEMBER KISSINGER: And why is it
13 significant? There's certainly, in the materials
14 that the Water Board has prepared, discussion about
15 the notion that there are projects that the
16 District has ongoing, that could be used as a basis
17 for mitigation.

18 MS. RICHARDSON: Uh-hum.

19 BOARD MEMBER KISSINGER: As I understand
20 it, from Board staff, there's been an unwillingness
21 by the District to talk about that. And I think I
22 hear, then, you saying, well, because it's tied.
23 What is the -- what does it matter whether it's
24 tied or not? Why can't the District and the Board
25 have the modus vivendi in the same way that the

1 Corps has with the District, with the Board, in
2 terms of whether it's WDRs versus a 401
3 Certification condition? Why don't it matter that
4 it's tied?

5 MS. RICHARDSON: From our perspective, and
6 I think I did hear the Corps say that any tie to
7 this project could ultimately result in an out-of-
8 balance cost for this project and could,
9 ultimately, impact this project.

10 From our perspective, we are already doing
11 those projects. I mean, we have already taken
12 steps to do many good environmental projects. And
13 we don't feel that this project is the driver to
14 get us to do those other good projects. We are
15 already motivated to do those projects. We've
16 already taken steps. We've already put them in our
17 CIP, or we've already moved forward with planning
18 efforts for those projects.

19 And we're willing to, you know,
20 collaborate with the Regional Board on those. We
21 have no problem with that. In fact, we welcome
22 their input into those.

23 But we don't feel like tying it to this
24 project is necessary.

25 BOARD MEMBER KISSINGER: Why is it

1 problematic?

2 MS. RICHARDSON: I might ask my attorney
3 to answer that question.

4 BOARD MEMBER KISSINGER: Okay.

5 MR. PROWS: Peter Prows, outside counsel
6 for the Water District. I have taken the oath.

7 There are a couple, I think, different
8 answers to that question. One, it may have some
9 effect on the District's ability to fund another
10 project that it's currently planning to do under
11 its Safe Clean Drinking Water Program, if I have --
12 the Safe Clean Water Program.

13 If it's called a mitigation project,
14 funding gets harder for the District to apply to a
15 project. So, if it's a mitigation condition, it
16 actually becomes harder for the District to
17 implement.

18 The other sort of maybe philosophical
19 issue is that -- as you'll hear from the District's
20 engineers and scientists, we don't actually believe
21 that there's a nexus between the impacts that are -
22 - we don't believe that there are impacts here and,
23 so, there's no nexus to require a mitigation
24 project.

25 I know that there's some, perhaps,

1 skepticism about that, but you haven't heard our
2 side of that. So, I'd just ask you to, please,
3 keep an open mind.

4 We are the lead CEQA agency. We did
5 certify an EIR that concluded that all impacts
6 would be mitigated to a less than significant
7 level. The Regional Board didn't take the steps
8 that we believe are required by law to challenge
9 that, if it disagreed. And because it hasn't
10 challenged that, it's actually waived those
11 objections. We don't agree with how Ms. Austin has
12 interpreted those CEQA guidelines. And you'll see
13 some back and forth in the correspondence about
14 that.

15 And, so, that's, I guess, a taste of some
16 of our concerns about tying mitigation that's
17 required in this proposed order to the projects
18 that the District might be using funds that are
19 earmarked for Safe Clean Water to implement,
20 anyway.

21 BOARD MEMBER KISSINGER: Let me ask one
22 more question and then I'll stop. And it's to Ms.
23 Richardson, I think.

24 Were you involved in the environmental
25 permitting around the Lower Berryessa reach?

1 MR. PROWS: No. Oh, sorry.

2 (Laughter.)

3 MS. RICHARDSON: I was somewhat involved
4 in that. I was acting as the Deputy Operating
5 Officer over design and construction, so the staff
6 doing that worked under me. But I probably don't
7 know all the details about that.

8 I do believe, though, that we have Mr.
9 Manidakos, who was very intimately involved in that
10 permitting, who could probably answer questions on
11 Lower Berryessa.

12 BOARD MEMBER KISSINGER: Okay, thank you.

13 VICE CHAIR MCGRATH: I would just like to
14 point out that I think it's a well-established
15 principal that you cannot accept the benefits of
16 the permit, begin construction, and then later
17 challenge conditions.

18 And it seems to me clear enough that there
19 was a perspective from the Regional Board staff,
20 going back at least two years, that there needed to
21 be some mitigation.

22 So, you can talk about waiver all you
23 want, but I think having accepted a permit and
24 having gone forward with construction, I'm not
25 convinced.

1 BOARD MEMBER AJAMI: Yeah, I just have a
2 quick comment. You referred to environmental
3 projects as if you're doing everybody a favor to
4 doing environmental mitigation. And the reality
5 is, these projects are not meant to be a favor to
6 the Water Board. That's meant to protect our
7 environment for the people, the same people you are
8 talking about, for the generations to come.

9 And I know we haven't gone through the
10 presentation that your colleague is going to give.
11 But when I look at the picture that he has put in
12 here, we have already done all these concrete, and
13 building these channels, and they're all falling
14 apart because of not concerning the fact that these
15 things erode. And down the line, 20 years, 30
16 years, 40 years become a problem, rather than the
17 solution.

18 So, I think, I just want to make sure that
19 you realize it's not like you're doing a Water
20 Board a favor because you're doing a lot of
21 environmental work. You're doing it because it's
22 better for your own watershed, in the long run.

23 So, I just want to make sure we clarify
24 that point.

25 MS. RICHARDSON: Understood. I don't --

1 if it sounded like I think I'm doing the Water
2 Board a favor, or the District is doing the Water
3 Board a favor, that is wrong. We are doing all the
4 people of Santa Clara County, all of our
5 constituents in the community a service that they
6 are asking for.

7 BOARD MEMBER AJAMI: Right.

8 MS. RICHARDSON: In addition, they're
9 asking for flood protection in a timely and cost-
10 effective manner. So, we're trying to do it all.
11 We're trying to give them the flood protection they
12 want, we're trying to give the community the
13 environmental enhancement it wants, all with
14 limited funding. So, yeah, we are trying our best
15 to do it all.

16 CHAIR YOUNG: All right, I have a
17 question, and you're welcome to defer to someone
18 else. But I'm going to repeat my question about
19 where did the \$20 million come from, on the
20 estimate. And if someone else is going to address
21 that, then that's fine.

22 MS. RICHARDSON: I think Mr. Manidakos
23 can address that during his presentation, if that's
24 okay.

25 CHAIR YOUNG: All right. Then I have one

1 other, brief question. I was a little concerned,
2 or confused, actually, about the assertion in the
3 District's letter, of September 19th of this year,
4 2016, that said that the Tentative Order, if we
5 adopted it, it would "distract from the watershed-
6 wide planning and habitat enhancements that the
7 District is working on."

8 It's hard for me to understand why
9 mitigation for a project would distract from the
10 overall watershed-wide planning effort,
11 particularly when the Tentative Order tries to make
12 its schedule track, and coincide with the adoption
13 of the budget for the One Water Plan.

14 I mean, again, we're talking about the
15 potential delays. And I just -- I don't see the
16 intersection there.

17 MS. RICHARDSON: As far as the
18 distraction, I mean, we are spending a lot of time
19 and resources on this particular issue, when we
20 would prefer to just complete the construction,
21 apply for a WDR when it's necessary, do adaptive
22 management, and move on to doing our other, good
23 projects that we are trying to get underway.

24 So, I think from our perspective, we feel
25 that it's not a good use of our staff -- it's not

1 the best use of our staff's time to do this.

2 CHAIR YOUNG: I'm sort of unconvinced that
3 your route takes less time than our route. But I
4 understand your answer, so thank you very much.

5 MS. RICHARDSON: Thank you.

6 CHAIR YOUNG: All right, Mr. Manitakos.

7 MR. MANITAKOS: Hi, I'm Jim Manitakos, an
8 Environmental Planner with the Santa Clara Valley
9 Water District. And I've taken the oath and I will
10 tell the truth, and nothing but the truth.

11 (Laughter.)

12 MR. MANITAKOS: Let's see, I think we have
13 some slides here. Oh, yeah. Yeah, the \$20 million
14 question, which is a lot of money, obviously, even
15 to agencies like yours and ours.

16 That's 20 acres of fresh water
17 restoration, enhancement, creation. There are
18 numerous studies and they obviously varies a lot.
19 But a million dollars an acre is a very, very
20 conservative number for that kind of restoration
21 project. And we can show you many projects that
22 have been done in the Bay Area where those kind of
23 costs of a million dollar an acre is not
24 extravagant. In fact, it's probably a low-ball
25 estimate.

1 So, without having exact project, of
2 course, there's a lot of noise around that \$20
3 million. But that's not a bad starting point for
4 what costs we're talking about.

5 Okay, I have a rather brief, hopefully
6 brief, presentation here that we can -- okay.
7 Okay, we've already talked about the description of
8 the project. I want to make a couple of points
9 here, about this reach, that weren't brought out in
10 the excellent presentation by the Regional Board
11 staff. I appreciate all that information.

12 First of all, Upper Berryessa Creek, for
13 the entire project area, is an entirely manmade
14 channel. That's not being modified. There was no
15 channel there until the 1920s, when a farmer dug a
16 ditch along this area. It's been modified,
17 enlarged in the 50s and then, again, I believe in
18 the 70s. But it's an entirely manmade channel.
19 There was no water feature there.

20 And you can even -- you can look at the
21 USGS maps from the early 1900s, and they'll show
22 you nothing by dry, high land there.

23 I won't go over these things, I think
24 they've already gone -- but there's a couple of
25 pictures. The picture on the left is a typical

1 section of it, right around Ames Avenue. And, as
2 you can see, it's a very straight, and very steep-
3 sided channel. It's eroded and the banks cave
4 continuously, and that's one of the big concerns of
5 the project design.

6 The second picture shows the railroad
7 trestle, the Pacific Railroad tracks that cross the
8 creek. And, actually, they go parallel to the
9 creek for quite a distance, much of the length.
10 And that will become important later, as I talk.

11 That railroad trestle built, I believe in
12 the early 1930s, with creosote soaked wood, would
13 be removed and replaced with the concrete
14 (indiscernible) -- and that's, by far, the biggest
15 proportion of concrete that would be put in the
16 creek as part of the Corps and District project.

17 And the third one is just upstream of
18 Montague Avenue, between Montague Avenue and I-680.
19 And that's a picture of the existing concrete
20 lining of the creek that would be removed
21 completely, as part of the project, and replaced
22 with a soft bottom.

23 We can move on. Okay, we can talk about
24 the existing environmental condition enhancements.
25 There was a lot of talk, questions about impacts.

1 And I think we need to be very clear about what the
2 impacts are, and something else, the mitigation
3 that is built into the project.

4 These mitigations are entirely consistent
5 with the Fish and Wildlife Service Corps and Nation
6 Act Report. That report was issued by Fish and
7 Wildlife Service. It was used by the Corps of
8 Engineers, when they prepared their EIS. We also
9 used it in our EIR.

10 One thing about that, it's clear there are
11 no Red-Legged Frogs in this reach. The Fish and
12 Wildlife Service, and the Red-Legged Frog is a
13 Federally listed species, does not occur in this
14 reach. I think the Regional Water Board staff
15 agrees with that. And the Valley Habitat Plan does
16 not model this reach as Red-Legged Frog habitat.

17 But to get on to it. One of the most
18 important habitats in the Fish and Wildlife
19 Service, who are experts at this, the most
20 important habitat there is grassland habitat that
21 occurs along the upper banks, and top of bank here.
22 Five acres of that would be removed during
23 construction to enlarge the channel.

24 But as the channel gets enlarged, you look
25 at a rendition on the right, the banks will be laid

1 back. And, actually, you'll end up with 6.2 acres
2 of grassland habitat. Not only will it be greater
3 in acreage than what's there, it will also be
4 converted. Because right now it's primarily non-
5 native grass species. It will be converted to
6 native species, as we will be hydro seeding the
7 area, and maintaining it to maintain the native
8 grassland there.

9 Okay. In terms of the environmental
10 conditions, I remember the pictures that the
11 Regional Board staff put up. They were very
12 interesting.

13 (Laughter.)

14 MR. MANITAKOS: If you looked at the
15 pictures, particularly the egret, the pictures of
16 the water in the channel, and what you didn't see
17 were trees. In fact, there are no trees in the
18 lower banks or below ordinary high water in the
19 entire 2.2 mile reach. Not a single tree.

20 There are some on the very upper banks,
21 top of bank area that would be removed. In fact,
22 53 native trees and shrubs. We went all the way
23 down to diameter, we said two inches or more, so
24 very even small saplings. And a total of 53 would
25 be removed as part of the project.

1 To replace them, we plant 134 native
2 trees, 123 native shrubs. So, a mitigation ratio,
3 just on the trees, of well over two to one. And
4 there's a list of the types of trees that would
5 grow in the area, that we will be planting as part
6 of the project, and maintaining and establishing
7 long the riparian corridor.

8 Okay. Another one is the intermittent
9 open water aquatic habitat, which occurs. There's
10 14.1 acres within the channel. And that will
11 remain, basically. After the low-flow channel
12 that's there now has established, it establishes
13 over time as a -- it does not pull the entire creek
14 bottom. You can't really see it too well here, in
15 these pictures. But you saw pictures that were
16 earlier. There's a three to five foot wide, low-
17 flow channel, that meanders through.

18 The hydrology will change, will not
19 change. The amount of water going there during low
20 flows will not change, and that same channel will
21 reestablish itself on the creek bottom.

22 And we will also improve the habitat along
23 there, the native wetlands vegetation that do grow
24 along the fringing margins of the creek. To help
25 them reestablish, we will be hydro seeding the

1 bottom with these native plants that are well
2 established, and they'll grow back.

3 So, you'll end up, after project
4 construction, with the same amount of aquatic
5 emergent vegetation there, and it will be much more
6 native, because we'll be seeding with native. So,
7 we expect the mix will improve from the existing,
8 mostly non-native, to mostly native wetlands
9 vegetation.

10 And that's the impacts. And all these
11 impacts were brought out in the EIR and the EIS.
12 Okay. All right, I want to go back. Sorry, I --
13 okay, there we are.

14 I would also mention that the Regional
15 Board staff had a big concern over the water
16 spreading and disappearing, as it flows through the
17 reconstructed creek channel.

18 The channel will get wider. It will get
19 wider for high flows. The channel, the low-flow
20 channel on the bottom, that establishes -- that
21 will be the same size. There's no reason to think
22 the water is going to spread out in a millimeter in
23 depth, or something, water doesn't react that way,
24 and then all disappear into the ground. There will
25 be just as much water going through there during

1 our low-flow season as it is today. And that will
2 support the same habitat as there today, only
3 improved in quality because we'll have a greater
4 amount of native wetland emergent vegetation
5 growing.

6 Okay. And, so, a big, key concern here is
7 the beneficial uses. And there are about four
8 beneficial uses talked about. The Rec 1, water
9 contact recreation. Although that's -- really,
10 it's very unlikely to see. It's very little used
11 today, as you can look at the pictures of it,
12 there's not people boating and fly fishing in this
13 stream. There is potential for that. That won't
14 change from present.

15 In fact, it will be easier to because the
16 project includes improvement. Which is the
17 District with the City of Milpitas. We're going to
18 establish a Class 1 pedestrian/bicycle trail along
19 the creek, which does not exist now, for over a
20 mile of the length of the creek. That will be
21 right adjacent to the creek and it will certainly
22 promote the Rec 2 use, non-contact water recreation
23 along it. And that will be open to the public. It
24 will be a maintained trail. It will have amenities
25 in terms of benches, lighting, et cetera. That

1 we'll work that out with the City of Milpitas. But
2 it will certainly be a big improvement. So, it
3 will improve that beneficial use.

4 There's warm water habitat. There will be
5 a temporary disruption during construction. But as
6 we said, it will return afterwards. And the warm
7 water habitat will certainly not be any worse than
8 it is now. And it will be better because of the
9 increase in native vegetation.

10 In terms of wildlife habitat, it's the
11 same story. There is the grassland and the aquatic
12 habitat, which the Fish and Wildlife Service Corps
13 and Nation Act Report pointed out as the two most
14 important habitat types there.

15 They will be increased in size, in terms
16 of the grassland. The aquatic habitat will be the
17 same acreage. And for both the grassland and the
18 aquatic habitat there will be an increase of
19 quality as we remove non-natives and seed, and
20 establish the native vegetation, which is part of
21 the project.

22 I'd also like to mention one thing about
23 this. The Regional Board -- the Regional staff
24 treats the buried riprap as the same thing as a
25 concrete bottom. That is a sterile bottom that

1 nothing can grow in.

