SOMO
SONOMA MOUNTAIN VILLAGE

February 14, 2011

VIA E-MAIL <commentletters@waterboards.ca.gov>
AND FACSIMILE (916) 341-5620

Jeanine Townsend, Clerk to the Board
State Water Resources Board
P. O. Box 100
Sacramento, CA 95812-2000

Re: Comment Letter – CEQA - Wetland Area Protection Policy & Regulations

Dear Ms. Townsend:

On behalf of Sonoma Mountain Village, LLC ("**SMV**"), I thank you for the opportunity to comment on the Initial Study and Notice of Preparation of an EIR for the proposed Wetland Area Protection Policy and Dredge and Fill Regulations Project (the "**Project**"). Please submit this letter as SMV's formal comments on the Notice of Preparation and Initial Study ("**IS**") for inclusion in the State Water Resources Control Board (the "**Board**")'s CEQA analysis for this Project.

REPRESENTATIVE CAPACITY OF SMV

SMV is the record owner of approximately 175 acres of contiguous land in Sonoma County, located within the jurisdictional boundaries of the City of Rohnert Park. SMV is affiliated with Codding Enterprises, which controls numerous landholdings in Sonoma County and is heir to the legacy of Hugh Codding, who was responsible for the development of numerous communities and commercial properties throughout Sonoma County.

The interests of SMV are representative of the construction and development industries throughout California in general – and the Board's North Coast and San Francisco Bay Regions (Regions 1 and 2, respectively), specifically – as SMV's properties fall within both Region's jurisdictions as do the holdings of Codding Enterprises and others within the community of builders and land developers of which SMV and Codding Enterprises are a part.

Thus, while the comments herein are those of SMV, the Board should accept these comments as representative of the construction and development industry in general, especially of those businesses within the North Coast and San Francisco Bay Regions which comprise a great percentage of our State's wetland areas.

TECHNICAL COMMENTS ON THE INITIAL STUDY

We have reviewed the Project documents and believe that the proposed policy and regulations are redundant to existing policies and regulations that protect wetlands at federal, state, and local levels. The policy and regulations are meant to do the following:

- Establish a new wetland definition for State wetlands as regulated by the various Regional Boards
- Establish state-wide assessment and reporting of wetlands
- Adjust regulation on dredge and fill in wetlands

Our specific comments are as follows:

1. The new wetland definition will add yet another definition to the list of existing wetland definitions, resulting in three definitions that would be in use by the State of California including the Coastal Commission wetland definition, the Department of Fish & Game wetland definition, and the Board's proposed wetland definition. In addition, various federal agencies provide separate definitions for wetlands, including the Natural Resource Conservation Service, the U.S. Fish & Wildlife Service, and Army Corps of Engineers. The Project description does not adequately address the inherent conflicts, additional regulatory confusion, and burden of duplication of efforts that yet another definition will have on land use planning and permitting.

2. The Project description analysis does not clarify how areas not now considered to be wetlands will either be included or excluded as regulated wetlands. For example, because the proposed wetland definition does not require that vegetation be present, any lake, pond, or river currently regulated as waters could be classified as wetlands and subject to any subsequent adopted wetland regulations. Moreover, the proposed definition assumes that areas that are wet for only seven days possess a hydric substrate and therefore would include temporarily flooded or ponded areas such as riparian areas or floodplains. Finally, the Project description does not address many features of construction that would be captured under the new definition that are not currently regulated as waters or wetlands such as irrigation canals, cooling ponds, settling ponds designed for stormwater management at construction sites, roadside ditches, and flood control facilities. Possibly any subtle depression in a paved parking lot, a constructed building pad, or a graveled corporation yard would fit the combined criteria

of seven days of wet substrate and no vegetation under the proposed definition. These additional facilities would be subject to regulation and their maintenance and use would be delayed or otherwise encumbered under the proposed Project.

