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LOS ANGELES
ORANGE COUNTY
SAN DIEGO
SAN FRANCISCO
SANTA BARBARA
WESTLAKE VILLAGE

FILE NO.: 71258.001

May 7, 2015

VIA E-MAIL. NO HARD COPY TO FOLLOW.

Email: bwolfe@waterboards.ca.gov; bruce.wolfe@waterboards.ca.gov

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

Re: San Francisquito Creek Joint Powers Authority **Request for Reconsideration by the San Francisco Bay Regional Water Quality Control Board**; Petition for Review and Reconsideration by the State Water Resources Control Board; Conditional CWA Section 401 Water Quality Certification for the San Francisquito Creek Flood Reduction, Ecosystem Restoration, and Recreation Project; CIWQS Place No. 757384 (SG)

Dear Mr. Wolfe:

We represent the San Francisquito Creek Joint Powers Authority (JPA) in connection with its application for water quality certification under Section 401 of the federal Clean Water Act (Application) for the San Francisquito Creek Flood Reduction, Ecosystem Restoration, and Recreation Project (Project). The JPA respectfully requests that the San Francisco Bay Regional Water Quality Control Board (Regional Board) reconsider and revise its Conditional Water Quality Certification (Certification) issued on April 7, 2015. Please know that the JPA intends to accept your invitation to present its concerns during an extended public comment at the Regional Board meeting on May 13, 2015. But we additionally ask that you agendaize this matter for Regional Board action at the very next meeting, which is currently scheduled for June 10, 2015.

The JPA's Section 401 application has experienced a long and difficult procedural history, which is not recited in the Certification. However, rather than review these old wounds, we propose to simply identify four curable concerns that are the basis for this request for reconsideration and revision of the Certification:

1. **PG&E Gas Transmission Line Removal. Condition 19 of the Certification requires the JPA to remove "the section of the PG&E gas pipeline to be abandoned that runs**

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beneath the Project's creek channel from the inboard top-of-bank of the Southern Levee to the inboard top-of-bank of the Northern Levee." The JPA seeks the removal or substantial revision of Condition 19.

Despite over two years of intensely close work with Regional Board staff following the completion of the Project EIR in October 2012, the Regional Board staff raised removal of abandoned PG&E pipeline for the first time in February 2015. Imagine the budget havoc that this delay has caused to the JPA and its plans to construct the Project. Further, although the JPA has asked for evidence that the abandoned gas line will be impacted by the Project or that it will present a water quality hazard at its present location, no such information has been provided, even as the JPA's experts have confirmed that no impact will be caused. In the 84 years that an underground gas pipeline has crossed the creek at this location, there is no record of a negative consequence as a result of it. In short, Condition 19 requires the JPA to mitigate for an unsubstantiated harm not created by the Project, and relies upon undocumented supposition to require mitigation. After learning of this new condition in February, the JPA offered to hire, at its expense, a credible third party expert of the Regional Board's choosing to assess the possibility of a future concern caused by abandoned pipeline, but this offer was refused. The absence of a demonstrated nexus between water quality, Condition 19, and the Project makes this Condition arbitrary and inappropriate. The significant financial burden to the taxpayers requires more than a theoretical assertion to support this condition.

Moreover, Condition 19 cannot stand because it is also fatally unclear. On its face, Condition 19 requires the JPA to remove a section of currently operating gas transmission line that *will be abandoned* by PG&E. This understanding is consistent with the plain meaning of the Condition 19 phrase "pipeline to be abandoned." Or, does Condition 19 require the JPA to remove both this currently operating pipeline and also the long inoperable PG&E gas transmission line that *was previously abandoned* in place by PG&E in 1959? Paragraph 10 (a)(ii) on page 5 of the Certification describes 1,350 linear feet of gas transmission line to be removed by the JPA. The 1,350 linear feet measurement can only approximately be achieved by adding together the lengths of both the currently operating "to be abandoned" pipeline with old pipeline that was abandoned without incident 55 years ago and that has no relation to the Project.

Condition 19 must be removed or revised in order to eliminate the ambiguity and uncertainty as to the obligations of the JPA. Further, any revised requirement that the JPA remove existing buried pipeline needs to be supported by substantial evidence that such removal is required to mitigate a harm. We believe there is no such evidence in the record.

2. **Subsequent Executive Officer Approvals and Acceptances. Certification Conditions 1, 2, 3, 6, 14, 16, 17, 18, 19, 20, 22, 23, 24, 25, 27, 28, 30, 31, and 32 (and possibly others that this writing overlooks) require a subsequent approval or acceptance to**

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the satisfaction of the Executive Officer of the Regional Board. The JPA asks that these approvals be governed by responsible and reasonable standards to eliminate concerns of unfettered discretion or undue and costly Project delay.

The JPA understands and agrees that its implementation of the Project and its compliance with the Certification conditions will require the JPA to prepare and submit additional documents, reports and technical studies. The JPA also understands and agrees that these subsequent documents must be credible. But many of these documents will affect the critical path of Project construction. Delay in their approval will trigger unreasonable consequences to the communities benefiting from the Project, such as missing seasonal windows for construction, adding mitigation penalties, and escalating Project cost.