2 Well, actually, it's going to be covered
3 with four inches of soil. That's four inches
4 minimum. The riprap underneath is 9 to 24 inches
5 in diameter, large rocks. Those rocks have
6 substantial voids in them and the soil will be
7 packed beyond those voids. So, many areas, in fact
8 most, much of the surface will have more than four
9 inches of cover, and that vegetation will be able
10 to grow and establish in that soil cover. The
11 roots will be able to get down, into the rocks
12 below that, where soil will be packed. So, it will
13 not be a sterile, hard concrete bottom. In fact,
14 it will be a bottom that will grow emergent
15 vegetation that's, in fact, higher quality than the
16 non-native emergent vegetation that's there now.

17 And in case you doubt that, we can go back
18 to the picture of Lower Silver Creek. As you'll
19 remember, the Regional Board staff brought up. I
20 think, if we can do this. It's somewhere, sorry.

21 There we are. It's the Lower Silver
22 Creek. In fact, we have rocks right at the surface
23 and vegetation grows. This isn't even the best
24 picture. We have all kinds of vegetation growing
25 on Lower Silver Creek. I've been there a year

1 after and it grows right among the rocks. In fact,
2 soil cover, even soil pack beyond the rocks,
3 between rocks is conducive and supports the growth
4 of emergent vegetation. And, so, rocks with four
5 plus inches, probably more like six or seven in
6 most places, can certainly grow emergent
7 vegetation.

8 And this brings into question the whole 20
9 acres. Over half that 20 acres is treating this
10 area of riprap, covered with substantial soil, that
11 we know will support native emergent vegetation as
12 a hard bottom. We disagree with Water Board staff
13 that nothing will grow there and it will have no
14 value.

15 If we were to give that the proper
16 biological value, you would see the project is
17 self-mitigating.

18 Sorry about switching back and forth, but
19 the pictures from --

20 BOARD MEMBER KISSINGER: When was that
21 constructed? When was that constructed, your
22 pictures from 2016, when was that constructed?

23 MR. MANITAKOS: That reach there was
24 constructed, I believe, 2015.

25 BOARD MEMBER KISSINGER: 2015?

1 MR. MANITAKOS: Yeah.

2 BOARD MEMBER KISSINGER: Are the
3 velocities in the channel profile and the slope the
4 same?

5 MR. MANITAKOS: I wouldn't know. It's
6 pretty similar in size and depth, so I would
7 suspect it is. But I do not have those numbers
8 with me. We can certainly provide those numbers.

9 In fact, the velocities that you talked --
10 that were cited, I think, by a member of the
11 Regional Board staff, in the EIR, those are maximum
12 velocities during the one-percent flow, which
13 occurs -- it occurs one day out of every 36,500
14 days. It will occur, the other 36,499 days
15 velocities will be much lower, we'll have the low
16 flows, and you won't be seeing anything like those
17 velocities. In fact, they would be a small
18 fraction of that.

19 And from a biological stand point, the
20 36,499 days are much more important than the one
21 day of the one percent flood, which rises and falls
22 in usually less than a day in this type of a
23 stream.

24 BOARD MEMBER KISSINGER: What do you make
25 of the Board staff's difference, with the District,

1 that it's not erosive, but depositional in terms of
2 the sediment. And that frequently you'll have to
3 go through there and remove the sediment. And in
4 the course of doing that, the biota, as well.

5 MR. MANITAKOS: Yeah, the next speaker we
6 have is a hydrologist, who's done quite a bit of
7 work on looking at this system. And I think he'll
8 answer that question much better than I could.

9 BOARD MEMBER KISSINGER: Okay.

10 MR. MANITAKOS: I would defer it.

11 BOARD MEMBER KISSINGER: Okay.

12 CHAIR YOUNG: Mr. Manitakos?

13 MR. MANITAKOS: Yeah, Chair?

14 CHAIR YOUNG: There are a lot of pages to
15 this presentation. Is this all your presentation?

16 MR. MANITAKOS: I don't know what you
17 have. I don't think so. I think it's -- much of
18 it's my colleague, Jack Xu, here.

19 BOARD MEMBER KISSINGER: He's got two more
20 pages.

21 CHAIR YOUNG: Okay. Then let's go ahead
22 and finish your presentation and then we'll do a
23 time check. Thank you.

24 MR. MANITAKOS: Well, I appreciate you
25 giving me the time to finish.

1 And to look at these -- we looked at this
2 slide. I apologize for not -- okay. Okay, I want
3 to bring up a few things.

4 Okay, we received the staff response to
5 comments just in the last week, and there are over
6 a hundred pages of a lot of great information in
7 there. I've been up late, every night, looking at
8 it and trying to digest it and understand it.

9 A couple of things. First, the staff did
10 comment on the EIR. There was no mention of either
11 riverine wetlands or nutrient cycling through the
12 system, in their EIR comments.

13 They brought a lot of new information that
14 we're trying to digest, just in the response to
15 comments in the last week. It would have been
16 useful to get it during the EIR process, but late
17 is better than never.

18 First, we talked about the existing dry
19 season flow, that it would spread. These systems
20 work. The gradient of the system and the amount of
21 water flowing through there will be unchanged after
22 project construction. A low-flow channel will
23 form, as it does in all of our -- every project
24 I've seen, which is many, many of them, where you
25 construct this. That the low-flow channel will

1 reform and it will be similar size. That it will
2 spread because the upper banks of the channel are
3 larger, which aren't even touched by the dry water
4 flows, they won't be spreading and disappearing of
5 water, as speculated in the response to comments,
6 by staff.

7 And, let's see. Okay, another thing I'd
8 like to bring up. There was talk about levees and
9 vegetation management. There are no levees on this
10 creek. This is an existing, no existing levees and
11 no proposed levees. The proposal is for an
12 incised, enlarged channel. Levee management
13 policies are just not relevant to this project, so
14 don't have to worry about those.

15 Okay. Then the four points, the planned
16 restrictions on woody, riparian vegetation, likely
17 will result in warmer water temperatures, and that
18 will adversely affect warm water habit use. I
19 don't understand.

20 First of all, there is zero woody
21 vegetation growing in this channel. And as you saw
22 from even the pictures from Regional Water Quality
23 Board, they showed pictures from miles away
24 upstream, miles away downstream of trees, to try to
25 indicate maybe trees are growing here. And the

1 fact is this artificial channel supports zero trees
2 growing below the ordinary high water mark. As we
3 said, there were 53 trees growing above the high
4 water mark. Most of them are actually outside the
5 channel, at top of bank. So, there is zero shade
6 on this stream right now, and that will not change.
7 So, water temperatures will not be affected by the
8 project.

9 Let's see, and I'll just -- I think we've
10 already talked about that one. Before I go on to
11 Jack Xu, a couple of comments I would respond to
12 questions.

13 There was a lot of question about
14 alternatives that were looked at, in both the EIR
15 and the EIS. And was the alternative -- if I can -
16 - okay, yeah, I want to go back to -- okay, I think
17 I can do it. All right, here it is.

18 We can go back to -- wait -- can we pull
19 this up to full. Nope, that's not working.

20 CHAIR YOUNG: I have to say the Santa
21 Clara Valley Water District's presentation has gone
22 on already a little bit longer than the staff led
23 me to believe it was going to go on.

24 MR. MANITAKOS: Okay, I'm very close now.

25 CHAIR YOUNG: So, if you could wrap up,

1 that would be great.

2 MR. MANITAKOS: Yeah, I'm moving as
3 quickly as any of the other speakers. Thank you.

4 This is the Lower Berryessa Project, and
5 this is a picture, the rendering that Regional
6 Board staff graciously provided. As you can see it
7 has, on the right side here, a very large, concrete
8 flood wall. And some riparian vegetation that's
9 growing in selected areas along benches.

10 That project, a couple of reasons why we
11 were able to do that at Lower Berryessa Creek is,
12 one, the right-of-way is wider there and gives us
13 more flexibility to do that.

14 But even with the wider right-of-way, it
15 required this very large -- you can't see it here.
16 This is a 14-foot high, concrete flood wall, which
17 is needed to contain the flows through there.

18 So, there is a possibility you could plant
19 trees in a channel. They do slow down the water
20 and reduce the flow conveyance capacity. But you
21 have to get a certain amount of water through
22 there, several thousand cfs, in the case of Upper
23 Berryessa Creek.

24 And that water, the way it can be done is
25 through a large, concrete flood wall.

1 So, that project was looked as alternative
2 design, like this, with a concrete flood wall to
3 provide the flow conveyance capacity. It was
4 looked at in the EIS, both as Alternative 4, and in
5 the EIR. The concerns were that, you know, the
6 cost of the flood -- the concrete flood wall is an
7 unsightly element. We'd rather not do that, if it
8 can be avoided. It's very costly, many, many
9 millions of dollars.

10 In fact, doing a design like this would
11 triple the cost, was the EIS estimate in the Corps'
12 EIS, in their playing documents. So, it would
13 triple the cost of the project to do this kind of
14 design. And that was found to be cost infeasible,
15 and it still remains cost infeasible, to this day.

16 BOARD MEMBER KISSINGER: Just out of
17 curiosity, why was it done on the Lower Berryessa?

18 MR. MANITAKOS: The Lower Berryessa?
19 Because we -- well, a couple of things. One,
20 because there was a wider right-of-way, we had to
21 only do the flood wall on one side which,
22 obviously, reduced the cost as compared to both
23 sides, which would be required on Upper Berryessa.

24 And second, the District was willing to
25 pay the extra money to do that, and it was required

1 as part of our 401 permit, and we were able to do
2 it.

3 However, the Corps was unwilling to accept
4 those costs, is my -- they didn't. They wouldn't
5 accept those costs, they were excessive. They
6 tried the B -- the B to C, too, and unacceptable.
7 A level at where it would not have been approved.

8 And if there are any other questions?

9 VICE CHAIR MCGRATH: I have a couple
10 questions.

11 CHAIR YOUNG: All right, let's have the
12 lights and questions for Mr. Manitakos.

13 VICE CHAIR MCGRATH: Even though I am
14 desperately hungry --

15 (Laughter.)

16 BOARD MEMBER KISSINGER: What else is new?

17 VICE CHAIR MCGRATH: What else is new.

18 BOARD MEMBER AJAMI: How are you
19 surviving?

20 VICE CHAIR MCGRATH: A couple of
21 questions. You talked about cost. I got the
22 impression that you assumed the purchase of 20
23 acres of land, is that correct?

24 MR. MANITAKOS: Actually, I think that's
25 based just on developing the land. I don't -- I

1 mean, land acquisition costs could be considerable.

2 Yeah, if they're --

3 VICE CHAIR MCGRATH: Well, just about cost
4 that --

5 MR. MANITAKOS: But I think the \$20
6 million was based on development, establishing
7 monitoring costs for a per-acre, for a typical
8 wetland.

9 And, in fact, that's part of the reason
10 why there are no wetland mitigation banks in Santa
11 Clara County because the costs are very prohibitive
12 to Alameda County --

13 VICE CHAIR MCGRATH: Stop.

14 MR. MANITAKOS: Okay.

15 VICE CHAIR MCGRATH: So, in terms of
16 costs, the ability of the District to do this on
17 lands they already owned, in your view, would not
18 reduce that cost?

19 MR. MANITAKOS: You know, it's a very
20 rough number. Yeah, sure, if we had the lands,
21 land acquisition --

22 VICE CHAIR MCGRATH: Did you submit that
23 cost estimate as a detailed cost estimate to our
24 staff?

25 MR. MANITAKOS: Well, if I --

1 VICE CHAIR MCGRATH: This is a yes or no
2 question.

3 MR. MANITAKOS: Yes. Once it's identified
4 what the project is, sure. I mean --

5 VICE CHAIR MCGRATH: You really --

6 MR. MANITAKOS: -- for a hypothetical
7 project we can provide estimates of similar
8 projects already --

9 VICE CHAIR MCGRATH: You will, you have,
10 or you did?

11 MR. MANITAKOS: Excuse me?

12 VICE CHAIR MCGRATH: You will or you did
13 already?

14 MR. MANITAKOS: We did not.

15 VICE CHAIR MCGRATH: Okay, that --

16 MR. MANITAKOS: We will, if you want us
17 to.

18 VICE CHAIR MCGRATH: Landscaping plan, you
19 did indicate that there are 53 trees and you're
20 going to replace them?

21 MR. MANITAKOS: Yes.

22 VICE CHAIR MCGRATH: Do you have a
23 landscaping plan that's --

24 MR. MANITAKOS: Yes, that's been submitted
25 and accepted by the Regional Board staff.

1 VICE CHAIR MCGRATH: And does that show
2 the locations in a place where we could -- so, when
3 we get to discussion, I'd like to be able to see
4 that landscaping plan.

5 Two more quick questions. And this is an
6 extremely important point on channel morphology, is
7 whether or not a similar channel will develop. And
8 the velocities in flood stage on this are very
9 high. They're well above erosion levels. So, I'm
10 very concerned that four inches of soil will be
11 gone in the first four or five minutes, at 11 feet
12 or 12 feet per second, which is your peak velocity.

13 So, I'm not at all convinced, at the
14 moment, that your vegetation material will survive
15 the first storm.

16 On the other hand, I mean, typically, when
17 flood control projects have tried to create a new
18 channel, they've distinguished between the nature
19 of rock across the channel section, to try to
20 reflect the equilibrium profile that was there
21 before construction, and afterwards, and have the
22 capacity of the channel to actually reestablish
23 that.

24 I don't see that anywhere here. Is that
25 some part of the plan that I've missed/

1 MR. MANITAKOS: Yeah. So, the gradient of
2 the creek does not change. The project does not
3 deepen it. In fact, it's set by the I-680, there's
4 hard stops besides I-680. At the top, we're not
5 changing that crossing. There's a Calaveras
6 Boulevard bridge and we're not changing that. So,
7 those are gray control structures at the top and
8 the bottom. And several within the creek, so the
9 gradient will not change.

10 Within the channel gradient, the amount of
11 water going through there won't change. We're not
12 -- praying more rainfall, we're not --

13 VICE CHAIR MCGRATH: And you don't think
14 that you need to establish some type of more
15 erosive channel to let that channel reestablish and
16 have some dynamism?

17 MR. MANITAKOS: I think that that's
18 exactly what will happen. It's dynamisms. The
19 water will flow through there, there's sediment
20 through there, there's the soil cover reporting.
21 And it's going to work its way, as I think Susan
22 said, it's two inches deeper in the low flow. It
23 will work its way through there and create a three
24 to five foot wide, small, low-flow channel.

25 In fact, trying to create a low-flow

1 channel, and expecting it to stay in place is
2 folly. The water's going to move around. It's
3 going to move the sediment around and it's going to
4 create a channel that's adapted to the morphology
5 dictated by the slope and the amount of water
6 flowing there, and neither of those change.

7 CHAIR YOUNG: I'm going to interrupt, just
8 a minute, with some housekeeping. I understand
9 that some of the Board Members have provided an
10 order, a lunch order. Are there other lunch orders
11 that need to be given to staff, now, or not? Yes?
12 No?

13 BOARD MEMBER KISSINGER: What's our plan
14 in terms of --

15 CHAIR YOUNG: Oh, a plan.

16 BOARD MEMBER KISSINGER: I mean, we're
17 going to take a break after --

18 CHAIR YOUNG: We are going to take a
19 break. And at that point, Board members can either
20 go out and scavenge something. Or, if you wanted
21 to put in an order from the menu that was passed
22 down, that's what you need to -- but, you know, air
23 mail right now to the staff.

24 (Laughter.)

25 BOARD MEMBER KISSINGER: I'll do staff.

1 CHAIR YOUNG: Okay, we're going with
2 scavenge.

3 All right, let's continue with the rest of
4 the questions, then. Jim, were you finished?

5 VICE CHAIR MCGRATH: Just is there --

6 CHAIR YOUNG: Well, I know you're not
7 finished. Were you done with these questions?

8 (Laughter.)

9 VICE CHAIR MCGRATH: Just is there an
10 estimate of time that you believe it will take for
11 a low-flow channel to redevelop in a similar
12 manner?

13 MR. MANITAKOS: You know, based on what
14 we've seen in other channels like this, like Lower
15 Silver Creek, within a year there's a pretty well
16 established. We do construction. Generally, we
17 wrap it up in the winter and hydro seed --

18 BOARD MEMBER KISSINGER: Okay.

19 MR. MANITAKOS: -- and by next year
20 there's one there.

21 CHAIR YOUNG: All right. One of our Board
22 Members has to leave. But did you want to make any
23 -- ask any follow-up questions, or have any
24 thoughts before you go?

25 BOARD MEMBER AJAMI: Yes, I guess --

1 sorry. I guess my confusion here, a little bit is,
2 and it might just be the problem I'm having with
3 the presentations earlier, by the staff, and now by
4 District. Obviously, I have a feeling that the way
5 they are presenting the work -- I guess there are
6 two questions.

7 One is, if you already had a concrete, and
8 I mentioned that to the Acting Operating Officer,
9 Chief Operating Officer, if you already had
10 concrete channels that are degrading, why would we
11 fill it up with another concrete channel. So, that
12 was my first question.

13 So, based on the discussions we had
14 earlier, I was under the impression we are actually
15 creating another sort of concrete channel.