3. The Project description does not evaluate alternatives to the proposed Project, and does not consider alternatives that already exist. For example, the State currently has determined that wetlands not subject to federal regulation will be regulated as State wetlands (*i.e.*, isolated and wetlands without a significant nexus) under the Porter-Cologne Water Quality Control Act.[1] Thus, continuing the current policy could achieve the same objectives as being proposed in the proposed Project. In addition, the Project description:

- Does not evaluate any data on how many wetlands have actually been exempted by the Corps of Engineers under the SWANCC and/or *Rapanos* court decisions in order to warrant this new policy. In practice, most wetlands are still being regulated by the Corps because of that agency's (and federal EPA) aggressive policy toward taking jurisdiction over wetlands;
- Does not evaluate how the prevalent use of the *Preliminary Jurisdictional Determination* procedures recently adopted by the Corps now includes all areas that meet the wetland definition and are subject to permitting;
- Does not address the EPA's recent announcement to modify wetlands protection policy which will be forthcoming under its new *Clean Water Protection Guidance*; and
- Does not evaluate the adequacy of existing programs by various organizations and agencies that compile information on wetlands and make the information available to the public.

We believe that the proposed regulations belabor existing federal, State, and local regulations which already provide extensive – and sufficient – protections over wetlands. The Project therefore appears overly-burdensome, duplicative, and unnecessary.

COMMENTS ON IMPACT CATEGORIES IN THE INITIAL STUDY

While concerns over several impact categories listed in the IS exist, the comments herein focus on the Land Use/Planning category[2] and the Population/Housing category.[3] Both

[1] Water Code § 13000, *et seq.*
[2] IS at pp. 41-42.
[3] IS at p. 46.

categories indicate that the Board expects impacts to be less than significant if mitigation for them is incorporated into the Project. While SMV does not necessarily disagree with this assessment, we believe this conclusion is accurate only if the proposed mitigation will allow for ***proper timing for implementation of wetland mitigation requirements.***

In particular, wetland mitigation requirements should be imposed only when a project has reached a point where potential impacts to wetlands are likely to occur. For large scale developments, substantial areas can be segregated from potential wetlands and developed without triggering wetland impacts. Often, these projects are built over the course of several years or longer, making it infeasible and unnecessary to implement wetland mitigation at the project's outset. Rather, mitigation on such projects should occur only when the project has reached a point where impact to wetlands might actually occur. Failing to develop regulations which are respectful of this fact will impede orderly development, construction and development in the State, and will thereby result in impacts to Land Use/Planning and Population/Housing which are unmitigable and significant.

A unique characteristic of SMV's property in the City of Rohnert Park provides an example of this point. SMV's property as a whole consists essentially of two parts: a northern parcel, which is completely hardscaped with a former Hewlett Packard/Agilent technology campus; and a southern parcel, which is a vacant agricultural field, free of any hardscaping or structural improvements. Because the northern parcel is entirely hardscaped, with the only areas which could possibly be considered wetlands being those which are artificial "constructed wetlands" exempt from Project requirements,[4] wetland mitigation is unnecessary and inappropriate for development which occurs exclusively on the northern parcel. It is only when such activities occur (or impact) the southern parcel that wetland mitigation becomes a concern, since the southern parcel consists entirely of vacant agricultural land and may, indeed, contain actionable wetland features. Thus, while SMV's entire project contemplates development on both the hardscaped north parcel and the unimproved southern parcel, there is a clear distinction between the two parcels and the consequences for potential impacts to wetlands on each.

This distinction is significant both for SMV and landowners whose properties are similarly configured. In the case of SMV, for example, development is proposed to occur in phases over the next 20 years, with initial phases for at least the next five years occurring exclusively on the hardscaped north parcel only. Notwithstanding the fact that wetland areas on the unimproved south parcel will not be impacted for several years (if wetland conditions exist there at all), if the entire multi-phase development is considered a single "project" which triggers wetland mitigation, such mitigation could be prematurely imposed

[4] *See* IS at p. 17 ("Areas and Activities Excluded from Project Requirements"; second bullet-point).

for the south parcel as a precondition to commencing work on the north parcel's hardscaped area. The result of such premature mitigation would be to curtail the financial feasibility of projects, preventing land use and planning policies from being realized, preventing housing from being developed, and ultimately causing local and regional agencies to fail to achieve their land use and housing goals.

This circumstance highlights the need to consider ***timing*** for wetland mitigation on multi-phased projects which contain a mixture of hardscaped and unimproved/agricultural/natural areas. Mitigation should not be required when phasing allows hardscaped areas to be developed without impact to unimproved areas (*e.g.*, agricultural or natural areas, such as farmland, grassland, *etc.*). It is only when actual impact to the unimproved areas will occur that wetland mitigation requirements should be triggered. Doing so will allow multi-phased projects such as SMV to commence and complete early phases, and use the revenues generated by completion of those phases to finance wetland mitigation necessary for development of unimproved areas.

