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

April 1, 2014

**VIA E-MAIL. NO HARD COPY TO FOLLOW.**

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

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

Dear Mr. Wolfe:

We represent the San Francisquito Creek Joint Powers Authority (SFCJPA or 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 SFCJPA respectfully requests that the San Francisco Bay Regional Water Quality Control Board (Regional Board) reconsider and rescind its letter dated February 27, 2014. Additionally, given the clearly defined next steps to complete water quality certification that the JPA and you agreed to at the March 19, 2014 meeting of the parties, as confirmed in the attached letter of the JPA dated March 31, 2014, the JPA further requests that the Regional Board act favorably on the JPA's Application for certification immediately following the completion of those steps.

We have several reasons for requesting reconsideration and rescission. As an initial matter, the Regional Board's issuance of its February 27, 2014 letter, which denied the Application without prejudice, was not authorized by governing law. In communications between the Executive Officer, the General Counsel of the Regional Board, and the JPA, the JPA learned that the Regional Board issued its unexpected denial as a procedural precaution to avoid a claim that it had waived its jurisdiction over the Application. The Executive Officer and the General Counsel had acted on the mistaken belief that the not-to-exceed one-year standard of the federal Clean Water Act within which the Regional Board must act on the Application would expire on March 12, 2014, one year

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after the JPA's submittal of the original Application for water quality certification. This belief was incorrect. Under the controlling federal and state laws, guidelines, and regulations, including those of the Regional Board itself, the one-year clock for the Regional Board to act did not begin to run until the Application was deemed complete. The one-year time period for the Regional Board to make a decision on the Application therefore commenced on September 4, 2013 and will not expire until September 3, 2014. The Regional Board's premature denial of the Application to avoid waiver was improper.

The irregular February 27, 2014 denial letter of the Regional Board had the additional effect of inappropriately delaying what we hope will be swift favorable action on the merits of the JPA's Application. The letter instructed the JPA to file a new application, which will return the Project to the Regional Board's queue for a second determination of completeness. The unavoidable delays that will accompany these extra, unnecessary steps are not legally justified. More importantly, these additional tasks and the time that they will consume do a disservice to the public health, safety and property interests of the communities served by the JPA. Implementation of the San Francisquito Creek Flood Reduction, Ecosystem Restoration, and Recreation Project, which is designed to withstand a 1% or 100-year flood event, will significantly reduce the current and recurring threat to life and property. As recently as December 23, 2012, a flow estimated at less than a 20-year event caused severe flooding in East Palo Alto. Waters overtopped and seeped through the existing levees in the Project area. The Project will protect over 1,000 homes located below sea level, many with rooftops below the top of the levee, as well as a school and regional U.S. Postal Service facility.

Lastly, it is the JPA's belief that its water quality certification Application is and has been complete and ready for Regional Board action. The JPA has been frustrated by the ever-changing menu of concerns raised by the Regional Board's staff, which has worked to forestall issuance of the pending water quality certification. These newly raised topics were not the subject of the specific comments made by the Regional Board in its August 2012 response to the Draft Environmental Impact Report for the Project, nor were they the subject of the questions raised by staff in the fall of 2013 at the time the Application was determined complete, nor were they the subject of the many meetings and calls between the parties. We note that the Regional Board's February 27, 2014 denial letter raised several new concerns regarding the fundamental design of the Project that were never previously identified as issues, including, by way of one example, a newly proposed alternative to construct an unneeded, impracticable bypass channel that would divert some of the flow in the San Francisquito Creek channel through both existing and potential ball fields, continue along the southern boundary of the municipal golf course through the Palo Alto Airport property, and discharge into the tidal marsh located at the southern end of the airport runway.

Despite its frustration with the changing requests of the Regional Board, the JPA pledges to remain focused on working harmoniously with the Regional Board to achieve water

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quality certification. In this spirit, the JPA continues to offer further minor adjustments to the Project design in response to Regional Board staff requests. It is the expectation of the JPA that the Regional Board will accept this continued cooperation, while adhering to the original time period afforded for water quality certification under law.

In closing, the JPA seeks not only rescission of the February 27, 2014 denial letter, but also a timely decision from the Regional Board on the merits of its water quality certification Application. The members and staff of the JPA are fully engaged and committed to working with the Regional Board over the course of this month in the hope that all remaining issues can be resolved and final certification granted in May 2014, well before the legal deadline of September 3, 2014.