16 MR. MANITAKOS: Yeah, I think that's not
17 quite correct. The concrete that's there now,
18 there is a section of concrete-lined channel, right
19 at the bend above Montague Expressway, that's about
20 400 feet long. The project actually removes that.

21 However, in some other places we are
22 adding concrete. Where we're adding concrete is
23 primarily -- the biggest chunk of concrete is at
24 that railroad bridge, that trestle bridge, where
25 just sound engineering design it makes it a lot --

1 because it goes across at an angle, you cannot
2 narrow it. It goes across at a very steep angle.

3 BOARD MEMBER AJAMI: Right.

4 MR. MANITAKOS: And that makes that
5 structure a couple hundred feet long, I believe.
6 So, it's a very long culvert that's pretty hard to
7 avoid, if you're going to build a modern railroad
8 bridge there.

9 There are two other places. There are two
10 concrete ramps that are above Montague, that go
11 down into the channel, because there's a lack of
12 maintenance access there. And those are not --
13 those are just going from the top of bank down to
14 the bank. They're 18-foot wide concrete ramps.
15 They're each about 100 feet long.

16 And, then, concrete is being added down at
17 the -- for transition at the Calaveras and Los
18 Coches Street bridges.

19 BOARD MEMBER AJAMI: Can I actually --

20 MR. MANITAKOS: So, when you talk about
21 the concrete, the amount of concrete, I guess just
22 some numbers --

23 BOARD MEMBER AJAMI: So, I guess, maybe
24 for me to understand, right now what you have
25 there, what percentage of it is already a degraded

1 concrete?

2 MR. MANITAKOS: Right. In terms of
3 concrete, there is about a -- I believe about a
4 half-acre of existing in total.

5 BOARD MEMBER AJAMI: Out of?

6 MR. MANITAKOS: What's that?

7 BOARD MEMBER AJAMI: Half-acre out of --

8 MR. MANITAKOS: Out of the whole area, of
9 about --

10 BOARD MEMBER AJAMI: Which is?

11 MR. MANITAKOS: Ten acres.

12 BOARD MEMBER AJAMI: Ten acres.

13 MR. MANITAKOS: Right.

14 BOARD MEMBER AJAMI: And then, so half-an-
15 acre, out of ten acres, and now you're replacing
16 that with --

17 MR. MANITAKOS: In terms of concrete --

18 BOARD MEMBER AJAMI: Percentage-wide.

19 MR. MANITAKOS: -- I think it's just about
20 an acre. And the stream channel, in total size,
21 increased to, what, 17 acres I think. The widened
22 channel, and about an acre of that is concreted.
23 There is the rock riprap that is buried under
24 another 9 acres, or so, of the channel.

25 BOARD MEMBER AJAMI: Okay. And that is --

1 that is correct. I mean, that's your impression of
2 it?

3 MR. LICHTEN: Yes. Yes.

4 MS. WHYTE: Yeah, those numbers are
5 clearly identified in the --

6 BOARD MEMBER AJAMI: Right, yeah. Okay,
7 that was my question.

8 BOARD MEMBER BATTEY: I have one.

9 CHAIR YOUNG: Yes.

10 BOARD MEMBER BATTEY: I have one quick
11 one, I think, maybe. So, I just want to make sure
12 I'm following this correctly, because it's quite a
13 difference of perspective. But your position is,
14 or the District's position is that the mitigation
15 in the EIR is all you need to do, and that you
16 don't need any other requirements?

17 MR. MANITAKOS: That's correct, and it's
18 the same conclusion as the EIS. The mitigations
19 are all pretty similar between the EIS and EIR.

20 BOARD MEMBER BATTEY: Okay. So, now
21 additional is required?

22 MR. MANITAKOS: We believe no additional,
23 yes.

24 BOARD MEMBER BATTEY: Okay, thank you.

25 CHAIR YOUNG: Are there other questions

1 from Board Members, right now?

2 All right, it is now around quarter to
3 2:00, on that clock. We're going to come back at
4 2:30. We are not going to close the room. So, if
5 you want to stay, you can. But that's the plan.
6 Thank you.

7 MR. MANITAKOS: Thank you.

8 CHAIR YOUNG: Thank you.

9 (Off the record at 1:45 p.m.)

10 (On the record at 2:38 p.m.)

11 (Board Member Ajami no longer present.)

12 CHAIR YOUNG: We are now going to
13 reconvene.

14 I see Mr. Prows, although Mr. Xu is the
15 next card that I have. So, you're in charge.

16 MR. PROWS: If we could beg the Chair's
17 indulgence, we had three members from the
18 community. One had to leave already,
19 unfortunately. But we have three members of the
20 community who like to just make a brief statement,
21 so they can get back to San Jose, or the San Jose
22 area, and the rest of us would continue with what
23 we had in mind, if that's okay.

24 CHAIR YOUNG: We can do that. Select your
25 own order, tell us who you are when you get up

1 here.

2 MR. PROWS: Thank you.

3 CHAIR YOUNG: We do like to make it as
4 easy as possible for the members of the public to
5 come in and share their views.

6 MS. LOCKE: Oh, thanks. Oh, I don't have
7 to stand on my tippy toes? That's good, thank you.

8 My name is Linda Locke. I'm with the
9 Berryessa Citizens Advisory Council. And my notes
10 this morning -- but, so, now it's good afternoon.

11 I just wanted to let you know that I heard
12 everything that you said, and we wanted to move
13 things along quickly, now.

14 So, but I wanted to let you know I've
15 lived in the Berryessa area for 51 years. I've
16 been very active in my community, in all kinds of
17 different ways, and in the church, also.

18 I know what it's like to have the creeks.
19 We live near a creek. I've taught in the schools,
20 near a creek, it was the Penitencia Creek. And
21 years ago, there was usually, you know, a drip
22 coming through. Rainy days, it would get a little
23 fuller. But one time we had a lot of rain and it
24 came up, went over the banks, across the road, and
25 into our elementary school, and the homes nearby.

1 So, it was really astonishing and we were
2 all just stunned that it could get that high and
3 go. So, since then it's been all repaired and we
4 have -- you know, the Water District did a lot of
5 things to help us out on that.

6 So, I'm very aware of the need for these
7 creeks to be well taken care of.

8 We did send a letter. I don't know if you
9 received it or not, but from the Berryessa Citizens
10 Advisory Council. And we are concerned about
11 getting this done in a timely manner.

12 And the one issue, that we have another
13 school that's nearby the Berryessa Creek. And
14 we're also very concerned about BART coming in.
15 It's already under construction for the past year
16 or so, so we know there's a lot of things going on.
17 And there's that station right there, which is on
18 Calaveras and -- not Calaveras -- Montague and
19 Capital. I only live around there.

20 And there's a BART Station in Berryessa,
21 right on Berryessa Road. So, if one BART station
22 was impacted, then we're also going to be impacted
23 at the other one, and it could be very severe for
24 all of our people going to and from work.

25 So, we're just really concerned about

1 getting this done in a timely manner, and making
2 sure that we're all working together. Dick Santos
3 does put it very well, I think, that we're all in
4 this together, in the State of California. So,
5 we'd like to show that we're trying to work with
6 you.

7 Thank you very much for your time and your
8 consideration.

9 CHAIR YOUNG: All right, thank you.

10 MR. CANEILLE: Good afternoon, my name is
11 Frank Caneille. I'm am the President of the
12 Berryessa Business Association. I am also a real
13 estate broker and a homeowner.

14 So, I heard a lot today regarding how this
15 project could be delayed or cause some problems in
16 the future. And I heard a lot of going on about
17 environmental and habitat. One thing that I've not
18 heard, really, is it affects the homeowners in our
19 area. How it impacts the homeowners if there is a
20 flood that happens because the creeks are not being
21 rejuvenated, fixed along the way, and all the
22 problems that come up with it.

23 One of the things that homeowners have to
24 have, and business owners, is flood insurance,
25 which is a burden on the homeowners. If there is a

1 flood and the homeowner suffers damage, that's a
2 burden on the homeowners and the business. The
3 impact, the economic impact that is associated with
4 a flood, like we're having right now in some of the
5 areas in Morgan Hill, the homeowners are taking the
6 brunt of all the damages being associated with this
7 flood.

8 So, it's one of the things that we'd
9 really like the Board, and everyone that's worked
10 on this project, to take also under consideration,
11 the homeowners that live near those creeks that
12 will be affected.

13 Yes, the BART Station is a big deal and
14 it, you know, will be an impact. It will impact
15 our traffic. Traffic, the way it is, as some of
16 the people already mentioned, it's very congested.
17 If there's a flood, it will be even worse.

18 But again, the most important thing I
19 would like to make a point of is how it impacts the
20 business owners and homeowners when there's a flood
21 in the vicinity.

22 And I thank you for the time that you're
23 giving me, Madam Chair, the Board, and the staff to
24 take this under consideration. Thank you.

25 CHAIR YOUNG: All right, thank you very

1 much for coming.

2 REVEREND MOORE: Hello, I am Reverend
3 Moore, President of San Jose Silicon Valley NAACP.
4 And like many of you, I am appointed by the
5 Governor. I'm also appointed on the POST
6 Commission, Peace Officer Standards and Training.

7 And never in my 34 and a half years have
8 ever seen a Commission, or group of people who
9 represent the Governor, tell me, as a community
10 member, that they really don't have time to listen
11 to me, or that I need to rush this thing through.

12 Procrastination is still a thief of time.
13 The urgency is now, not tomorrow. The flooding
14 could happen at any moment, any time, any day, not
15 gauged or measured by you. And there does not seem
16 to be any concern of the human capacity and which
17 it's going to affect. There are human beings'
18 lives down here that we're talking about.

19 We finally get the BART from Oakland to
20 San Jose, that would offer people up here
21 opportunities for jobs, that could flood out and
22 also keep them from coming down there, and you seem
23 to have no concern.

24 It seems that the attitude that I felt
25 coming in here, feels as though you already had a

1 decision made. And the way some of you, on the
2 Board, have talked to other people from my
3 community, makes me see why up here, in Oakland,
4 the politics or the radical attitude of the
5 community is such. Because the only way that I
6 believe that you will listen to the community, or
7 the people that this will affect, is if we fill up
8 this room with radicals, and threaten to tear
9 something up or burn it up. That seems to be the
10 politics of this area.

11 It hurts me that your Board or your people
12 do not come down and interview one member of the
13 community, and ask what the community wanted. You
14 had no concern for what we want, only concern for
15 what you want to do. You don't live down there.
16 you're not going to be affected if this floods out.
17 These aren't your people's jobs. These aren't your
18 people's homes. These are my people. This is my
19 community.

20 And I'm offended by the fact that you will
21 not take the time to even consider how we might be
22 able to work this plan out. You're not taking, for
23 one minute, is there a place that we can
24 compromise. This seems to be the politics of
25 today.

1 The rhetoric, because it's this group that
2 brought it, that you're not going to accept it, not
3 that there's some life in it.

4 Take time to come in with an open mind and
5 consider how we can work on this together, to make
6 it work. Together, how it would best affect to
7 save this community. How, if we change it by two
8 feet or three feet we could move forward today.
9 Because we want this stopped, now. We do not want
10 the WDR as part of this plan. The community
11 doesn't want it. And that is the question you
12 haven't asked.

13 So, please, consider the human aspects
14 this time. In Santa Clara County, we think of the
15 community first. We think of the people and how
16 it's going to affect it.

17 And I'm asking you, today, have you
18 thought about the people's lives that you will
19 impact by delaying this project, the cost that it
20 might be on the overrun. The jobs that would be
21 lost. The money that would be pulled back from
22 this.

23 You have not thought about the human
24 aspect. And you always want to learn about the
25 cost, you come down there and buy a home, and see

1 how much the land is worth, and see why the prices
2 are so high. And until you take all those into
3 consideration, please, respectfully, my
4 representatives from the Water District, who came
5 down, talk to them with respect. Talk to them as
6 their equal.

7 Because, like you, I serve on POST, as I
8 said. And I have never talked to anyone that's
9 come before us in a manner in which I saw people
10 talked to today. Thank you.

11 CHAIR YOUNG: All right. Thank you, Mr.
12 Moore.

13 I understand that the three of you are
14 probably going to have to leave before we're
15 finished with this business here. I wanted to take
16 this opportunity to let you know, from my
17 perspective, that I echo the comments that Mr.
18 Kissinger made earlier, that there is every concern
19 at this Board, and I think it actually extends to
20 the staff, as well, to be able to provide flood
21 control for the community, for the BART Station,
22 for the surrounding businesses.

23 That is why the staff took the step
24 earlier of doing the Water Quality Certification on
25 a very short time frame.

1 That is why we have been trying to ask
2 questions about testimony that has -- that people
3 have given, that there may be delays.

4 So, I don't want you to leave thinking
5 that we are not concerned with members of the
6 community. I, for one, am. And we have been
7 trying to do what -- I don't want to get myself
8 into trouble here.

9 But I do want you to feel that we are very
10 concerned about not having delays in this project.
11 And as far as I know, the construction's underway.

12 And I have to leave it at that, at this
13 point. But I do hope that you felt like you were
14 heard.

15 Are there other Members of the Board --
16 okay. Thank you.

17 VICE CHAIR MCGRATH: Because I'm a civil
18 engineer, I want to make it clear I'm a civil
19 engineer in stream hydrology. Protection of life
20 is my highest priority. Protection of property
21 comes next. But we have to do that in a manner
22 consistent with law, so that's what do here. And
23 we ask questions to try to get to those places.

24 CHAIR YOUNG: You know, I have one more
25 card from a member of the public.

1 MR. SANTOS: That person had to leave.

2 CHAIR YOUNG: He did have to leave, all
3 right.

4 MR. SANTOS: What was the name?

5 CHAIR YOUNG: Sorry, it's on the file.
6 Mister -- well, it's a Lauren Boyd.

7 (Off-mic comment.)

8 CHAIR YOUNG: She had to leave. All
9 right. Okay, I was going to give her an
10 opportunity to come up at this point. All right.
11 Thank you.

12 Then I think we're going to -- sir?

13 MR. SANTOS: (Off-mic comment.)

14 CHAIR YOUNG: Thank you for coming.

15 I believe we now have Mr. Xu, from the
16 Water District.

17 MR. XU: Yes. Yes. So, good afternoon,
18 Board and Chair. My name is Jack Xu. I'm with the
19 Hydrology, Hydraulics, and Geomorphology Unit at
20 the District. So, I share a very common background
21 as the Vice-Chair right here.

22 And I just want to kind of layup -- I'm
23 going to try to keep this more brief, because I
24 know we've all had a long day.

25 But the purpose of my presentation is

1 really to explain why we believe that the current
2 project reach is an erosional reach, and not a
3 degradational reach, as the Water Board staff
4 suggest.

5 So, this is kind of our look at it, our
6 take, our observations, and the data we've
7 collected. This is what we believe. Because, we
8 don't want to maintain the channel and dredge it
9 all the time, it costs us money. So, we want to
10 make sure that it's going to function and it's
11 going to stay stable for the long term, as well.
12 So, it's in our best interest to kind of meet in
13 the same -- you know, we have the same goal, it's
14 just we have different viewpoints at this point.
15 And I just want to present our viewpoint to you
16 guys.

17 So, an overview. Three main points I'm
18 trying to make. The first is, when you go into the
19 field, there's significant field evidence that we
20 believe this is a degradational channel.

21 Second, we have historical evidence, old
22 model data from flood insurance studies, old plans
23 that weren't built, but you have the existing
24 ground to go off of, that show that in current
25 surveys, when you compare them, kind of show the

1 channel is degrading, and not grading, as your
2 staff believe.

3 And, lastly, in the post-project
4 conditions we did sediment modeling, sediment
5 analysis. This is the same sediment analysis that
6 they mentioned earlier, on the Micosol (phonetic),
7 and Tetra Tech. And we reviewed it, and went
8 through several iterations, and we also shared it
9 with the Water Board staff.

10 And we believe that, from these results,
11 it shows that the project will actually be very
12 stable and have not -- a very negligible amount of
13 aggregation or degradation.

14 So, first, I'm going to start with just
15 general observations of the area. So, this is --
16 oh, sorry, I forgot to dim the lights. Preset one
17 or two?

18 VICE CHAIR MCGRATH: Can I ask you, when
19 you do this, to define the reaches of the channel?
20 Because I've been able to look at the velocity for
21 the channels and that would help me try to
22 understand how velocity changes up and down the
23 stream.

24 MR. XU: Okay. Are you interested in the
25 existing condition or the proposed condition,

1 mostly?

2 VICE CHAIR MCGRATH: Oh, both.

3 MR. XU: Okay. So, this is the existing
4 condition, obviously. And, so, we walked the
5 channel, we walked the creek and I found a lot of
6 evidence of field degradation.

7 And, so, the picture on the top right, or
8 circled in red, you see the bank is falling into
9 the creek. There appears to be a bench and a low-
10 flow channel. What we believe this is, is the
11 original channel bottom was actually the bench, and
12 the creek has (indiscernible) to the point that it
13 has created a second channel, low-flow channel
14 underneath.

