

May 16, 2016

By E-Mail and Mail

Dyan Whyte  
Assistant Executive Officer  
San Francisco Bay Regional Water Quality Control Board  
1515 Clay Street, Suite 1400  
Oakland, CA 94612

Dear Ms. Whyte:

The Santa Clara Valley Water District (District) was disappointed to learn that the San Francisco Bay Regional Water Quality Control Board (Regional Board) staff are still intending, in the coming months, to ask the Regional Board to issue Waste Discharge Requirements (WDRs) to the District relating to the Upper Berryessa Creek Flood Risk Management Project (Project). The District has twice written Regional Board staff requesting that consideration of WDRs for the Project be deferred for the time being, because at this time the District is not proposing any discharge, there is no apparent need to consider WDRs, and the District's attention and resources would be better focused on meeting the tight Project timeline set by the U.S. Army Corps of Engineers (USACE). Rather than considering the District's request, much less explaining why WDRs are appropriate at this time, Regional Board staff are moving forward with punitive and unnecessary WDRs. Should the Regional Board continue down this path, it could put the entire Project—including many millions of dollars in federal funding and an important long-term infrastructure investment—in jeopardy.

The District's previous letters explained why it would be premature for the Regional Board to consider WDRs at this time. This letter does not address the conflicts between the draft WDRs and the prior certifications of the Project by the Regional Board and the District, or the technical inaccuracies in the draft WDRs; those will be addressed, as necessary, in future correspondence. Rather, this letter explains that the Regional Board does not have the authority to consider WDRs at this time, or to impose additional construction-related conditions on the Project. It concludes with another request that WDRs not be considered at this time but that, if they are, certain procedures required by due process be followed.

### **Background**

The Project is to construct, and then operate and maintain, flood protection measures in Upper Berryessa Creek. This Project is a necessary part of the Bay Area Rapid Transit (BART) system expansion project, to extend BART service from Fremont through Milpitas to San Jose. The BART expansion project is a \$2.3 billion (including \$900 million in federal funding) project, and it is projected to be complete in late 2017.



The USACE is responsible for construction of the Project, and the District will be responsible for operations and maintenance (O&M) of the Project.

The District is the lead agency under the California Environmental Quality Act (CEQA) for the Project, and the Regional Board is a CEQA responsible agency. The District prepared and circulated a draft environmental impact report (EIR) for the Project. The Regional Board submitted extensive comments on the draft EIR, including comments on the Project's impacts to waters of the State and on sedimentation. The District provided detailed responses to each Regional Board comment in the Final EIR and revised the text of the Final EIR as necessary based on the comments and responses. The District's Board of Directors certified the Final EIR on February 9, 2016, finding that impacts to biological resources, cultural resources, hazardous materials, transportation and traffic, hydrology, and water quality would be less-than-significant if mitigation measures identified in the EIR were implemented. No suit or other challenge was filed to challenge the District's certification of the EIR, and the time to do so has now expired.

In October 2015, the USACE applied to the Regional Board for certification that the construction portion of the Project would not violate State water quality standards. On March 14, 2016, the Regional Board issued to the Corps (but not to the District) a "Certification And Waste Discharge Requirements", confirming that construction of the Project, as conditioned in that order, would comply with "applicable requirements of State law." That document also confirmed that construction-related discharges would be regulated by the WDRs contained in State Water Resources Control Board (SWRCB) Order No. 2003-0017-DWQ. Paragraph 5 of SWRCB Order No. 2003-0017-DWQ provides that "[t]hese General WDRs fulfill the requirements of [the Water Code requiring WDRs for persons discharging or proposing to discharge] for proposed dredge or fill discharges to waters of the United States that are regulated under the State's CWA section 401 authority." The Regional Board's March 14, 2016 order thus certified that construction of the Project, as conditioned in that order, was consistent with State law and was regulated by pre-existing WDRs.

Yet now, Regional Board staff are proposing to ask the Regional Board to impose new WDRs for construction of the Project on *both* the Corps and the District. Those draft WDRs include new and substantial mitigation requirements, which are likely to cost millions, and new restrictions on the seasonal timing of construction, which are likely to cause significant delays or outright cancellation of the Project. Those draft WDRs also impose conditions related to O&M for the Project—even though the Project will not be built until late 2017 at the earliest. The final EIR concluded that O&M was not likely to cause significant adverse environmental impacts, and the USACE O&M Manual will not be finished and provided to the District until the Project is transferred from USACE to the District as required in the March 24, 2016 order. Although the District has repeatedly objected to the issuance of new WDRs at this time, Regional Board staff have not offered any explanation for why additional WDRs over and beyond those contained in the March 14, 2016 order should be imposed at this time.