Our communities deserve no less. Because of the continuously degraded condition of the existing, uncertified levees, every winter season that transpires before the Project is complete brings an increased risk of danger to the JPA communities. In addition to this widely recognized risk of flood, which the Project will ameliorate, delay by the Regional Board on its consideration of the merits of the Application also threatens local water quality. Under current conditions, flood flows pass through homes, garages, businesses and streets before being discharged into the San Francisco Bay. After the Project is built, these waters will flow over a broad new marsh constructed within the San Francisquito Creek channel.

Please be advised that, for the purpose of preserving the JPA's rights and to meet the legal appeal 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 asked us to assure the Regional Board and you that it has requested that the State Board hold the Petition in abeyance while the parties work expeditiously to complete the JPA's water quality certification process.

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The San Francisquito Creek Joint Powers Authority remains optimistic that the issues raised in this request for reconsideration can be resolved through timely work with the Regional Board, so that action on its Petition to the State Board will prove unnecessary.

Sincerely,



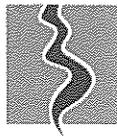
William W. Carter  
for MUSICK, PEELER & GARRETT LLP

Enclosures:

SFCJPA Letter of March 31, 2014 to the Regional Board  
Petition to the State Water Resources Control Board for Review and Reconsideration  
Exhibits to Petition for Review and Reconsideration

Sent via electronic mail to:

Mr. Len Materman, Executive Director of the SFCJPA  
(len@sfcjpa.org)  
Mr. Kevin Murray, Project Manager of the SFCJPA  
(kmurray@sfcjpa.org)  
Mr. Greg Stepanicich, General Counsel to the SFCJPA  
(gstepanicich@rwglaw.com)  
Shin-Roei Lee, Chief, Watershed Division, Regional Board  
(shin-roei.lee@waterboards.ca.gov)  
Margarete "Maggie" Beth, Environmental Specialist, Regional Board  
(mabeth@waterboards.ca.gov)



SAN FRANCISQUITO CREEK  
JOINT POWERS AUTHORITY  
SFCJPA.ORG

March 31, 2014

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

Dear Mr. Wolfe:

We appreciate the willingness of Shin-Roei Lee and you to meet on March 19 with staff leadership from the cities of Palo Alto and East Palo Alto and the Santa Clara Valley Water District (SCVWD), as well as myself. We believe that the meeting helped to build a common understanding of the SFCJPA's proposed S.F. Bay-Highway 101 project and the Regional Water Quality Control Board's (Regional Water Board) 401 Certification process. Thank you for reviewing the text below to verify that we are in agreement on the key points and next steps from our March 19 discussion.

- On March 19, you expressed that your primary concern with the project relates to the impact of San Francisquito Creek flows on the habitat and species within the Faber Tract marsh located just north of the creek. This clarification was very helpful in light of a new design modification we are considering to fill the low point in the levee separating the creek and marsh. As I noted in the meeting using a graph of levee heights and water surface elevations, our hydraulic modeling shows that this modification would decrease the overall volume, frequency, and velocity of water entering the tidal-dominated marsh as compared to the current condition. Our design consultant is preparing a technical memorandum of this finding, which we will send to your staff this week.
- We appreciated the opportunity to clarify for you that the fluvial flow used in the hydraulic model of the reach affecting the Faber Tract will be a maximum of 7,400 cubic feet per second (cfs). This is based on the fact that the upstream constriction at Middlefield Road Bridge will not allow more than 6,700 cfs and there is an additional maximum of 700 cfs contributed from the watershed between the Middlefield Road Bridge and the levee separating the creek from Faber Tract. I understood that the conclusions reached by your staff were based on an assumed maximum flow of 9,400 cfs at that levee as a result of the new Caltrans Highway 101 bridge replacement project. We agreed that further explanation of tidal conditions and of the U.S. Army Corps of Engineers hydraulic model of upstream constrictions is necessary to be clear on the appropriate design flow for this project.
- You indicated that Regional Water Board staff has questions regarding the designed level of protection that the project would afford to East Palo Alto properties now threatened by floodwaters. There should be no question that the protection of life and property is fundamental to the purpose and design of this project. We remain confident that the proposed project design has met and continues to meet our flood protection objectives, which include removing properties from the fluvial floodplain and accommodating Sea Level Rise. As I indicated, our technical team, including consultants, SFCJPA project manager and SCVWD staff, will meet with your staff to review the model and project design, including the modification mentioned above. We agreed that this discussion should be expeditious and conclusive, and thus this week I will suggest to Shin-Roei a few times in April that our team is available to meet to resolve all Regional Water Board questions related to the project's design and hydraulic performance.
- We discussed the urgent, recurring flood threat downstream of Highway 101, and the necessity of completing this project prior to commencing projects upstream of Highway 101 that are not yet designed or certified under CEQA. The City of East Palo Alto emphasized that project delays continue to place low-income minority residents directly in harm's way. We agreed that the permitting of this urgent downstream project should not be slowed by a need to submit application materials relative to specific requirements covered by other Regional Water Board permits such as the Municipal Regional Permit. We further discussed our shared interest in utilizing a detention facility in the upper watershed. Given that such a project is currently not funded and cannot be built for many years, if at all, we agreed that our analysis of the Least Environmentally Damaging Practicable Alternative (LEDPA) should only include the proposed project and two alternatives between the Bay and Highway 101 that you requested.