15 The evidence that, if you look at the
16 second picture, you see that there's an outfall
17 that's been constructed a while ago, and you
18 provide your normal armor and your protection for
19 erosion, for the water coming out the pipe. And
20 you can see how that sacrete (phonetic) really has
21 fallen several feet. And when you construct this,
22 you wouldn't build a sacrete halfway down the creek
23 and leave the rest of it dirt. You would construct
24 it all the way to the toe, to protect the bank.

25 So, that leads us to believe that the

1 creek has dropped several creek and, subsequently,
2 there has been a failure in this outfall
3 protection, where the secrete has dropped. And
4 this location is just upstream of Montague
5 Expressway, if you look at the figure.

6 VICE CHAIR MCGRATH: And what reach is
7 that?

8 MR. XU: This is all the same reach. So,
9 I don't know exactly what the --

10 MS. GLENDENING: Reach 4.

11 MR. XU: Reach 4. Okay, thank you.
12 Thanks, Susan.

13 Here, so if you imagine we just looked
14 downstream, and we turn around and we look
15 upstream, this is the 400ish foot of concrete trap
16 channel, that my colleague, Jim, mentioned earlier.
17 That will be removed in the proposed project.

18 You can see that's a big drop where the
19 red arrow is, several feet. And this does not
20 appear to be a local scour hole. It appears to be
21 a head cut that has terminated at the concrete
22 apron, because it acts like a (indiscernible)
23 control structure.

24 Moving downstream to Los Coches Street.
25 The same kind of idea. We see on the left an

1 outflow that's been constructed more recently, with
2 newer concrete. It's kind of got a whiter sheen to
3 it. I terminates at the invert.

4 On the right, almost across the creek, you
5 can see where one that was constructed further in
6 time, ago, has dropped several feet. The same idea
7 that the other one has fallen. Which leads us to
8 believe that the creek has, indeed, fallen by
9 several feet.

10 One of my last pictures, probably one of
11 the most telling, is at the Los Coches Creek Street
12 crossing. And here, you can see a very deep cut
13 around the apron of the old bridge bottom. So,
14 what we believed that happened is that the concrete
15 that you see, now, used to be the bottom of an old
16 culvert. The creek used to be that wide.

17 And, then, when they put the new bridge n,
18 they kind of just abandoned the old apron. But you
19 can see how the creek has moved around and kind of
20 cut around it, and the old concrete is still there,
21 visibly marking the old invert.

22 VICE CHAIR MCGRATH: What direction are we
23 looking at?

24 MR. XU: So, in the big picture, you're
25 looking downstream at the bridge. And the smaller

1 picture, you're standing right near the cut,
2 looking upstream.

3 VICE CHAIR MCGRATH: So, where does Los
4 Coches Creek come in?

5 MR. XU: The very downstream end of the
6 project reach.

7 VICE CHAIR MCGRATH: It's the other side
8 of the bridge?

9 MR. XU: It's the -- oh, sorry, Los Coches
10 Creek comes in upstream. It adds more flow to it.

11 MR. LICHTEN: It's to the right of the
12 photo?

13 MR. XU: Yeah, so if you can -- yeah.

14 VICE CHAIR MCGRATH: And the concrete pad
15 that we see in the foreground?

16 MR. XU: Yeah, so that -- that is still in
17 the creek, but we believe that to be a remnant of
18 the old culvert that went through. So, when they
19 improved the road, they added a free-span bridge.

20 VICE CHAIR MCGRATH: But the large thing
21 in the foreground, on this --

22 MR. XU: Oh, the very large. That's
23 collapsed debris, erosion. You're talking about
24 this stuff, right?

25 VICE CHAIR MCGRATH: No, no, in the larger

1 picture.

2 MR. XU: So, this -- this whole thing?

3 VICE CHAIR MCGRATH: Yeah.

4 MR. XU: That's the bottom of the concrete
5 apron we believe to be the old channel invert going
6 through Los Coches Street, before the bridge was
7 turned into a clear span. Or, not a clear span.
8 But it used to be a trapezoid kind of shape, very
9 standard. You know, you throw a culvert in there.
10 And, now, they've improved the bridge and made it
11 wider.

12 VICE CHAIR MCGRATH: But you don't have
13 any as-builts to kind of confirm that?

14 MR. XU: We do not. So, I guess this --
15 we can touch on what Setenay had talked about
16 earlier.

17 One of our project managers, she
18 incorrectly sent a design drawing. They're not as-
19 builts. As-builts have a stamp from the resident
20 engineer, signed and dated. These are not signed
21 and dated by a resident engineer, they're signed
22 and dated by a design engineer.

23 By looking through the plans, we do not
24 believe this was ever built. There's a lot of
25 evidence that, you know, if it was built, the stuff

1 would still be in the creek. It had, this design
2 plan had large, three-foot drop structures, and
3 massive amounts of concrete. You know, we just
4 don't see any of that.

5 And for it to move from what was designed,
6 but never built, to its current condition, is
7 almost naturally infeasible. Where the creek would
8 be a grading, but from the banks, not from the
9 streambed. So, that's what leads us to believe
10 that this was never built. And we could never find
11 any as-built plans.

12 And when we consulted with our records
13 staff, they had no idea of this ever being like a
14 bid project.

15 So, going back to historical data, here's
16 a few longitudinal profiles. The purple one, you
17 can probably ignore. That's just in there. I
18 don't know the datum for that. It was never
19 explicitly established, so it's just kind of -- I
20 plotted it, just to see where it would land. So,
21 you can probably ignore that. But that's from some
22 of the design plans that we dug up, that were never
23 built.

24 The red line is the HEC 2 Hydraulic model
25 flood insurance, done in the 70s. So, we consider

1 that to be pretty accurate. The datum was indeed
2 in the model, in the metadata, so we know it's
3 NGBE-29, so we can correlate it.

4 The blue line is the existing conditions
5 profile that was surveyed before the project. And
6 the green line is the proposed project invert.

7 So, you can see that in the middle of the
8 project reach it's been pretty stable. But at the
9 upstream and downstream area, it's degraded
10 considerably, which is evidenced by the field
11 observations at the upstream Montague area, and the
12 downstream, Los Coches area.

13 VICE CHAIR MCGRATH: So, the downstream
14 reach would be Reach 1, and then it would be Reach
15 1, 2, 3, 4, going upstream. Is that correct?

16 MR. XU: I believe so. Is that accurate?
17 Okay, yeah.

18 VICE CHAIR MCGRATH: And the profile would
19 be flat in Reach 1, which kind of makes sense given
20 that the Reach 1 projected velocities are
21 diminished from about 11 to about 6. And upstream,
22 they're all about the same. Does that match your
23 understanding?

24 MR. XU: Are you talking about the
25 proposed conditions model?

1 VICE CHAIR MCGRATH: Yeah.

2 MR. XU: Okay. I believe so. I mean,
3 you're also talking about the 100-year event,
4 right?

5 VICE CHAIR MCGRATH: Yeah.

6 MR. XU: Okay.

7 VICE CHAIR MCGRATH: They're pretty rapid.
8 But I guess the question that I would have in here,
9 too, in terms of the developing recovery of the
10 channel, which you're arguing for, what are the
11 low-flow velocities? Because that's going to
12 define how much sediment's going to move around --

13 MR. XU: Sure. Okay, yeah.

14 VICE CHAIR MCGRATH: -- and how rapidly.

15 MR. XU: How quick, yeah. Like, you would
16 expect a 100-year flood to have a bunch of
17 velocity. That's what happens, right?

18 VICE CHAIR MCGRATH: Yeah.

19 MR. XU: You expect to lose beds, you
20 expect for some --

21 VICE CHAIR MCGRATH: Sometimes, 10-year
22 floods are awful close to the same level.

23 MR. XU: Right. But we want to look at
24 this longest, yeah. I believe an indication of
25 those velocities are much lower, as you'd expect.

1 I don't have the numbers right in front of me. But
2 I'm sure we can get them for you, if you're
3 interested.

4 VICE CHAIR MCGRATH: I do think it's
5 integral to your point that the channel will
6 recover quickly.

7 MR. XU: Yeah, uh-hum. So, I think the --
8 if I can go back to this one, I guess, to talk
9 about the channel, the Provost (phonetic) channel,
10 in general.

11 So, as you can see here, the channel's
12 already starting to create a bank full. It's
13 depositing sediment here. So, we have a good idea
14 of what the bank full section is going to look
15 like, after we built a channel. Obviously, this is
16 much -- if this is the real bank full width, I
17 think it's about 12, 15 feet wide, maybe a couple
18 of feet deep. If that's true, in our proposed
19 cross-section, because it's much wider to carry the
20 proposed conveyance, the creek will either,
21 theoretically, if you cover it with four inches of
22 soil, kind of cut into that four inches of soil and
23 kind of build around that, or it will deposit a
24 little more and create the bench afterwards.
25 Depending on which way, you know, it swings, if

1 it's aggradational or degradational in certain
2 areas.

3 And I believe that as the sediment gets
4 fed into the system, it's going to eventually, the
5 riprap will be clogged with cobbles, and small
6 gravel that comes from upstream, whatever makes it
7 through the debris basin. And everything else will
8 be just fines, locally.

9 And these creeks tend to get pretty turbid
10 during storms, so I don't think there's a lack of
11 fine sediment. And I think your staff would agree
12 that there's a lot of sediment that comes in.

13 So, I don't think there's any danger of it
14 ever losing the bottom because it would just
15 constantly replenish itself. It may erode, you
16 know, in a 100-year storm, a 10-year storm, bigger
17 events. But we believe that there's enough
18 sediment coming in that it will, you know, keep
19 enough depth to establish new vegetation growth
20 after extreme events.

21 So, here is just another plot. These are
22 cross-sections. The same color coding. So, blue
23 is the current condition. Red is the old, 1970 HEC
24 2 model, which you have pretty good confidence in.
25 And the green is a 90-percent design. And, then,

1 in one of them, we have a 1955, maybe, possibly
2 accurate drawing of a ditch.

3 So, did my best to overlay them. But you
4 can see there's a general trend of degradation.

5 And, especially, in the Los Coches, you
6 can see what I mean when I say -- if you remember
7 that picture, earlier, there's a small bench in the
8 blue line, in the existing channel. And if you
9 look at the red, from the 70s, you can tell that
10 this bench is an artifact of the galwag (phonetic)
11 of the old channel.

12 So, that you can see if it started like
13 red, and then it kind of dug in here, and then the
14 bank collapsed a little bit here, you get kind of
15 this shape.

16 Right, well, this is going from a green to
17 a red shape which is -- or a green to a blue shape,
18 which means it would have build somehow -- the
19 channel would have to build somehow on the banks,
20 instead of, you know, building from an ingreat,
21 which I don't think there's a natural example of
22 that ever happening.

23 VICE CHAIR MCGRATH: But this seems to
24 suggest that you've excavated about three feet what
25 may or may not currently -- an equilibrium channel.

1 MR. XU: Right, yeah. So, we believe it
2 to be degradational. So, if we increase the trough
3 sectional area, and we're going to reduce stress,
4 we're going to incur deposition from a
5 degradational state. So, we're moving towards a
6 more stable channel.

7 And, then, as I move forward, the next
8 I'll talk about -- so, we want to know how far.
9 Did we go too far? Did we move the creek too much
10 toward a depositional scenario, where we're going
11 to start having to incur maintenance? And that's
12 where we performed the Proposed Condition Sediment
13 Study to make sure that, hey, we didn't go too far
14 to the other side. We actually kind of met
15 somewhere close to the middle. And, you know, we
16 can live with, you know, a foot of deposition or a
17 foot of erosion. Because, you know, you're not
18 always 100 percent sure of how accurate sediment
19 studies are.

20 So, the proposed project, like I said,
21 widens and it reduced your stresses. So, when we
22 do that, we did the Sediment Model. So, here's
23 just -- we just did one 10-year event, first. And,
24 then, so the black line is the proposed and the red
25 line is the after-storm invert.

1 This was run in HGC RADS, using their Act
2 6 routine.

3 So, you can see at the culverts, not
4 surprisingly, where flow velocities drop out, you
5 get little build ups of sediment. At the very end,
6 you get a little bit of erosion.

7 And as we moved forward, we also did five,
8 back-to-back 10-year events, which are more
9 indicative of channel forming discharge. And we
10 see kind of the same places had the same problems.
11 The culvert gets a little bit of sediment. Los
12 Coches gets a little sediment and a little more
13 erosion. And that's expected after that many big
14 events, we expect to see some large deposits.

15 You know, say another two-year storm comes
16 along, you know, it might wash all that stuff out.

17 But for the most part, in the channel
18 overall, the invert doesn't change too much. And
19 that's what gives us confidence that, yes, this
20 channel is in -- will not aggrade in its state.

21 VICE CHAIR MCGRATH: So, back to that for
22 a second.

23 MR. XU: Sure.

24 VICE CHAIR MCGRATH: Because you've got --
25 I'm not quite understanding the left side of it.

1 You've got some aggradation, and that matches the
2 flattening of the slope, and the lower velocities.

3 But then you've got Los Coches coming in,
4 and I don't know what the cue on that is. And,
5 then, you've got channel degradation, but it looks
6 like you've got a mathematical problem in your
7 model there, actually, is what it looks like.

8 MR. XU: And, yeah --

9 VICE CHAIR MCGRATH: If it's not at all
10 smoothed.

11 MR. XU: Well, the --

12 VICE CHAIR MCGRATH: And what's causing
13 that? Is that -- I mean, that could be bridge
14 abutment.

15 MR. XU: Yeah, it could be the sediment
16 sizing on the bed. It could be the change in
17 velocity. Maybe after Los Coches there might be a
18 design change for the channel because, you know, it
19 gets higher velocities. Maybe the roughness
20 changes or the vegetation design changed. I can't
21 100 percent tell you what it is without, you know,
22 actually looking at it and doing analysis.

23 But those are possibilities. It could be
24 an artifact of the downstream boundary condition,
25 as well.

1 VICE CHAIR MCGRATH: Okay.

2 MR. XU: So, a lot of possibilities.

3 Sorry, no answers for you.

4 So, our conclusion, then, is that we
5 believe the data, you know, in the field. We'll go
6 out there and it looks like degradational. We
7 looked at historical plans and it all points to a
8 degradational state.

9 So, if we wind in the proposed project, it
10 should stabilize the channel. And, then,
11 furthermore, our sediment modeling shows that, you
12 know, we don't believe there's going to be any
13 significant degradation, aggradation, either way,
14 in the proposed conditions. Which gives us
15 confidence to move forward with this. And that
16 the, you know, proposed habitat that Jim mentioned
17 will all probably take hold, and look like what you
18 guys saw in the Lower Silver Creek Project.

19 So, any questions, any further questions?

20 Thank you.

21 VICE CHAIR MCGRATH: That was quite
22 helpful. Yeah, thank you.

23 MS. WHYTE: Can I make a comment? I just
24 wanted to add and just clarify that the
25 disagreement between whether the channel is

1 erosional or aggrading, essentially relates to the
2 mitigation that would be necessary as part of any
3 maintenance down the road, which is not as much of
4 a critical question, now. It's the risk that the
5 District has claimed they're willing to take in
6 terms of what mitigation may be required, based on
7 their certainty in their modeling.

8 I think what's more critical, at least
9 from my perspective, is taking that information and
10 considering it erosional, and then talking about
11 how natural processes will create a viable, low-
12 flow channel, that will sustain water and provide
13 function and value during the dry season. And
14 that, to me, was not answered as part of this
15 presentation. And it's the question that I keep
16 coming back to, in my mind.

17 I'll also note that the previous speaker,
18 from the District, showed the example of the Lower
19 Silver Creek there. Well, that is not a section,
20 best of my understanding, in which the bottom of
21 the channel was riprapped. So, you did see
22 somewhat of a low-flow channel, and you saw some
23 complex geomorphology within that. You did see
24 some rock in the sidewalls that was coming in, that
25 was vegetated.

1 But here, you know, the concern that we've
2 continued to express is the bottom of the channel.
3 And, so, if it's erosional, and you're protecting
4 the bottom from eroding, then forming the low-flow
5 channel and how that's going to work is one of the
6 issues of concern that we're reaching out for,
7 within the mitigation that we'd like to see happen
8 because of those impacts.

9 VICE CHAIR MCGRATH: I think I recognized
10 most of that. But I guess there's two questions
11 that I have for you, recognizing, as probably you
12 do, that relative accuracy of sediment movement
13 modeling, is the weakest part of our hydrologic
14 package.

15 MR. XU: Of course, right. Yeah.

16 VICE CHAIR MCGRATH: You know, that was
17 the first lesson from Dr. Shen.

18 But the -- so, do you have any hydrographs
19 for that stream? I mean, that goes back, that kind
20 of gives us what a typical channel forming flow
21 might be?