### **The Regional Board Lacks Authority To Consider WDRs**

The Regional Board may not unilaterally issue WDRs to the District or the USACE unless the Regional Board can establish that there is a "proposed discharge, existing discharge, or material change in an existing discharge". (Water Code § 13263(a).) The USACE is certainly not currently discharging, or changing an existing discharge, related to the Project. Nor is the

USACE proposing any discharges beyond what the Regional Board already approved in its March order. Therefore, no reason exists to impose new WDRs on the USACE.

The District is not currently discharging, or changing an existing discharge, related to the Project. The District is also not, at this time, proposing any discharges related to construction of the Project.

Currently, the District is not proposing any discharges associated with O&M for the Project. The Project will not be constructed until late 2017 at the earliest. In the meantime, the USACE will be developing an O&M Manual. Only after that O&M Manual been finalized will any discharges associated with O&M—if any—be proposed. In the meantime, then District is not proposing any new discharge, and thus the Regional Board lacks authority to consider WDRs against the District.

### **There Is No Basis For Imposing Additional Construction-Related Conditions Now**

Conditions imposed on a project must have an “essential nexus and rough proportionality” to some impact the project will have, or else they are considered unconstitutional. (*Koontz v. St. Johns River Water Mgmt. Dist.* (2013) 133 S. Ct. 2586, 2595.) Having already found that construction of the Project, as conditioned in the March 14, 2016 order, will comply with the law, there is simply no legal basis now for imposing additional conditions, on either the USACE or the District, related to construction of the Project.

### **Due Process Going Forward**

Regional Board staff have proposed significant draft WDRs, for a significant project, on the USACE and the District. The Regional Board has no authority to consider these WDRs, and no basis for considering additional construction-related conditions, as explained above. But if Regional Board staff insist on pressing forward with these WDRs, they should ensure that the District is afforded due process. Specifically:

- **Documents.** The draft WDRs refer to a “Project file” maintained at the Regional Board “under CIWQS Place No. 818597, and Regulatory Measure No. 403119.” In order to adequately prepare a response to the draft WDRs, the District needs a copy of the Regional Board’s documents related to the Project, including the Project file. Please provide those documents to the District.
- **Regional Board Staff Brief.** Because Regional Board staff have yet to explain the basis for proposing additional WDRs now, Regional Board staff should prepare a brief that articulates the basis for its proposal, including the legal authority and citations to the evidence supporting each proposed finding.
- **Schedule.** Once the District has the Regional Board staff’s documents and brief, the District will need an adequate time to review them and prepare its response. The District requests that it be given at least 45 days after receipt of those documents and brief to review them and prepare a response to the draft WDRs.
- **Right Of Reply.** If, after receiving the District’s response, Regional Board staff intend to advance additional arguments, documents, or evidence, then the District requests that it be given an adequate amount of time to review those additional materials and reply to them. Thirty days should be an adequate amount of time.

- **Hearing.** The District requests a hearing on any draft WDRs, with the right to call witnesses and to cross-examination.
- **Separation Of Functions And Ex Parte Communications.** When acting in an adjudicatory proceeding, agencies must institute an internal separation of functions between prosecutors, decision-makers, and the decision-makers' advisors, and prohibit ex parte communications between them. (*Morongo Band of Mission Indians v. State Water Res. Control Bd.* (2009) 45 Cal.4th 731, 737-739; *Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 10-15.)<sup>1</sup> How will the Regional Board implement these requirements here? And which people will serve each function?

Thank you for your consideration of these concerns and comments. I look forward to your response.

Sincerely,



Melanie Richardson, P.E.  
Acting Chief Operating Officer  
Watersheds Division

cc: M. Richardson, C. Hakes, J. Nam, J. Manidakos, File

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<sup>1</sup> The Chief Counsel of State Water Resources Control Board has prepared a helpful memorandum on the subject, available online at [http://www.waterboards.ca.gov/laws\\_regulations/docs/exparte.pdf](http://www.waterboards.ca.gov/laws_regulations/docs/exparte.pdf).