The Board's proposed regulations should account for this distinction, and recognize that large-scale projects may have areas of hardscpaing which will be developed in early phases entirely separate from unimproved areas which will be developed in later phases, years – perhaps even decades – after development on hardscaped areas is completed.

COMMENTS ON PROJECT ANALYSIS OF ECONOMIC COSTS

While CEQA generally does not address a project's impacts which are purely social or economic, social or economic impacts ***must*** be addressed if they could trigger other physical impacts or result in urban decay, economic deterioration, or other factors that lead to the decline of neighborhoods, shopping centers, and community businesses.[5] In *Bakersfield Citizens for Local Control v. City of Bakersfield*, for example, the court held that CEQA requires an analysis of the individual and cumulative economic impacts of a project on local businesses and the community at large.[6]

Thus, to adequately execute its obligations under CEQA, the Board must comprehensively examine the social and environmental impacts that the Project would have on neighborhoods and business areas throughout the State, and address such impacts in any draft and final EIR.

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[5] *See, e.g., Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184; *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173; *Citizens Ass'n for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151.

[6] *Bakersfield Citizens for Local Control, supra*, at 1204.

Such examination should include, for example an assessment of the number and size of blighted[7] properties throughout California which would be subject to the proposed regulations (*e.g.*, the scope of blighted properties located within wetlands or which likely have wetland features subjecting them to the proposed regulations before development could occur), and the degree to which the proposed regulations would hinder development, redevelopment, or other improvements from occurring on those properties (thereby perpetuating their blighted condition). A similar assessment should be made as to properties which are undergoing development or redevelopment, but would be subject to the proposed regulations (and could thereby be forced to terminate development or redevelopment due to the additional cost and restriction posed by the proposed regulations). Similarly, a similar assessment should be performed as to non-blighted properties which would nevertheless be impacted if nearby blighted properties are unable to be developed or redeveloped due to the economic and other costs posed by the proposed regulations (*e.g.*, a neighborhood bordering a vacant industrial lot with wetland features).

We note that such impacts should be addressed as ***this stage*** of the CEQA process, rather than at future project-specific stages, because the proposed regulations will set in place a State-wide framework which ***all communities*** must deal with, creating State-wide social and economic impacts which cannot be addressed at later project-specific stages. In other words, the Project in-and-of-itself will create social and economic impacts which CEQA mandates be analyzed ***now***, whose effects would be impermissibly segmented if addressed on a project-by-project basis only after the Board has already approved the Project.[8]

We also note that examination of the State's own budgetary situation, and that of the Board in itself, should be included in the CEQA analysis of for the Project, and for practical planning and implementation of the proposed regulations. This Project comes at a time when the State budget remains billions of dollars in deficit, requiring drastic cuts by all State agencies, including the Board. Such budgetary effects are echoed among the thousands of cities, counties, and other local agencies which face unprecedented financial challenges. While the Board has put commendable efforts in to publicizing the Project (including conducting numerous public meetings and undertaking other public outreach efforts), the simple fact is that the proposed regulations are coming ***at exactly the worst time for both the State and its local agencies***, not to mention the private

[7] As used herein, the term "blighted" is used not only in its formal sense, referring to properties which meet the formal definition for "blight" under California redevelopment law (*see* Health & Safety Code §§ 33030, 33031), but also in its generic sense, referring to properties which are underutilized, vacant, or face economic pressures which preclude them from being put to their highest and best use.

[8] *See, e.g.*, CEQA Guidelines § 15378(a); *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577 (defining a "project" to mean the whole of an action and prohibiting segmenting or piecemealing).

sector which will be saddled with yet further costs and hindrances toward business growth.

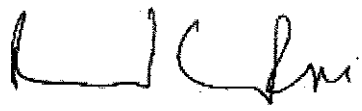
In short, this Project is ill-timed in light of the current economic challenges faced by the State, its local agencies, its businesses, and its residents; but if the Project must proceed, analysis of the social and economic impacts that the proposed regulations would cause is necessary for the Board to maintain compliance with CEQA.

CONCLUDING REMARKS

On behalf of SMV, I thank you again for the opportunity to submit the above-stated comments to the Board. We are hopeful that the Board will give proper weight to the burden its proposed regulations will place on businesses and communities throughout the State, and we look forward to reviewing a well-reasoned draft EIR at the time the Board makes it available for public comment.

Thank you for your attention to this matter.

Very truly yours,



Richard Pope, Director