22 MR. XU: Uh-hum, yeah, we could -- I can
23 speak to that. So, the Corps had a sediment inflow
24 curve. They had some data points for a sediment
25 input load.

1 VICE CHAIR MCGRATH: No, I'm looking for
2 hydrographs.

3 MR. XU: Oh, you want sort of -- yeah, we
4 have a stream gauge at Calaveras. It missed the
5 80s and the 90s, so the really wet years. But we
6 got data from about the 70s to the early 80s, and
7 we started the gauge up, again, in the early 2000s.
8 So, we have enough data to, you know, do a flood
9 frequency analysis curve, and come with a bankful
10 discharge. And, also, with the field visits, we
11 can kind of correlate that.

12 VICE CHAIR MCGRATH: Okay. Another issue
13 that lies in a debate between our staff and your
14 staff, on a technical basis, is what this will do
15 to whether or not there's water in the stream.
16 Which is, I think, critical.

17 And that, I think, both to the hydrograph
18 and whether or not the source of the water in the
19 channel, in the summer, is groundwater slowly
20 seeping, or it's runoff. Do you have a take on
21 that or any data on that?

22 MR. XU: So, these pictures that I took,
23 they were in June. It was bone dry. The only
24 little bit of water is from the Alhambra Plant,
25 that has industrial discharge pools.

1 But in the winter geese and, you know,
2 like you saw, they come in there. So, it
3 definitely doesn't flow all the time.

4 So, I don't know if that changes any of
5 the concerns that, you know, you would have on
6 having it being able to flow continuously.

7 I also wanted to touch on your concerns on
8 possibly, you know, if everything just eroded away
9 and there's riprap left, right. From the bankful
10 channel, that we believe will form, so this kind of
11 small channel. If you can imagine, this will be
12 there, that's four inches of dirt, and this will
13 end up being, you know, whatever comes down from
14 the hills. It will end up depositing and veg will
15 grow there naturally.

16 And because it will be riprap, and not a
17 flat channel, it will collect stuff, right. If the
18 gravel comes down, it will lodge in between, and it
19 will just get moved, generally, with the process.
20 We'll never get something like a flat, you know,
21 just pure riprap. Right? You can't -- things will
22 get caught in it, right. Things will grow
23 randomly. And there's probably trash that comes
24 down here, too. So, it won't be completely bare
25 riprap, I don't think ever, with the sediment load

1 and input that you'll get, and just the nature of
2 the matrix of the rock.

3 BOARD MEMBER BATTEY: Can I just ask?

4 MR. XU: Uh-hum.

5 BOARD MEMBER BATTEY: So, to me, this
6 question of does it flow year-round, or not, is
7 sort of an important one. And, so, I just wanted
8 to hear from staff on -- do you have a different
9 perspective on that, based on the presentation you
10 gave. I'd love to hear both sides of it.

11 MS. GLENDENING: All the documents I've
12 seen, for the project, say there's perennial flow,
13 at least up to the Piedmont Creek Tributary. And
14 that flow is attributed to what they're saying is
15 the excess groundwater, pumped groundwater from an
16 Alhambra Water Plant, just upstream of the
17 tributary mouth. Also --

18 BOARD MEMBER BATTEY: So, that includes
19 this reach?

20 MS. GLENDENING: In this project, there
21 will be a concrete culvert to direct flow from the
22 Piedmont Creek Tributary into Berryessa Creek. So,
23 just the very bottom 60 feet, or so, of Piedmont
24 Creek is part of the project. In addition to a
25 rail crossing, that crosses over Piedmont Creek.

1 So, that will also have the riprap treatment, from
2 the rail crossing down to the tributary mouth in
3 Piedmont Creek.

4 MS. WHYTE: I think she's asking about our
5 observations for existing conditions during the dry
6 season.

7 MS. GLENDENING: Right, so our -- I've
8 been there at least five times, and there's been in
9 that area down -- from Piedmont Creek, downstream
10 to Calaveras Boulevard, the downstream boundary,
11 including additional area upstream of Piedmont
12 Creek, up to about Ames -- upstream of the Ames
13 Bridge crossing. So, I estimated about one-third
14 of the creek has been wet, every time I've been
15 there during the dry season.

16 BOARD MEMBER BATTEY: In this section?

17 MS. GLENDENING: Yes.

18 BOARD MEMBER BATTEY: Okay.

19 MS. GLENDENING: In addition, I've
20 observed wet, or muddy, you know, moisture in the
21 creek in an inspection in May 2015. And, you know,
22 that's not necessarily dry season, but it was
23 during the drought.

24 MR. FERNANDEZ: And just to add a little
25 bit onto that. The EIR, itself, identified impacts

1 to warm water fish, namely mosquito fish and
2 California roach. But they dismissed them as less
3 than significant because they were not rare and
4 endangered species, and they can move somewhere
5 else in the watershed.

6 But that doesn't mean that it wouldn't
7 take away the beneficial use during a portion of
8 the year, which we consider significant.

9 BOARD MEMBER BATTEY: And can I just get
10 clarity on this. Is the bottom riprapped or is it
11 not riprapped?

12 MR. XU: I believe the design has riprap,
13 with covering of soil.

14 BOARD MEMBER BATTEY: Right, four inches
15 of soil.

16 MR. MANITAKOS: And, actually, choked
17 riprap. They're going to push the soil down into
18 the void, so the riprap, and then compact, push the
19 soil -- put a layer of soil and compact it.

20 And I think I can add to Susan's
21 observations. Yeah, from somewhat above Piedmont
22 Creek, if you see where Yosemite Drive is there,
23 from there down pretty much there's water there all
24 year.

25 From Yosemite to past Montague, up to the

1 -- actually, almost to 680, that's generally dry
2 during the dry season. That completely dries up.

3 And, then, right at 680 it tends to get
4 wet, again.

5 BOARD MEMBER BATTEY: Right. And if I
6 followed your earlier presentation, you expect
7 those same conditions to result after construction.
8 After you're done, you're going to have wet where
9 it was wet and you're going to have dry where it
10 was dry?

11 MR. MANITAKOS: Right. No, we expect the
12 same hydrology with -- yeah, the same water is
13 flowing through. It appears that it really -- that
14 section between like Yosemite and up above
15 Montague, that area appears to infiltrate very
16 well. I don't think adding the riprap will change
17 that. I think it will still infiltrate and it will
18 dry up.

19 It doesn't -- based on our geotechnical,
20 it doesn't -- the groundwater table is well below
21 bed level there. As you get down lower,
22 groundwater rises. And by the time you're down to
23 Calaveras, groundwater's almost to the creek bed
24 level. So, we think that in addition to the
25 bottling plant, which is right at the Piedmont

1 confluence, which puts out water every day, they're
2 always discharging there. They bottle it in a very
3 large, deep, groundwater well. And, then, the
4 excess water they discharge into the --

5 CHAIR YOUNG: All right. I have two more
6 --

7 MR. MANITAKOS: It keeps that area wet.

8 CHAIR YOUNG: I have two more cards. And
9 there is Rita Chan, Assistant District Counsel.

10 MS. CHAN: Yes, good afternoon. My name
11 is Rita Chan and I took the oath, earlier. I'm
12 legal counsel to the Water District. And present,
13 today, also is the outside counsel, Peter Prows, in
14 case there's other questions.

15 I'm going to try to keep it short
16 although, you know, I would have to try to address
17 some of the questions or issues brought up by some
18 of the Board Members, which I heard. And maybe our
19 response might not be entirely satisfactory, or at
20 least I want to provide some clarification of those
21 issues.

22 I heard earlier that one of the Board
23 Members want to hear more about how the NEPA/CEQA
24 process work into this design.

25 I heard from one of the Board Members that

1 you wanted the issue to be framed. And I agree,
2 totally. Because I think, at the end of the day,
3 we need to talk about what, actually, is the
4 contention here.

5 I also heard a lot of discussions about
6 the certainty of whether there will be more, or
7 less sedimentation removal. And I will kind of
8 talk about a little bit, just so, you know -- but
9 with the issue framed, you understand why I think
10 that discussion might not be as important as we
11 think today.

12 But before we go on, I do have a list of
13 talking points, but I don't want to forget a couple
14 things I want to mention. So, earlier, I heard
15 that the Board is going to exclude the letter that
16 the District sent. Well, actually, we sent two
17 letters. One, a few days ago, asking for a delay.

18 And, then, we did send a letter yesterday,
19 and before 5:00 p.m., providing more comments to
20 the staff's responses to comments.

21 It is certainly not the Water District
22 intention to surprise the Board or Board staff.
23 And the reason that we sent the letter so late is
24 because it took that much time to go through close
25 to 100 pages of single-side responses.

1 Now, the District has submitted a number
2 of comments, lengthy comments in the last few
3 months. One in September, one in November.
4 Commenting on staff's proposed -- in the Revised
5 Tentative Order. And we have asked staff, Regional
6 Board staff to share with us their responses to
7 comments, you know, and give us enough time to
8 prepare for the public hearing.

9 And, you know, our position is, from a due
10 process stand point, and under the provision of the
11 Administrative Procedural Act, we, as a party,
12 should be given a little bit more time than the
13 general public, you know, the typical seven days.
14 And here, we're given four business days, because
15 we didn't see the responses to comments.

16 And we understand that Regional Board
17 staff is working feverishly. They're trying to,
18 you know, get them done. But we were told, you
19 know, a while ago, that they were working on the
20 comments, that they needed to do some
21 recategorization and reorganization to make it
22 easier for the public, and we understand that. And
23 just we're at -- but that's the reason that we had
24 to send the letter so late.

25 And another reason is because there are

1 some new issues, and theories, that were raised in
2 staff's responses to comments, that we believe
3 relate to, and we ought to respond to. And that's
4 part of, you know, the preservation of the records.

5 So, we respectfully request that, you
6 know, the Regional Board reconsider that position
7 and admit that letter into the record.

8 Otherwise, my secondary request would be
9 just to ask the outside counsel to summarize what
10 we said in the letter, because it is important
11 that, you know, there are some new issues raised,
12 and we were given four days.

13 And you mentioned, earlier, that you
14 planned to hear all the evidence that's relevant to
15 the matter, and this is clearly relevant to the
16 matter. So, that's my first point.

17 CHAIR YOUNG: I'm not going to change my
18 ruling, for the reasons I stated earlier. You are
19 not the only parties to this matter. There are
20 many other interested parties, some of whom were
21 not even able to come today.

22 It is not fair for you to send a letter
23 the night before the hearing and expect it to be
24 part of the record. That's really outside of the
25 bounds of normal procedure.

1 You folks have been testifying, pretty
2 much here, since about noon. I would hope that the
3 contents of your letter would actually already have
4 been part of your testimony.

5 Mr. Prows is welcome to get up and
6 summarize those points, in front of the Board.
7 We've, you know, gone this far, we're not going to
8 cut him off, now.

9 But I'm surprised that you are surprised,
10 let's just put it that way. So, continue.
11 Continue, please, with your testimony.

12 MS. CHAN: And, then, I think to the
13 extent, you know, he's going to summarize, he's
14 going to try his best to summarize the points that
15 was not previously mentioned during the earlier
16 testimony. So, hopefully, that will save the Board
17 some time.

18 So, another point that has not been
19 raised, but it has raised in our comments several
20 times, was the idea, the notion that if the
21 Regional Board adopts this order, it should be
22 mindful that the State could very well be
23 responsible for the cost required to comply with
24 the condition, including the mitigation.

25 Because the Constitution requires that the

1 State reimburse local agency for the cost of State
2 law mandates. And there's a recent Supreme Court
3 decision, and it involved the Regional Board's
4 issuance of a Stormwater Permit to local water
5 agencies. And in that case the Board -- I mean,
6 the Court held that those conditions in the
7 Stormwater Permit are clearly State mandates, and
8 not Federal mandates, so that exception does not
9 apply.

10 Here, you know, it's pretty obvious to us
11 that, you know, the requirements of State mandates,
12 because it appeared over, again, in the Tentative
13 Order that the impacts associated with what they
14 call Waters of the State, which is a concept under
15 State law, under the Porter-Cologne Act.

16 In the response to comments, which is what
17 we just saw about four days ago, Regional Board
18 staff invoked an exception to this reimbursement
19 requirement. And this exception says, when the
20 local agency has the authority to levy fees or
21 assessment sufficient to pay for the cost, there's
22 no, really, analysis in the response other than
23 invoking that exception.

24 And we would just like to clarify that the
25 District does not have the authority to levy new

1 fees and assessment unilaterally, without going
2 through some kind of voter approval process, which
3 is part of the Prop. 218.

4 Given that, you know, we talked about the
5 \$20 million project. I can't speak to it, you
6 know, but I know there's a lot of discussion about
7 the cost. But providing a restoration project on
8 20 acres of land is certainly not the type of cost
9 that the District could easily just get our hands
10 on, without going through some sort of process.
11 So, I just want to at least make that point clear.
12 Because it's in our response to comments, it's --
13 not response. The letter that we sent, yesterday.

14 So, let's try to frame the issue. So, I
15 know there was a lot of discussion that talked
16 about sedimentation. At the end of the day, we
17 talked about a 20-acre mitigation. Where does that
18 come from? Where does that requirement come from,
19 based on our review of the order?

20 Here's what the calculation came about.
21 In the District EIR, we concluded that there are
22 about 4.18 acres of Waters of the U.S., which is
23 also Waters of the State, as you know. And there
24 is also some vegetation area, and I forgot what it
25 is, about .5 acres. So, we add that amount and we

1 said construction would be to impact on this 5 acre
2 of non-native grassland and habitat.

3 At the end of the project, the project's
4 going to create more than 5 acre of habitat because
5 we're going to have a wider channel, because we're
6 going to hydro seed. And, also, our science told
7 us that within one to two years, the vegetation is
8 going to be regenerated.

9 I know this is a disputed issue, but
10 that's what the EIR concluded. And that's it.

11 And we concluded that as far as impact on
12 this Waters of the State and Waters of the U.S.
13 there's a less than significant impact. Because,
14 as I mentioned, there will be more than 5 acre at
15 the end, after two years, so one to two years.

16 In the Order, Regional Board staff stated
17 that 4.18 acres of Waters of U.S., and we agree
18 that that's also Waters of the State. But Regional
19 Board staff also added a 5.93, close to 6 acres of
20 area as part of the Waters of the State. And this
21 5.93, and I might have misquote the figure, about
22 that number, is area about the order in high
23 watermark, through the top of the bank.

24 Now, I, you know, it just doesn't seem
25 reasonable for us to count all the area of high

1 watermarks, to the top of the bank as Waters of the
2 State. So, they add these two numbers together,
3 4.18 plus 5.93, whatever that number is. And, now,
4 I saw from the Supplemental is that the summation
5 of that number is like 9.81. And they multiplied
6 that by 2, because they wanted a 2-to-1 ratio.

7 And the reason being, as we were told,
8 that, you know, they were uncertain as to how fast
9 the vegetation will be regenerated, the
10 (indiscernible) -- of the habitat. So, they
11 wanted, you know, it's quite typical, 2-to-1. So,
12 that probably come up with close to 20 acre of
13 mitigation. And that's the issue that we have the
14 most problem with. Because the District
15 fundamentally disagree with that analysis.

16 First, the actual acreage of impact and,
17 you know, we also might have some question about a
18 2-to-1 ratio, too. But I know our EIR concluded
19 that the impacts to Waters of the State is less
20 than significant.

21 So, that's the issue that we are putting
22 before you, with the hope that you could consider
23 and, you know, discuss.

24 Now, earlier, there's some discussion
25 about the CEQA guidelines allowing a responsible

1 agency to come in at a later time to add more
2 mitigation requirements, pursuant to 15096, of the
3 CEQA guidelines. Which is the provision that
4 responsible agency should follow.

5 We, respectfully, disagree how 15096
6 should be interpreted. There are three sections in
7 15096 that need to be read together.

8 So, first, 15096(f), I believe, is said
9 that, "Responsible agencies must consider" -- "In
10 making a decision whether to approve a project, the
11 responsible agency must consider the impacts as
12 identified in the EIR."

13 Okay. So, in our EIR, the impacts,
14 whether it's about diversity or, you know,
15 diminished flow, we did not identify that as a
16 significant impacts. So, that's 15096(f).

17 And, then, 15096(g)(2) says, you know, and
18 that's what Ms. Austin, you know, alluded to, does
19 say, "The responsible agency may" -- "should not
20 approve a project where they could identify
21 feasible alternatives, or mitigation measures that
22 would substantially reduce the significant
23 impacts."

24 So, here, our argument is that there's no
25 significant impacts identified in the EIR. So,

1 responsible agency review and also the formulation
2 of alternatives and mitigation measures are limited
3 to what's identified in the EIR.

4 Most importantly, we have 15096(e), which
5 cited a few options for responsible agency to take,
6 if they -- if a responsible agency disagree with
7 what a lead agency concluded.

8 So, a responsible agency's not required to
9 rely on a lead agency's EIR to make a decision or
10 to approve a project.

