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By Email and U.S. Mail

Tamarin Austin
State Water Resources Control Board
Office of Chief Counsel
1001 I Street, 22nd Floor
Sacramento, CA 95814

Subject: Upper Berryessa

Dear Ms. Austin:

Thank you for engaging so thoughtfully, seriously, and professionally with the Santa Clara Valley Water District (District) over its concerns about San Francisco Bay Regional Water Quality Control Board (Regional Board) staff's intent to bring proposed waste discharge requirements (WDRs), related to the construction, and operations and maintenance (O&M), of the Upper Berryessa Creek Flood Risk Management Project (project), before the Regional Board. The District especially appreciates your openness to a "pragmatic solution" that addresses both sides' concerns. This letter responds to your legal arguments, and offers some suggestions on how the District and the Regional Board might pragmatically cooperate on these issues moving forward.

1. The Water Quality Certification Precludes Additional Construction-Related Mitigation Conditions

Earlier this year, the Regional Board's Executive Director issued a Water Quality Certification order (WQC), certifying that construction of the project, as conditioned in that order, "will comply with the applicable provisions" of federal and state law. The project has not changed since this WQC issued. The District's position is that the Regional Board, having certified that construction of the project complies with all applicable laws, has no legal authority or justification for imposing additional construction-related mitigation conditions on the District now.

Your response to this argument is that the WQC "explicitly directs that mitigation would be deferred to the WDRs to be considered later this year." Although the WQC referred to the

possibility that the Regional Board might subsequently "consider[]" construction-related WDRs, the WQC was not conditioned in any way on the Regional Board issuing additional construction-related WDRs. Nor could the Executive Director, in such an order, pre-commit the Regional Board to issuing additional construction-related WDRs. If the Regional Board is asked to consider additional construction-related WDRs, it should reject them.

Your message also refers to various communications from Regional Board staff referring to additional construction-related mitigation. The District has repeatedly objected to additional construction-related mitigation. (See letters dated 30 March, 29 April, and 16 May.) Regional Board staff communications, over the District's objections, do not provide legal authority or justification for additional construction-related mitigation where there otherwise is no such authority or justification.

Regional Board staff have also justified their approach by stating that the WQC was "incomplete". But there is no such thing as an incomplete WQC. Either a project complies with all applicable law (and is certified in a WQC), or it does not. The WQC here is complete.

2. The Regional Board Must Conduct Additional CEQA Environmental Review Before Imposing Additional Mitigation

The mitigation that would be required by the administrative draft WDRs includes the "restoration" of more than 20 acres of "riverine wetland area." Such a large mitigation project is likely to have significant environmental effects; its ostensible purpose is to mitigate for other supposed significant environmental effects on waters.

As stated above, the District's position remains that mitigation for supposed impacts on waters from either construction or O&M of the project is not legally required. The certified EIR concludes that both temporary and permanent impacts on waters would be less than significant. Putting aside that the Regional Board could have but did not challenge the certified EIR, and even assuming, for the sake of argument, that the Regional Board has authority to impose additional mitigation for impacts on waters (which the District contends it does not), CEQA requires the Regional Board to conduct additional environmental review before WDRs with additional mitigation may be adopted.

The District has previously noted that no CEQA review has been done that identifies a significant effect on waters or analyzes the significant impacts of the large mitigation project Regional Board staff is now proposing. CEQA requires the Regional Board to complete CEQA

review before it can require this new mitigation project. (*See Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 401 ("mitigation measures must be discussed in an EIR").)

Your message suggests that, if additional environmental review is required, it will be up to "the District to prepare CEQA documentation." The District respectfully disagrees. The District, as the lead agency, has already approved the project as-is. If additional environmental review is required at this point because the Regional Board has identified new significant effects and proposed substantial project changes as mitigation, such review would be the Regional Board's responsibility. (*See* CEQA Guidelines § 15162(c) (after project approval by lead agency, "a subsequent EIR or negative declaration shall only be prepared by the public agency which grants the next discretionary approval").)

3. The Regional Board Cannot Second Guess The Certified EIR

Your message has served to bring into focus an important issue: whether and how the EIR, prepared by the District as lead agency, constrains review of the project by the Regional Board, acting as a responsible agency. In particular, does the District's EIR, which finds that impacts to water quality will be less than significant, constrain the Regional Board's ability to conclude that the EIR is wrong and to impose additional water-quality-related mitigation measures?

We have both cited CEQA Guidelines section 15096, though we have so far reached different conclusions as to its interpretation and application here. You appear to read Section 15096 to allow the Regional Board, when acting as a CEQA responsible agency, to find significant effects, and impose additional mitigation measures, even if the EIR finds those effects to be less-than-significant, and without taking any of the actions listed in Section 15096(e).

We read Section 15096 differently. In our view, where, as here, a certified EIR finds impacts to be less than significant, Section 15096 imposes significant constraints on the ability of responsible agencies to nevertheless find significant impacts to that resource, and thus impose their own additional mitigation measures. If a responsible agency thinks that a certified EIR is "not adequate for use by the responsible agency", paragraph (e) requires that it "must" either: (i) "[t]ake the issue to court within 30 days", or (ii) prepare a subsequent EIR "if permissible under Section 15162", or (iii) assume the lead agency role per Section 15052(a)(3). If the responsible agency does not take one of these three actions, it shall "[b]e deemed to have waived any objection to the adequacy of the EIR". (Section 15096(e)(2).) If the responsible agency does not challenge the EIR, then "the responsible agency must consider the environmental effects of the

project *as shown* in the EIR". (Section 15096(f), emphasis added.) These provisions leave no room for a responsible agency to second-guess the EIR's findings about less-than-significant environmental impacts beyond the three ways specified in Section 15096(e).