The JPA does not object to submittal of these later required documents or to approval by the Executive Officer (EO). Instead, the JPA has previously requested and now again asks for a set of standards and deadlines to govern EO acceptance. In this way, the Certification can avoid the flaw of authorizing, or appearing to authorize, the EO to act or not act with unfettered discretion. The JPA proposes that each time the Certification requires subsequent approval or acceptance by the EO, that approval or acceptance be cabined by these additional standard provisions: (a) acceptance or approval by the EO shall not be unreasonably withheld; (b) any disapproval shall be in writing and shall state the reasons therefor and the corrections required; (c) except for the purpose of directly addressing a change to the Project that is set forth in a subsequent JPA report, the EO acceptance shall not add new conditions to the Certification; and (d) unless the EO disapproves a subsequent JPA report in writing within 14 days of a JPA submittal, the EO shall be deemed to have approved the submittal.

3. Revisions to Mitigation Calculations. The impacts and mitigations set forth on Table 1, page 8, and in Condition 23 of the Certification contain errors that can and should be corrected in a revised Certification.

For several distinct reasons, the calculations of impacts and mitigations listed in the Certification are incorrect. In one instance, a typographical decimal place error requires correction. Additionally, seasonal wetlands, a freshwater pond, and freshwater marsh within the adjacent golf course were included in the calculation of impacts because these were initially contemplated to be potentially impacted by the Project, but it is now known that they will remain untouched and unaffected by the Project. Over the past month, the JPA has successfully worked with Regional Water Board staff to refine the impact and mitigation values, and the JPA asks that Table 1 and Condition 23 be revised now to reflect the correct calculations.

4. Finality to the Five-Year Reports. Conditions 31(e) and 32 appear to require reporting at five year intervals in perpetuity. The JPA asks that it report five years

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after conclusion of Project construction, and that this single report satisfy Conditions 31(e) and 32. If Project operations or maintenance change after that report, these activities would be considered as part of a different Certification that may include a future reporting requirement.

The JPA asks for an appropriate and timely end to its reporting obligations under the Certification. These reporting obligations should conclude within a reasonable time after completion of the Project, which is estimated to be concluded by December 2017. However, read literally, as the JPA must, Conditions 31(e) and 32 do not contain an end date for the JPA's technical reporting to the Regional Board on revisions to the Project's Operations and Maintenance Manual. Because the Regional Board has deemed that any changes to operations and maintenance beyond five years shall require a different Certification, the JPA proposes that it report any changes to its Operations and Maintenance Manual five-years after Project construction is completed. Subsequent reports, if appropriate, can be required by any different Regional Board permit that allows operations and maintenance activities to continue beyond that time.

The JPA and the Regional Board are partners in their companion missions: completion of the essential flood control Project at the earliest possible time, under fair and responsible conditions, and at the taxpayer expense that best achieves the dual objectives of flood management and water quality. As always, the JPA pledges to remain focused on working harmoniously with the Regional Board toward issuance of a revised Certification that meets these goals. The members and staff of the JPA are fully engaged and committed to productive discussions and meetings at any time of your convenience over the course of this next month.

We advise that, for the sole purpose of preserving the JPA's legal rights within the statutory challenge deadline, the JPA has simultaneously on this date filed a Petition for Review and Reconsideration (Petition) with the State Water Resources Control Board (State Board). A copy of the Petition is enclosed. The JPA has requested that the State Board hold the Petition in abeyance while the parties work expeditiously to revise the JPA's Conditional Water Quality Certification.

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The San Francisquito Creek Joint Powers Authority looks forward to resolving the four issues raised in this request for reconsideration through timely work with the Regional Board, so that action on its Petition to the State Board will prove unnecessary and a revised Certification can issue at, or immediately prior to, the June 10 meeting of the Regional Board.

Sincerely,



Jane Eljson Usher
for MUSICK, PEELER & GARRETT LLP

Enclosures:

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

Sent via electronic mail to:

U.S. Representative Jackie Speier
State Senator Jerry Hill
State Assemblymember Rich Gordon
Regional Board members Terry Young, Jim McGrath, John Muller, Margaret Abe-Koga,
William Kissinger, Newsha Ajami, Steve Lefkovits
SFCJPA Board members Kirsten Keith, Dave Pine, Ruben Abrica, Pat Burt, Gary Kremen
Ms. Susan Glendening, Environmental Specialist, Regional Board
Mr. Len Materman, Executive Director of the SFCJPA
Mr. Greg Stepanicich, General Counsel to the SFCJPA
Mr. Kevin Murray, Project Manager of the SFCJPA

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On May 7, 2015, I served true copies of the following document(s) described as **REQUEST FOR RECONSIDERATION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

- BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Musick, Peeler & Garrett LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Los Angeles, California.
- BY FAX TRANSMISSION:** I faxed a copy of the document(s) to the persons at the fax numbers listed in the Service List. The document(s) were transmitted at or before 5:00 p.m. The telephone number of the sending facsimile machine was (213) 624-1376. No error was reported by the fax machine that I used. A record of the fax transmission was properly issued by the sending fax machine.
- BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address c.staley@mpglaw.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on May 7, 2015, at Los Angeles, California.


Cindy L. Staley

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