11 Here are the few options. One, which is
12 the worst option, from most people's perspective,
13 is to sue the lead agency within 30 days after the
14 NRD was filed. No one wants to do that. I mean,
15 we want to work together, right.

16 The second option is for the responsible
17 agency to take on the lead agency role, but this
18 action may only be taken if it's allowed at all,
19 under 15052. 15052 allows the responsible agency
20 to take on the lead agency role only if, one, the
21 lead agency did not consult the responsible agency
22 in the first place. And by the time the
23 responsible agency found out that, oh, there's this
24 document out there and I don't agree, and that 30
25 days statute of limitations is passed, then the

1 responsible agency can't take on the lead agency
2 role.

3 The third option. The responsible agency
4 may prepare a subsequent EIR. But you can only do
5 that if 15162 circumstances exist. And what 15162
6 is that, once EIR certification is done, if there
7 are new significant impacts, or substantially worse
8 significant impacts. Meaning that impacts have
9 already been identified in the EIR, but the agency,
10 the responsible agency believes that because of
11 changes to the project they're substantially worse,
12 then they can prepare the subsequent EIR.

13 And if you don't take one of these
14 options, the issues are considered waived.

15 So, if you read those three sections
16 together, and I think most CEQA practitioners
17 interpret it that way then, you know, really, I
18 think it's too late to bring up those issues.

19 Not to mention, I mean this is a point
20 that I want to make, but we do -- it's not just
21 about timing. We do disagree, fundamentally, you
22 know, with the impact analysis.

23 So, that's the item. Which brings me to
24 the point that we've brought in several of our
25 comment letter. And that is, if the Regional Board

1 is going to adopt the -- and that's exactly what I
2 -- there's one potential option that the Regional
3 Board can consider and that is to basically call a
4 new significant impact or substantially worse
5 significant impact, that responsible to prepare a
6 CEQA subsequent document, in this case it would be
7 a subsequent EIR does not fall with the District.
8 It falls with the Regional Board.

9 So, these are some of the points. But, I
10 mean, you know, I think we provided a lot, you
11 know, of comments. But, I mean, the key that I
12 really wanted to talk about is just that nexus
13 between the impacts and mitigation. We just don't
14 see the nexus.

15 And, you know, I think we had a lot of --
16 we've heard a lot of discussion about, you know,
17 existing and potential, and beneficial use. But we
18 believe that the law requires mitigation of impacts
19 that has to be roughly proportional to the impact
20 cost of the project.

21 So, even though we're looking at existing
22 or potential beneficial use, it has to be an impact
23 by the project. How does a project make an
24 existing or potential beneficial use worse?
25 Otherwise, you know, you might have a

1 Constitutional issue under the long line of
2 Nolan (phonetic) and, you know, Nolan cases.

3 So, you know, I want -- I mean, these are
4 most of my main points. And I wanted to just leave
5 it at that. And if you guys have any questions, I
6 mean, I'm open to answer those questions.

7 And I have Peter here who's, you know,
8 going to do it very quickly, summarize the points
9 that I have not yet made and I missed, and in
10 response to some of the new issues and new theories
11 raised in the responses to comments, that we
12 received about last Wednesday, at 4:15 p.m.

13 CHAIR YOUNG: Well, I'm going to suggest
14 that we go ahead and hear from Mr. Prows, and then
15 we'll do questions for both attorneys at the same
16 time.

17 MR. PROWS: Thank you, again, Board
18 Members. Just a couple quick points. I won't
19 reiterate the points that have been made by others,
20 I hope.

21 The letter that we submitted and the
22 points that I want to focus on are responding to
23 responses that were made to comments that we
24 submitted months ago, and that we've been asking
25 for responses for, for a long time. And have been

1 kind of sandbagged here in the last week with
2 staff's -- I guess they've been thinking about this
3 a while, but only sharing their views about a lot
4 of the key legal issues, as well as all of the
5 environmental impacts.

6 When the initial draft orders came in,
7 there was no brief, there was no explanation, there
8 was no science behind it. And we've been
9 criticized by some of you for not providing data to
10 you in advance of this hearing. That's primarily
11 because we never saw staff's analysis of the
12 environmental impacts until last Wednesday, very
13 close to the end of business. So, that was
14 unfortunate.

15 But on the question of who's going to be
16 responsible for the reimbursement or the payment of
17 the costs of the mitigation requirement, in this
18 order, as Rita said, it's our view that it's going
19 to be the State that's going to be on the hook for
20 that. And that's Article 13-B, I believe, Section
21 6, of the California Constitution, which the
22 California Supreme Court interpreted last summer,
23 to apply to decisions by the Regional Board to
24 local agencies.

25 One of the other exceptions that staff

1 invoked, Rita already mentioned the exception if
2 the local agency has the ability to raise taxes, or
3 assessments, or fees to pay for it, which the
4 District does not have that ability. So, that
5 exception does not apply.

6 The other exception that staff noted is if
7 the mandate is not unique to local governments.
8 The Supreme Court has interpreted that exception
9 very narrowly. We don't think this is a project
10 that complies with that. This order, and its
11 conditions, would be directed to the District, not
12 to the general public, and only arise from a
13 Government-sponsored flood control project that
14 would not be taken by the general public. So, that
15 exception does not apply, in our view, either.

16 The District staff cited a 9th Circuit
17 case for their view that they now have the
18 authority to rescind and reissue a 401
19 Certification. But that case does not say that you
20 have the authority rescind and reissue a Section
21 401 Certification with new conditions, when
22 circumstances have not changed, this much time has
23 passed, and construction has already been done.
24 This case doesn't say anything like that.

25 There was a lot of discussion about the

1 language in the Section 401 Certification that
2 referenced the -- that said, effectively, that the
3 Regional Board would be considering waste discharge
4 requirements for construction impacts.

5 Now, we were not a party to that Section
6 401 Certification, so, respectfully, we did not
7 accept the benefits of that because it wasn't our
8 permit.

9 But it's been our view all along that
10 mitigation is not required. And that if the Board
11 were to consider waste discharge requirements, that
12 it should reject them. That 401 Cert was not made
13 subject to or conditioned upon the issuance of
14 subsequent waste discharge requirements that
15 contained mitigation for the capital project
16 impacts.

17 It was asking you to make a discretionary
18 decision, one way or another. We've been urging,
19 in our letters, that you reject this proposal and
20 we continue to do so. You can consider it all you
21 like, but our recommendation is that you reject it.

22 There are a couple of new papers cited in
23 the staff's -- their main comment about
24 environmental impacts is a response to C-13-A.
25 Most of that was new to us, again.

1 They cite a paper by Sudduth and Meyer,
2 for the proposition that bioengineered stream banks
3 adversely affect species biomass. I read the
4 paper, it doesn't really say that.

5 What it does say is that bank
6 stabilization projects can have positive effects on
7 bank habitat and macro invertebrate communities in
8 urban streams. That's exactly what this is. I
9 don't think that paper helps the staff.

10 They also state that the project has the
11 "potential" to adversely affect water quality
12 through a loss of nutrient cycling. And we've had
13 a lot of discussion about the dry season flows
14 here.

15 But in support of staff's analysis, they
16 cite a 2005 EPA report. That report, what it
17 actually said, is that projects that reestablish
18 geomorphic stability in streams may promote
19 conditions for de-nitrification, if they control
20 erosion. So, that's some of the reason why we
21 wanted to have some discussion about sedimentation
22 here, because we do think this project controls
23 erosion by bringing this from a degradational
24 channel, to a channel that's more in equilibrium.
25 Which I think addresses staff's concerns there.

1 There's a Water Code issue. The Water
2 Code gives you authority to regulate discharges --
3 or to regulate discharges of waste into Waters of
4 the State. It's our contention that this is --
5 well, this project is not discharging waste. This
6 is building a flood control project.

7 So, our position has been this is not a
8 waste discharge over which you have authority.

9 Staff's response, last week, was that you
10 have authority -- they didn't actually take issue
11 with our contention that this is not waste. What
12 they said was that they have authority to regulate
13 dischargers of dredge and fill materials with WDRs.

14 We disagree. Water Code Section 13372(b)
15 gives you that authority only once the State has an
16 approved permit program under Section 404.
17 California does not. You do not have authority
18 regulate dischargers of dredged or fill material
19 that are not also waste. This is not a waste
20 discharge in this project. You don't have
21 authority.

22 We'd raised an argument in earlier letters
23 that Water Code Sections 13263(a) and 13241 require
24 you, in considering and issuing waste discharge
25 requirements, to consider regional factors. Such

1 as economic impacts and housing impacts.

2 Staff's response to that was that they,
3 "Have considered all cost data considered by the
4 Corps and District."

5 But it's not the District's job to submit
6 regional impacts to you. It's your job to
7 affirmatively consider those factors, whenever you
8 issue a WDR. You haven't done it. This order
9 doesn't do it.

10 A couple of other smaller points. The
11 responses to comments cite numerous, earlier,
12 Regional Board decisions as precedent for what they
13 are suggesting you do here today.

14 But the Administrative Procedure Act
15 prohibits reliance on prior decisions,
16 administrative decisions, except when those
17 decisions have been designated and indexed as
18 precedential.

19 That's Government Code 11425.10(a)(7).
20 Those earlier decisions that are cited in staff's
21 responses to comments have not been designated and
22 indexed as precedential, so they can't be relied
23 upon by you, now, as precedent. That's actually my
24 last point.

25 The last -- we've contended that we didn't

1 ask for this waste discharge requirement. We
2 didn't apply for a permit from you. One is
3 proposed to be imposed upon us. That feels like an
4 enforcement action, to us, and maybe that's why we
5 have our backs up a little bit.

6 We'd argued that there's a Constitutional
7 and Administrative Procedure Act requirement to
8 separate your prosecutorial from your advisory
9 functions.

10 The response we got back was this isn't an
11 enforcement action, so we aren't going to be
12 separating functions.

13 We think this is an enforcement action.
14 You were required to separate functions, and you
15 should have done so. We should be sitting up
16 there, as any other party is.

17 If there are any questions, I'm happy to
18 field them. Thank you.

19 CHAIR YOUNG: All right, we will be taking
20 questions for both Ms. Chan and Mr. Prows.

21 BOARD MEMBER KISSINGER: So, if you're
22 confident that what we're doing, or what's on the
23 table for us to do is State imposed, and under the
24 recent Supreme Court decision going to be the
25 financial costs are going to be borne by the State,

1 why are you here, arguing about this? I mean, it's
2 not going to come out of your pocket, it's going to
3 come out of our pocket.

4 MR. PROWS: Well, I guess I would throw
5 that back and you and say what we've told you is,
6 if you make this a mitigation condition, we have
7 ways to -- I mean, if you make it a mitigation
8 condition, we lose some of the ways we have to pay
9 for it. So, we're going to be going to the State
10 for reimbursement. I'm sure that's not going to
11 make the Governor or the Legislature happy.

12 Obviously, staff disagrees with our
13 analysis, or at least their responses to comments
14 indicate they would contest that.

15 So, I mean, if they were conceding that
16 the State were on the hook for this, maybe we'd not
17 have such a problem with it. But we're going to
18 have a -- if you go through with this, you know --

19 BOARD MEMBER KISSINGER: But the reverse
20 is true. If you're confident in your argument, you
21 have no reason to be making -- to be here today,
22 right?

23 MR. PROWS: Well, I am confident in the
24 argument, but I think it's important to be here
25 today. I think it's important for you, also, to

1 understand the implications of what you're doing.

2 BOARD MEMBER KISSINGER: We've been duly
3 cautioned, I appreciate it.

4 MR. PROWS: Good.

5 BOARD MEMBER KISSINGER: Let me ask you a
6 different -- and I don't mean to be glib about it,
7 because I recognize that there are real costs we're
8 talking about here, in a time of scarcity. So, I
9 don't mean to be glib about it.

10 We started this hearing talking about
11 importance of getting this job done, getting the
12 certification done so the construction could begin.
13 And I haven't heard anyone argue back from the
14 District, or from the Corps, that the Board was
15 anything but clear that there would be, under
16 consideration, waste discharge requirements that
17 would be imposed not just on the Corps, but on the
18 District. And it was in the letter that was the
19 401 Certification. So, that, I think, is
20 uncontested.

21 What I hear in various arguments that you
22 folks have put forward, and I take my hat off to
23 you, you put it forward very skillfully, is that --
24 if I understand the District's position correctly,
25 not only should we -- were we not entitled to

1 include waste discharge requirements or conditions
2 in the 401 Certification, but the only time and the
3 only way by which any mitigation could have been
4 ordered would have been through the CEQA process.
5 And if we had done it through the CEQA process, we
6 would have had to take extraordinary actions,
7 essentially pushing you aside as a lead agency and
8 doing our own CEQA process. That's what I hear you
9 saying.

10 MR. PROWS: That's the --

11 BOARD MEMBER KISSINGER: But I just want
12 to finish the point. If we had done those things,
13 construction would not have commenced on this
14 project, right?

15 MS. CHAN: No. Well, and typically, how
16 it works, or ideally how it works within the
17 regulatory and CEQA framework is this. The lead
18 agency would, you know, give the draft document or
19 the public for review, and including all the
20 responsible agencies. And during that process, the
21 responsible agencies will come back and say, well,
22 wait a minute, I don't think this is good enough,
23 you know. And you can do it through the public
24 review process. And sometimes we do engage with
25 responsible agencies, regulatory agencies, like an

1 actual meeting and say, hey, tell us more about
2 what you want to see.

3 In my experience, in the last, like, 13
4 years practicing CEQA, what we usually see is if
5 the responsible agency and the lead agency agree
6 that there is a significant impact to be mitigated,
7 we try to -- or the lead agency try to write the
8 mitigation measure as specific as possible, but
9 also allow some flexibility for this later, you
10 know -- so a lot of time, just to give you an
11 example, when a mitigation measure, so say
12 something like, you know, the lead agency will
13 restore the habitat at a ratio minimum 2-to-1. So,
14 you know, that allows the responsible agency, at a
15 later time, to kind of go above. And sometimes we
16 put a range, because that also protect the lead
17 agency from -- but that's the place where it's
18 better to go through that process and get some kind
19 of agreement on what it should or should not be.

20 You know, at a later time, then we run
21 into the CEQA issue. You know, like have the issue
22 been waived? And in this case we said, yeah, it
23 has, you know.

24 BOARD MEMBER KISSINGER: Okay, so let me
25 stop you for a second. I want to make sure I

1 understand what you just said. What I heard you
2 say is if there had been that kind of engagement in
3 the CEQA process, we wouldn't be arguing about
4 whether mitigation would be required, we'd only be
5 arguing about how much mitigation. That the
6 District was prepared to do mitigation then, but
7 not now. Is that what I hear you saying?

8 MS. CHAN: Well, close, but not exactly.
9 So, when I discuss about this process, the two
10 agencies may or may not agree, right. At the end,
11 it's the lead agency's conclusion, when they
12 certify the EIR whether to -- just a scenario, the
13 lead agency might put in the mitigation metric 2-
14 to-1. And, then, the responsible agency, at a
15 later time say, no, I want 3-to-1. Then the same
16 thing, you run into the same issue.

17 BOARD MEMBER KISSINGER: But I've sat here
18 and I've watched pictures. Ours have ducks. Yours
19 don't have ducks. You know, ours have habitat.
20 Yours don't have habitat.

21 You know, it's plain to me that these two
22 agencies are not going to agree, right?

23 MS. CHAN: Well, that is a hypothetical, I
24 don't know. We could be -- you know, we could
25 craft, together, a metric that both agencies, you

1 know, feel comfortable with.

2 But we will be -- let's not forget that
3 there's an additional limitation here and that is,
4 you know, there is a Congress-authorized project
5 that we cannot go beyond. So, we are not the only
6 one who said that, you know, we don't think that
7 the nexus in terms of the impact was there. The
8 mitigation, and the degree -- you know, and the
9 Corps agree with us, in their analysis.

10 BOARD MEMBER KISSINGER: Yeah. Look, I
11 think everyone that's spoken today are people of
12 goodwill, and honorable, and advocating effectively
13 for their positions.

14 My problem, sitting here today, is I see
15 two widely disparate presentations of the world, as
16 it exists. And the one thing that we all agree
17 upon, everyone agrees upon, is making sure that
18 this construction commences.

19 And what I hear from lawyers, and I'm one,
20 too, so I'm, you know, blaming myself, too, is lots
21 of procedural hurdles, barriers, and ways by which
22 to accomplish your end, except for the fact of
23 getting this project off the ground and going.
24 Which is what everyone worked together to do.

25 And, now, having done that, all these

1 arguments are being raised to prevent what was
2 clear, at the time the arrangements were put in
3 place, to get this thing off the ground.

4 And, so, that's where I'm struggling. I
5 hear all your arguments. Your arguments, you know,
6 I haven't double checked it. But your arguments
7 may have some legal merit and I want to look at
8 them more closely.