- The two project alternatives requested by the Regional Water Board include:
  - 1) Downstream of the project area, widen the channel slightly by continuing the new levee in the Palo Alto Golf Course to the location where the golf course meets the northern end of the Palo Alto Airport. This alternative also lowers the levee between the creek and Faber Tract to allow fluvial flows into the triangular area of that Tract near the Bay. On March 19, you stated your belief that the U.S. Fish & Wildlife Service (USFWS), which manages the Faber Tract, supports lowering this portion of the levee and that you would confirm this as soon as possible. With twelve days having passed since our meeting, we assume USFWS support has been confirmed and we will proceed with our analysis of this new alternative. Finally, you stated this alternative would not impact the airport.
  - 2) In addition to building certified flood control structures in place on the existing channel, construct a bypass channel to divert some of the flow from San Francisquito Creek to a floodwater detention basin at the existing ball fields and at the potential sports fields near the downstream end of the proposed flood wall. Floodwaters would then exit the detention basin into a new channel that would continue along the southern boundary of the golf course along Embarcadero Road, cut through the airport property, and discharge to the tidal marsh south of the airport runway.

We agreed that our analysis of these alternatives, which we intend to present to the Regional Water Board within the next 30 days, will not be nearly as detailed as our analysis of the preferred project and that it should consider and describe the factors that led us to find that the proposed project is the LEDPA.

- Neither the SFCJPA proposed project, nor the two alternatives to our project listed above that the Regional Water Board requested we analyze, would include a bypass channel through the middle of the City of Palo Alto's golf course. This new information will be included in documents that the City is preparing in response to a February 28, 2014 letter from the Regional Water Board regarding a golf course reconfiguration project.
- In addition to analyzing the two additional project alternatives described above, we agreed to summarize in table format all of the alternatives considered for the area downstream of Highway 101. By summarizing the benefits and impacts of each alternative, this table will provide further justification that the proposed project is the LEDPA.
- You informed us that your "denial without prejudice" of our 401 Certification application, communicated by letter on February 27, 2014, is a decision subject to appeal. For the purpose of preserving all rights of the SFCJPA and the communities we serve, we will seek both reconsideration of this denial by the Regional Water Board and also its review by the State Water Board. Please note that we will ask that this request be held in abeyance pending what we hope will be a speedy resolution of the above issues and the certification of our current application. We intend to work diligently to make this certification happen at the earliest possible time.

We appreciate your contributions to the above paragraphs, which characterize our conversation, the content and planned outcomes of an upcoming meeting among Regional Water Board senior and technical staff and our project team, and any and all new deliverables that must accompany our continued application for water quality certification.

On behalf of my colleagues at the meeting, who are copied below and contributed to this summary, thank you again for your commitment to completing the permit process on this critical and timely project for our communities.

Sincerely,



Len Materman  
Executive Director

cc: Magda Gonzalez, City Manager, East Palo Alto  
Jim Keene, City Manager, Palo Alto  
Norma Camacho, Chief Operating Officer, Watersheds, Santa Clara Valley Water District  
John Doughty, Community Development Director, East Palo Alto  
Melanie Richardson, Deputy Operating Officer, Santa Clara Valley Water District  
Molly Stump, City Attorney, Palo Alto

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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

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

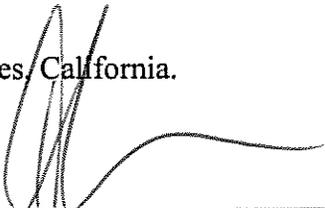
On April 1, 2014, I served true copies of the following document(s) described as **REQUEST FOR RECONSIDERATION** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

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

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

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



Carrie A. Durfee

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**SERVICE LIST**  
***Re CITY OF PALO ALTO***

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