The language you quote from Section 15096(g) does not change the analysis. Subsection (g)(1) begins by noting that a responsible agency's role "is more limited than a lead agency." The responsible agency's authority to review "any significant effect the project would have on the environment" can only be referring to significant effects *identified in the lead agency's EIR*, not to effects the responsible agency might think are significant but which are not identified as such in the EIR. This interpretation is bolstered by the fact that CEQA prescribes that, where a project is to be carried out or approved by more than one agency, "the determination of whether the project may have a significant effect on the environment shall be made by the *lead agency*." (Pub. Res. Code § 21165(a), emphasis added.) To read Section 15096(g) any other way would deprive Section 15096(e) (which deems objections to the EIR "waived" unless the other steps in that paragraph are taken) and Section 15096(f) (which requires the responsible agency to consider the environmental effects "as shown" in the EIR) of all meaning.

In short, the Regional Board may adopt additional mitigation measures for the Upper Berryessa project for impacts identified in the EIR as less-than-significant only after it *first* takes one of the three actions in Section 15096(e). Otherwise, it is deemed to waived any objection to the EIR's findings about less-than-significant impacts and to the adequacy of the EIR's mitigation measures, and the Regional Board cannot impose additional mitigation.

Both *Ogden* and *RiverWatch* support the District's interpretation of Section 15096. *Ogden* turned on whether a responsible agency could second guess the lead agency's determination that an impact was less than significant without taking the steps identified in Section 15096(e). (*Ogden Envt'l Serv. v. City of San Diego* (S.D. Cal. 1988) 687 F.Supp. 1436, 1450-1452.) *Ogden* found for the lead agency, holding that if the responsible agency believes that the lead agency's environmental review was inadequate, the responsible agency "must take the necessary steps to challenge the lead agency's findings or otherwise be deemed to have waived any objection." (*Id.* at 1451, citing Section 15096(e).) Because the Regional Board has not taken any of the necessary steps to challenge the District's findings about less-than-significant impacts on waters, the Regional Board is deemed to have waived any objection.

RiverWatch held that a responsible agency violated CEQA by not giving adequate consideration to the lead agency's EIR. (*RiverWatch v. Olivenhain Mun. Water Dist.* (2009) 170 Cal.App.4th 1186, 1207.) To reach that result, *RiverWatch* applied the rule that a responsible agency "must consider the environmental effects of the project *as shown in the EIR*", and that,

before approving the project, the responsible agency must "find either that the project's significant environmental effects *identified in the EIR* have been avoided or mitigated, or that unmitigated effects are outweighed by the project's benefits." (*Id.*, emphasis added.) *RiverWatch* does not authorize responsible agencies to second guess the findings in the EIR; rather, *RiverWatch* effectively cautions responsible agencies, such as the Regional Board, against second guessing the findings in the EIR.

4. Water Code Section 13270 Precludes Issuance Of WDRs To The District For Construction

Again, as stated above, the Regional Board is precluded from issuing WDRs to the District or imposing additional construction-related conditions in the WDRs because the WQC already certified that construction of the project as conditioned in the WQC would comply with federal and state laws. However, when we spoke, the District also raised another argument pursuant to Section 13270 of the Water Code. To clarify: the District's argument is that Water Code § 13270 precludes issuance of WDRs *to the District* related to the *Corps's* construction of the project on the District's property. The District does not contend that this section prohibits issuance of WDRs to the District related to any discharges that might result from the District's O&M.

San Diego Unified Port District read Section 13270 broadly: "Section 13270 prohibits a Regional Board from requiring a report of waste discharge and from issuing requirements to any lessor public agency which leases land to another public agency ... ." Section 13270 did not apply in that case because it involved a public agency leasing land to *private* entities. But this matter involves one public agency (the District) effectively leasing its land to another public agency (the Corps) to enable the Corps's construction of the project. Section 13270 prohibits the Regional Board from issuing WDRs to the District related to the Corps's construction of the project on the District's property. (*Please also see* Lahontan Region Regional Board Order No. 6-00-57A03 (applying Section 13270 to remove one public agency from WDR for another public agency's supply of "recycled water to irrigate fodder and fiber crops" on the former's property).)

5. The Regional Board Should Not Require The District To Mitigate For Construction-Related Impacts

For the reasons given above, the District does not believe that the Regional Board has authority to issue WDRs requiring the District to mitigate for construction-related impacts from the project. The District is by no means asking the Regional Board to re-characterize any "mitigation" conditions as something else, like an "enhancement" project. Rather, the District is

asking that any language in the WDRs suggesting that the District is a construction-related discharger, or that the District should be responsible for construction-related mitigation or other conditions, be deleted.

Separate and apart from this discussion about these WDRs, the District is eager to discuss ways it can work together with the Regional Board to make progress in implementing some environmental enhancement projects that the District has been planning. Environmental enhancement is an important part of the District's mission, and the District has access to funds specifically for environmental enhancement projects. The District is hopeful that a meeting with Regional Board staff devoted to discussing these environmental enhancement projects can be arranged soon.

Thank you for your continued consideration of these important issues. I look forward to your response.

Sincerely yours,

BRISCOE IVESTER & BAZEL LLP

Peter S. Prows