9 Except for one point, everyone came to the
10 table and tried to figure out a solution. And
11 here, after the fact, well, we never agreed to
12 that. I guess I'm not totally on board for it,
13 although I wasn't here for those discussions, and I
14 don't think any of you guys were, either.

15 MR. PROWS: I think what you heard from
16 Melanie, who I think -- did she leave? She had to
17 leave, unfortunately.

18 What you heard from her was we had a
19 different understanding of what had been agreed to.
20 Our understanding of the agreement that management
21 at the Regional Board, and at the Water District
22 had reach, was a 401 Certification would be issued
23 to the Corps for construction, with the conditions
24 that would be required there. And then, later,
25 waste discharge requirements would be issued for

1 O&M, and for the District.

2 BOARD MEMBER KISSINGER: But that's
3 plainly not what the letter says.

4 MR. PROWS: Well, that's what staff wrote
5 in the 401, but that's not how we saw it at the
6 time.

7 BOARD MEMBER KISSINGER: Is there a letter
8 in the record? Maybe I missed it, I haven't seen
9 all the correspondence. In which the District
10 says, hey, that's not what our deal was?

11 MR. PROWS: We wrote letters. We wrote
12 letters in the spring, two or three letters in the
13 spring saying -- you know, as soon as the Regional
14 Board staff started saying, okay, now, we're going
15 for a mitigation project, we immediately wrote
16 letters saying that was not our understanding of
17 the agreement.

18 CHAIR YOUNG: And, I'm sorry, I'm looking
19 at an e-mail right now, that is in our record.
20 It's on page 3 of the response to comments. It was
21 an e-mail memorializing the agreement, on January
22 4th, written by Keith Lichten, to Melanie
23 Richardson. The e-mail was dated January 21st.

24 It very clearly says that the Board will
25 issue a separate WDR -- and I'm quoting, now. "The

1 WDRs are likely to address aspects of the project
2 in greater detail...alternate mitigation to address
3 the project design issues." that was there on
4 January 21st.

5 You're referring to letters that you wrote
6 disagreeing with the Water Quality Certification
7 that was issued in the spring.

8 MR. PROWS: Well, I --

9 CHAIR YOUNG: It's hard for me to get to
10 where you're trying to get us to go.

11 MR. PROWS: Well, I think what I've said
12 before is still the same. Is that we made clear,
13 even in that January meeting, we did not think
14 mitigation was required. If your staff was going
15 to bring a mitigation project to you, a waste
16 discharge requirement to you, for your
17 consideration, our suggestion has always been that
18 you should reject it.

19 So, this was not our agreement that a
20 mitigation project -- that we were agreeing to a
21 mitigation project. That is not our understanding
22 of that conversation. Maybe there was a
23 miscommunication. This is obviously awkward for
24 everybody, but that is not our understanding of the
25 deal.

1 VICE CHAIR MCGRATH: I would like to get
2 past this to actually discuss reasonable
3 mitigation.

4 CHAIR YOUNG: But let's let Bill finish.

5 BOARD MEMBER KISSINGER: Let me, it's a
6 good point to make a segue. Go ahead.

7 VICE CHAIR MCGRATH: Because what is very
8 clear, if we're going to take a legal posture, and
9 you're going to have to litigate us to make
10 mitigation, when you get an e-mail that includes
11 language about a plan to compensate for the capital
12 project's impacts, I would take the position that
13 your responsibility is to not accept any kind of
14 document from the Regional Board, and go forward in
15 construction with that understanding. But to
16 litigate the question at that time, in a Writ of
17 Mandate.

18 MR. PROWS: You didn't issue a document to
19 us.

20 VICE CHAIR MCGRATH: So, you know, I would
21 like to get past this question, perhaps just agree
22 to disagree for the moment, and talk about
23 mitigation. Because very little of the discussion,
24 despite my pleas, has actually addressed project
25 impacts.

1 CHAIR YOUNG: Yes. But I want to make
2 sure that all of the Board Members have had the
3 opportunity to ask the questions of the attorneys
4 who are presenting here. Are there any additional
5 questions at this time?

6 BOARD MEMBER KISSINGER: No. Well, then,
7 I guess I'd come back to the question that I began
8 with. Didn't begin with, but the second question
9 which I really had in mind, is the key issue.
10 Which is the various things that -- I guess the
11 question is what do you think the Board should have
12 done here, that would ensure both an outcome that
13 satisfies the District, other than just agreeing
14 there's no mitigation required, and gets the
15 project moving forward?

16 Recognizing there is a fundamental view
17 about the facts underlying here?

18 MR. PROWS: I think one of the key things
19 that could have been done better, by Regional Board
20 staff, who have been very diligent in this, I must
21 compliment them. We got a response to our Draft
22 EIR. It was a lengthy comment letter that the
23 Regional Board submitted. And the Final EIR
24 responded to those comments, made some changes.

25 But that comment letter did not include

1 many of the comments that we saw, for the first
2 time, a week ago about impacts.

3 And, so, if Regional Board staff had
4 concerns about -- and that's what you heard from
5 Jim. If Regional Board staff had concerns about
6 denitrification and, you know, low channel flows,
7 the time to make those comments was much earlier in
8 the process, rather than a week ago.

9 And that would have, maybe, enabled us to
10 have a dialogue about what the science really is.

11 But we've been hamstrung. We've been
12 asking for responses all along. What are the
13 impacts that you're concerned about? And we only
14 got that a week ago.

15 So, I would just suggest earlier
16 engagement in the process by the Regional Board
17 staff, with all of their concerns.

18 BOARD MEMBER BATTEY: I know I have it
19 here someplace, but just to help me out here, when
20 was the EIR certified, again?

21 MR. PROWS: February of 2016. And the
22 draft was circulated when?

23 MR. MANITAKOS: (Off-mic comments.)

24 MR. PROWS: November 15th. And that came
25 after an EIS process that was fully, publicly

1 noticed. You know, I don't know whether Regional
2 Board staff ever, actually, physically, got in the
3 mail a copy of the final -- the Draft EIS, or Final
4 EIS, but these things are publicly noticed.

5 So, I mean, there's been years of
6 opportunity to make some of these --

7 BOARD MEMBER BATTEY: So, they weren't
8 done as one document, they were two separate
9 documents?

10 MR. PROWS: There were two separate
11 environmental reviews done, a full-blown EIS and a
12 full-blown EIR.

13 BOARD MEMBER BATTEY: And the EIS was
14 finalized in 2015 or 2016?

15 MR. PROWS: 2014.

16 MR. MANITAKOS: (Off-mic comments.)

17 BOARD MEMBER BATTEY: 2014.

18 CHAIR YOUNG: I think this might be an
19 appropriate time to allow Regional -- I'm sorry,
20 I'm kind of losing my voice. To allow Regional
21 Board staff to let us know what was in the comment
22 letter that you sent for the EIA, our EIS process.
23 And, also, to comment on, particularly, Mr. Prows'
24 statement that the Water Board -- didn't know why
25 you wanted mitigation until four days ago?

1 MS. WHYTE: I don't, unfortunately, have
2 our comment letter on the EIR here with me. I
3 actually reviewed it two days ago. I thought it
4 was in my package. I can't seem to find it.

5 I can say, when I reviewed it again, I
6 looked at it and I felt reassured that, once again,
7 we did clearly articulate our concerns regarding
8 impacts. It was -- so, we can produce that. I
9 believe it's part of the record. I think it's
10 quite clear. We say it in a very straight forward
11 way.

12 There's been a lot of conversation back
13 and forth with the District staff, over time. It's
14 not just been coming in, they're not hearing this
15 stuff for the first time.

16 There's been a lot of legal analysis and
17 discussions, back and forth, that Tamarin has been
18 engaged in, with counsel. There's been a lot at
19 the staff level.

20 Prior to this, there were a number of high
21 level meetings that took place with the former
22 Director of the Water District, Norma. Right now,
23 there's an interim Director at this time. When
24 these discussions took place, I was in many, maybe
25 not all of those meetings, where we continued to

1 make the same points over, and over again on this.

2 We have been trying, quite frankly, to set
3 up another meeting with the District since, I think
4 it was, September. And they refused to meet with
5 us until they had our final response to comments in
6 hand. And given the nature and where we are in
7 this process, we were not prepared to produce and
8 distribute draft documents. But we offered many
9 times to meet with them to try to have a technical
10 discussion, to more fully discuss where we are with
11 concerns with impacts, and to try to resolve this.

12 And we were repeatedly told not without a
13 final response to comments document.

14 So, that's in part, why we are here today.
15 I don't really know what else to say along those
16 lines. I'm quite, shall I say, dumbfounded about
17 the situation we're in, as well.

18 BOARD MEMBER BATTEY: Can I just clarify,
19 a response to what? Final comments responding to -
20 -

21 MS. WHYTE: The order before you today.
22 So, we have produced, for this Board package, a
23 response to the comments that have been received.
24 And those, we typically distribute seven days prior
25 to the Board meeting, itself, so that the Board and

1 the public is seeing those responses at the same
2 time. And that's been our standard practice. And
3 that's what we waited to do in this situation.

4 Although, again, we would have been happy
5 to discuss these comments and the details. Many of
6 the arguments are really legal arguments. And, as
7 I said, Tamarin has been engaged back and forth
8 with that. But the technical issues and the issues
9 related to impacts, I would say we've been nothing
10 but open in trying to understand both the
11 engineering out there, the sediment transport
12 issues, and the habitat value issues, which is why
13 we've been out in the field a number of times.

14 CHAIR YOUNG: It's a very small point, but
15 Mr. Prows keeps saying four days. You just said a
16 week. I could say that more than four days ago I
17 was looking at it on the website.

18 MS. WHYTE: He said four business days, I
19 believe.

20 CHAIR YOUNG: Okay.

21 MS. WHYTE: But this was a week ago, last
22 Wednesday. When we finished packaging our Board
23 materials would have been on Wednesday, a week ago
24 today.

25 CHAIR YOUNG: Okay. Yes, Ms. Austin?

1 MS. AUSTIN: With your indulgence, I would
2 like to address some of the legal issues, just so
3 that we have a clear record and the Board feels
4 comfortable moving forward.

5 Some of the issues that were raised, in
6 the letter, yesterday, that Mr. Prows was
7 discussing, I wanted to clarify that these were not
8 new issues. These are litigated legal issues, that
9 I've been in e-mails with Rita and Peter since last
10 July, discussing CEQA issues. Whether or not
11 mitigation can be required. Unfunded mandates,
12 that's not new.

13 Unfunded mandates is addressed in your
14 response to comments, in S04, S13, RTO-C-01. And
15 I'm not expecting you to follow along with this.
16 I'm just reiterating, so we have a clear record.

17 The issue concerning whether the District
18 had agreed to mitigation, that was discussed back
19 in my e-mail, with Peter and Rita, in July last
20 year. It's also in your response to comments, RTO-
21 C-01.

22 I won't address the findings of adverse
23 impact. I think that's really more appropriate for
24 staff. It's more technical.

25 With respect to the Regional Board's

1 authority to regulate non-waste dischargers, I
2 would like to take Mike Napolitano that he can stop
3 working on the Vineyard Waiver, if we're not going
4 to regulate them.

5 (Laughter.)

6 MS. AUSTIN: Obviously, you all know from
7 our last Board meeting, that this Board does
8 regulate sediment in our Grazing Waiver, our
9 Grazing Permits, our Vineyard Permits, our TMDLs
10 concerning sediment. So, this is obviously an area
11 that's within your purview.

12 Discussing jurisdiction, you have a slide
13 on that. That's also in RTO- -- I think that's an
14 S-04.

15 The regional factors was discussed in your
16 response to comments in S-11.

17 There was a comment or a question about
18 the citation to earlier Regional Board decisions.
19 Government Code 11425.60 establishes that State
20 Board decisions are precedential. And that's also
21 State Board Order WR96 -- 96-1, the Lagunitas Creek
22 Order, Footnote 11.

23 And I know you're all interested in
24 separation of functions. One moment, switch
25 screens. It is not the standard practice of the

1 Regional Board to separate functions in permitting
2 matters. And I will quote, "Unlike in enforcement
3 actions, in permitting actions such as the adoption
4 of" -- this was the Central Coast AG Order -- "the
5 State Water Board and Regional Water Boards do not
6 separate functions between prosecutorial and
7 advisory staff members. In permitting actions,
8 staff members are expected to make recommendations
9 to the Board Members. And doing so does not
10 convert their role from advisory staff to
11 independent advocates." State Board Order WQ-2013-
12 0101, page 9, note 27.

13 BOARD MEMBER KISSINGER: Precise.

14 MS. AUSTIN: CEQA, we talked a lot about
15 CEQA today. And I did cover with you, earlier, the
16 issue of the CEQA Guidelines. I made an additional
17 note on that in here.

18 One thing to note is that the discharger's
19 EIR does describe significant impacts concerning
20 areas under Water Board's jurisdiction. And just
21 for shorthand, you can look at Impacts Bio2, Bio3,
22 Bio4, Bio5, Geo2, WAQ1, WAQ5, and WAQ6. And as I
23 described earlier, where there are impacts, as the
24 discharger has identified, the Regional Board has
25 the duty to identify mitigation that can reduce

1 those impacts. And I think that's what we're here
2 talking about, today.

3 In addition to the CEQA Guideline, you
4 also have the California Code or Regs, Title 23,
5 and it's Section 3742. Which says that, "The
6 Board," and this is specific to you, the Board,
7 "when acting as a responsible agency may condition
8 the discharge of waste," which is what we're
9 talking about here, "for any project subject to
10 CEQA to protect against environmental damage to
11 water resources, to minimize adverse environmental
12 impacts on water resources, or to ensure long-term
13 protection of water resources."

14 So, again, you're well within your purview
15 to be asking for mitigation.

16 And for your reference, the CEQA comments,
17 response to comments, S18, S21, and also S22 cover
18 the issues that have been raised today. So, that
19 is in your materials. I know you've all read them,
20 so you can feel comfortable that we have a complete
21 record on those issues.

22 BOARD MEMBER KISSINGER: Well, what about
23 -- before you go, Ms. Austin, a response to the
24 argument about this being a State-imposed mandate
25 on a local agency?

1 MS. AUSTIN: Right. And, so, that was in
2 S04 and S13. Having -- Marnie and I have had the
3 joy, recently, of briefing the unfunded mandates
4 issue with respect to the Municipal Regional
5 Stormwater Permit. And, so, I think we both feel
6 fairly comfortable in saying that these mitigation
7 requirements for dredge and fill is a standard
8 requirement.

9 This is not something specific to a local
10 agency because they're doing flood control work.
11 It's, as you saw last month, anybody who goes out
12 and dredges and fills, private citizen, local
13 agency, State agency, Federal agency is going to
14 have to do mitigation. The Army Corps of Engineers
15 does mitigation in its maintenance dredging
16 projects. So, that is not unique. And, so, that
17 is one of the requirements that we were talking
18 about today.

19 There's other exceptions. I think that's
20 the most compelling as we're sitting here,
21 discussing it, today.

22 CHAIR YOUNG: All right. We've been going
23 for some time without a break. Since we're all
24 human, we might need a break. I'm going to ask
25 people to be back, you know, in five minutes this

1 time. When we come back, I'm going to ask the
2 staff if they have any additional information they
3 want to give to us. That's a standard thing that
4 we do when we're considering this kind of permit.

5 And, then, at that point, we will have
6 Board discussion of the matter. And I will be
7 asking the Board Members if anyone wants, at that
8 time, to go into closed session deliberation?
9 Which I understand, from Ms. Austin, is an option
10 available to us at this point.

11 MR. PROWS: Can you give us the authority
12 for that? I want to take a look at that, please.

13 MS. AUSTIN: Sure, that is Government Code
14 Section --

15 MR. PROWS: Sorry, give it again, please.

16 MS. AUSTIN: On the agenda. 1126(b)(3).

17 MR. PROWS: Government Code 1126 --

18 MS. AUSTIN: 1123 --

19 MR. PROWS: (c)(3)

20 MS. AUSTIN: I beg your pardon.

21 MR. PROWS: Can you give it one more
22 time?

23 MS. AUSTIN: From the beginning.
24 11126(c)(3).

25 MR. PROWS: Thanks.

1 MS. AUSTIN: Sure thing.

2 CHAIR YOUNG: All right, five minutes,
3 folks. thank you.

4 (Off the record at 4:11 p.m.)

5 (On the record at 4:21 p.m.)

6 CHAIR YOUNG: All right, folks, we're
7 going to reconvene. And we are now going to hear
8 from the staff. Oh, as promised, thank you.

9 MS. WHYTE: Thanks. I was going to ask
10 Xavier to say just a few words about -- you've
11 heard from the District that they feel that they've
12 really self-mitigated, or the mitigation is already
13 included in what they're already planning to do as
14 part of the project. So, I wanted to have Xavier
15 articulate some of our concerns with that, and why
16 it doesn't meet our full mitigation needs.

17 And, then, I'd like Keith to just say a
18 few words about mitigation, itself, and then we can
19 go from there if you have any questions. So, we'll
20 keep it brief at this point.

21 MR. FERNANDEZ: First, I'd like to talk
22 about native versus non-native vegetation. The
23 District and Corps are planning to stockpile the
24 existing seed that contains all the non-native
25 species. And, then, they're going to use that to

1 overlay. So, then, hydro seeding the native
2 vegetation, given those, is going to have very
3 little chance of actually being very successful,
4 because the invasive species will be there, the
5 seed bed will be there. They'll come back strong
6 as ever.

7 In terms of we also believe that the
8 actual, physical space occupied by the riprap will
9 reduce populations macro invertebrates, which will
10 then have a food chain effect.

11 We also believe, we agree with the
12 District that plans will grow in the spaces of the
13 riprap. But it doesn't take away that the riprap
14 is going to occupy space which is where nutrient
15 cycling would occur, and there will be a reduction
16 in nutrient cycling.

17 The parts that will be reference,
18 actually, deal somewhat with interpretation. But
19 what it showed was that by using bioengineering,
20 that is plants, rather than hardscape, such as
21 riprap, improves water quality.

22 In addition, we do have a tree planting
23 plan that I know Mr. McGrath wanted to see. And
24 what it does, and we don't think this is sufficient
25 mitigation for the riparian impacts. What it shows

1 is that the trees are being planted outside the
2 access road, which is above the top of the bank
3 that will contain the 100-year flow event. It will
4 not provide shade. It will not provide endemic
5 matter into the creek. And for those reasons, we
6 do not believe that the mitigation is acceptable in
7 the EIR, all by itself.

8 CHAIR YOUNG: Yes, we have questions on
9 that.

10 BOARD MEMBER BATTEY: I just had a
11 question about the -- could -- when I was looking
12 at the photos, it wasn't clear to me the trees,
13 whether they were wetland, or wetland species. Are
14 they willows? I couldn't see them in the photos.
15 So, I'd like to understand.

16 MR. FERNANDEZ: The trees are primarily at
17 the bank. They're not willows. The project design
18 will be planting willows and such in the channel,
19 which is what we were seeing at Lower Silver Creek,
20 and Lower Berryessa, which we do think improves
21 functions, including nutrient processes, and also
22 provides habitat.

23 MR. LICHTEN: Okay, I'll briefly speak to
24 the idea of mitigation. And I wanted to underline
25 that, as staff following the Basin Plan, our desire

1 is always to look, first, for mitigation to impacts
2 that is in-kind. So, the same kind of water item
3 as is being impacted, onsite, or as close to onsite
4 as possible.

5 And second, we always want to bring before
6 you, at least to the extent we can, an order that
7 has the mitigation spelled out. What's the
8 project?

9 And, so, with that in mind, we spent a lot
10 of time with the District and Corps staff, talking
11 through project design alternatives that could be
12 viewed as mitigating onsite, as a part of the
13 project. And, as we discussed, because of the
14 various procedures behind the project, and the need
15 for a certain delivery time, the project wasn't
16 able to accommodate those changes.

17 So, that said, we worked with the District
18 and talked with them about options for mitigation.
19 And always indicating our intent for the project to
20 move forward, and our intent to be as flexible as
21 possible in identifying whatever might be
22 appropriate. Including projects like the work at
23 Lake Almaden, behind their headquarters, that might
24 be small in area, but would provide a benefit to a
25 large reach of creek in terms of fish passage,

1 temperature reduction, and that kind of thing.

2 For whatever reason, their belief,
3 perhaps, that mitigation isn't necessary for the
4 project, we didn't receive any proposals.

5 And, so, in the absence of that
6 information, you have the language in the order
7 that you see before you, which is typical for
8 projects with impacts.

9 In terms of the ratios, thinking through
10 what the location of the mitigation might be, what
11 the delay is between the timing of the impacts and
12 the timing of construction, and mitigation, and so
13 forth. Our intent continues to be to work
14 collaboratively with the District, to identify
15 projects that they're doing, that they may already
16 be doing, they may already be funded, that could
17 address the impacts that we find in the creek.

18 Oh, I wanted to just note, make two other
19 brief notes. And there's a -- let's see. The
20 question we're really asking is, you know, given
21 what we have now, given the condition of the creek,
22 and really, is reflective of a lot of disturbed
23 waters that we have in our Region, you know, how
24 can we maintain and improve it, and also maintain
25 and improve waters overall?

1 So, when we talk about mitigation, to the
2 degree there's some additional degradation here,
3 we're really talking about creating that
4 incremental benefit somewhere else. So that,
5 overall, we're having a District-wide approach.

6 The District has that approach, or at
7 least they're on their way, with their One Water
8 Plan. So, we're going to continue to engage with
9 that. We're hopeful that that's going to serve as
10 the source for some projects. And we're hopeful to
11 kind of get into that, so that we're not in the
12 position of having this project-by-project
13 discussion. We could have more efficient
14 permitting overall.

15 CHAIR YOUNG: All right. I want to make
16 sure I understand, Keith, what you just said. In
17 working with the District to identify potential
18 mitigation, or projects that the Regional Board
19 would think would provide the same benefits as what
20 the mitigation in this package is trying to get at,
21 I think I heard you just say that there's -- since
22 the District is doing so much work, both now and in
23 the future with its One Water Plan, that it's
24 possible that they've already got something on the
25 drawing boards that might do -- I mean, we can't

1 say that because we don't know. But that would be
2 a possibility. And I guess I'm assuming that if it
3 isn't mitigation for something else, already, if
4 it's something that they're just doing, that that
5 could be legal and we could get there from here.

6 MR. LICHTEN: Yes, we think that we could
7 accept such a project as mitigation for the
8 impacts.

9 CHAIR YOUNG: Uh-hum. And that would, I'm
10 assuming, be a whole lot less expensive than a new,
11 that was their term, new mitigation project that
12 would cost \$20 million?

13 MR. LICHTEN: Yes, that's right.

14 CHAIR YOUNG: Okay, my logic is following
15 your logic. All right.

16 MR. LICHTEN: Yeah, just when we -- when
17 we talk about the benefit-to-effect ratio, you
18 know, it doesn't necessarily require that someone
19 go over a 10- or 20-acre area and do work on every
20 square foot of that area. You know, it could be an
21 intervention in a creek that has a benefit to a
22 much broader area, even though the work is in a
23 more limited extent.

24 So, certainly, one could do restoration
25 over a larger area, but that's not necessarily

1 required under the order.

2 CHAIR YOUNG: All right, thank you.

3 Does the Board have any additional
4 questions before we turn to our own deliberations?

5 BOARD MEMBER OGBU: Well, I just had a
6 quick question about the taking existing projects
7 and making them mitigation. It sounded like the
8 District's attorneys are saying that that was not
9 something -- like it's more complicated than that.
10 And that, if it doesn't come from the same funding,
11 they can't consider it. I mean, I liked that idea,
12 but it sounded like it was there were a lot more
13 hoops to jump through. And that might not actually
14 be feasible because of the way the costs come
15 together.

16 MR. KENDALL: (Off-mic comment.)

17 CHAIR YOUNG: I'm going to let the staff
18 answer that question, first and -- you've been
19 quiet for a very long time, so we'll give you this
20 one.

21 (Laughter.)

22 MR. LICHTEN: Right. Our understanding,
23 from talking with the District staff, is that there
24 are limitations on certain funding pots that they
25 have. So, it may be that some of the bond funds

1 may not qualify for such projects. On the other
2 hand, they may have other sources of funding that
3 could support it. So, we haven't -- it is more
4 complex than that, but that's --

5 BOARD MEMBER KISSINGER: Just to follow up
6 on that. Is there anything that requires -- or, is
7 there anything that limits our ability to deem
8 something as mitigation, while the District deems
9 it as something else?

10 MS. WHYTE: Not that I'm aware of. As
11 long as we would have long-term assurances that it
12 would continue to function as intended. That's,
13 you know, one of the key criteria that we look to
14 for mitigation.

15 BOARD MEMBER KISSINGER: Right. Thanks.

16 CHAIR YOUNG: All right. Sir? Yes. No,
17 I think you need to go to the microphone because of
18 the court reporter and our recordings.

19 MR. KENDALL: So, Tom Kendall, again, from
20 the Corps. So, yeah, the whole -- I mean, I
21 brought up the "MOU" during my remarks, and that's
22 the memorandum of understanding. And we're -- you
23 know, this is really the heart of the issue is how
24 do we find something that allows everybody to walk
25 away feeling like we've got something?

1 And, so, the Water District, I think, was
2 trying to make the point that once it's labeled
3 mitigation, it really does impact some of their
4 abilities to tap into funding sources and so on.
5 And, so, I've had some sidebars with Mary about,
6 you know, what could the whereas clauses look like,
7 in this MOU, that allow us to say it doesn't smell
8 like the way -- we can't have it smell, but it
9 still smells like a way that works for the Water
10 Board.

11 And we hope there's a way to do that. And
12 Ken will even -- when we were all trying to recall
13 what happened back in the January conversation, you
14 know, what I think the Corps people I talked to got
15 out of that was that it was sort of in this vein.
16 That there might be some things that would be sort
17 of allowed to be checking the box for the different
18 audiences. But nobody from the Corps, at least,
19 left that meeting feeling like we clearly felt
20 there was a need for some new mitigation
21 investment.

22 It was because of these very kind of talks
23 that I think they left that meeting with that
24 impression. So, I just wanted to share that.

25 CHAIR YOUNG: All right, thank you.

1 I think a number of us might be sort of
2 thinking about the same types of possibilities, as
3 whether there's a way that we can provide language
4 in the Order, that would get the things done on the
5 ground that we require to be done on the ground,
6 without labeling it something that you folks can't
7 live with.

8 So, I'll just put that out there as kind
9 of where I'm going. But I don't want to
10 foreshorten the conversation.

11 So, unless -- more questions of staff,
12 sure.

13 VICE CHAIR MCGRATH: And I want to do this
14 with the District. I apologize for not asking this
15 when Jack Xu was here. And it has to do with the
16 sedimentation practices. The testimony in the
17 Regional Board response to comments was that over
18 the period of time, since the 1980s, there's been
19 about 250,000 cubic yards of material cleared from
20 the stream.

21 And that works out to about 10,000 cubic
22 yards a year, you know, given the relative
23 accuracy.

24 So, is that a decent number, from the
25 staff's perspective? Am I about right on the

1 facts?

2 MS. FRUCHT: That was the number reported
3 on the EIS.

4 VICE CHAIR MCGRATH: So, it was reported
5 in the EIS. And does the District agree that that
6 number was in the EIS, and is a reasonable working
7 number.

8 MR. MANITAKOS: That is a number that
9 includes both Upper -- both the project reach in
10 the area above 680, which was considered an
11 alternative for the EIR. So, it actually goes way
12 up into the hills beyond it.

13 I think about 10 percent, we can get the
14 numbers, of it actually occurs within the project
15 area.

16 VICE CHAIR MCGRATH: So, you think the
17 number is closer to, say, one or two thousand?

18 MR. MANITAKOS: Well, let's see what --

19 MR. PROWS: Sorry, this is part of Jack's
20 presentation that we elided in the interest of
21 time, in case there wasn't any interest from the
22 Board, on this specific question, actually.

23 Jack actually did prepare some slides on
24 this, which are in your packet.

25 MR. MANITAKOS: Can you bear with me?

1 MR. PROWS: Yeah.

2 MR. MANITAKOS: So, the total is about 21,
3 22 thousand. If you look at the three red boxes?
4 My math isn't so much better than yours. 14.7,
5 plus 6.6 is 21.3. So, 21,300 cubic yards out of
6 that total 250,000 actually occurred in this reach.
7 Almost, you know, the greatest amount of sediment
8 removal came, actually, downstream or upstream of
9 this actual construction.

10 VICE CHAIR MCGRATH: A thousand cubic
11 yards a year.

12 MR. MANITAKOS: Cubic yards, yeah, sorry.

13 VICE CHAIR MCGRATH: Okay, thank you.

14 MS. GLENDENING: I wanted to add, also, I
15 believe in the EIS, Section 7.4, or something like
16 that, it says there's about - that they estimate
17 about 7,000 cubic yards per year, annually, on
18 average, would need to be removed from the project
19 reach.

20 VICE CHAIR MCGRATH: Would need to be?

21 MS. GLENDENING: Or, would accumulate.
22 Whether that's subject to maintenance is a
23 different issue.

24 VICE CHAIR MCGRATH: Yeah.

25 MR. MANITAKOS: Some level accumulations.

1 We don't go out there with the white gloves and get
2 every spec of dirt. We only remove -- in fact,
3 under SMP, we're only allowed to remove when it
4 hits a certain trigger that compromises the flow
5 conveyance capacity of the stream.

6 Yeah, so, we do look at -- yeah, that
7 number, I believe, you know, is an over-estimate
8 amount for that that would actually be removed.
9 You know, sediment accumulates in places, and if
10 doesn't affect conveyance capacity, then we leave
11 it there and we don't -- we're not allowed to, in
12 fact, by law.

13 CHAIR YOUNG: All right.

14 MR. MANITAKOS: And that's part of the
15 Adaptive Management Plan, you know, would be to
16 define what exactly that is. And I think that's a
17 -- it would be somewhat less than that. Somewhat.
18 Maybe quite a bit less than that.

19 CHAIR YOUNG: Okay, thank you.

20 All right. If there are no further
21 questions for staff --

22 BOARD MEMBER BATTEY: I have one more,
23 sorry.

24 (Laughter.)

25 BOARD MEMBER BATTEY: Could you just tell

1 me, in the process, either California Fish and
2 Wildlife or U.S. Fish and Wildlife in terms of
3 stream habitat and species issues, where did they -
4 - what did they weigh in around all of this, in the
5 EIR or elsewhere?

6 MS. GLENDENING: For the EIS, the U.S.
7 Fish and Wildlife Service consulted and prepared a
8 Coordination Act Report. And identified the
9 emergent wetland -- or, excuse me, emergent
10 vegetation as the mitigation target, using the
11 egret as a target species.

12 And, also, ranked it as number 2, out of
13 4, in terms of value, with ranging 1 is the highest
14 value and 4 is the least value.

15 They also ranked the grasslands in the
16 project reach, at a ranking of 4, using predatory
17 birds as the target species.

18 BOARD MEMBER BATTEY: Okay.

19 MS. GLENDENING: CDF, California
20 Department of Fish and Wildlife, did not consult on
21 the project because I understand that they do not
22 typically consult on projects that are done by the
23 Corps.

24 CHAIR YOUNG: Okay. Now, we'll shift to
25 Board deliberation. And as promised, I'm going to

1 ask if there is any Member of the Board who would
2 like to go into closed session to do deliberation.
3 And our rule -- my rule is that one vote means that
4 we go into closed session.

5 MR. PROWS: Madam Chair, point of order on
6 that. We don't read the Government Code Section,
7 as was cited by counsel, as giving you the
8 authority here to go into closed session.

9 So, we would urge you to have your
10 deliberations in public. But just for the record,
11 we don't read the statute as authorizing you to do
12 that.

13 CHAIR YOUNG: All right, thank you for
14 that input. I'm still going to ask the question.
15 My general feeling is that I take my attorney's
16 advice. So --

17 BOARD MEMBER LEFKOVITS: Yeah, I think I
18 would like a closed --

19 CHAIR YOUNG: All right, we will have a
20 closed door deliberation. That means,
21 unfortunately, I'm required to have all of you
22 folks step out of the room.

23 We will send -- I usually say, oh, it's
24 not going to take very long but, I mean, I never
25 know. In ever know.

1 We will let you -- we'll send someone out
2 and let you know what our estimate is of when we'll
3 be reconvening. Thank you.

4
5 **Item 12. Closed Session - Deliberation**

6 CHAIR YOUNG: All right, let the record
7 show we are convening -- reconvening in open
8 session.

9 We've had a wonderful discussion. And the
10 gist of what all of the Board Members have agreed
11 upon is that mitigation is appropriate.

12 We have not been able to formulate the
13 exact language at this point, that we all are
14 comfortable with to describe that mitigation.

15 So, we -- and we're losing our quorum.
16 So, we are going to continue this item to next
17 month's Board meeting, to continue it then.

18 Is there anything that my attorney would
19 like to add to what I just said, to make us all
20 legal.

21 MS. WHYTE: No. Thank you, it's fine.

22 CHAIR YOUNG: All right.

23 (Off-mic comment.)

24 CHAIR YOUNG: If the attorneys are telling
25 us that it's okay, we would prefer to continue to

1 March, because there will be people missing from
2 the February meeting, and we would like to have the
3 continuity of personnel.

4 MS. WHYTE: March is fine.

5 CHAIR YOUNG: March. All right. It's
6 always the second Wednesday of the month. So, it
7 will be the second Wednesday in March.

8 Thank you, folks, for your patience. We
9 stand adjourned. I have been waiting to do this
10 for hours.

11
12 **Item 13. Adjournment to the Next Board Meeting -**
13 **February 8, 2017**

14 (Adjourned at 6:11 p.m.)
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