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8 STATE OF CALIFORNIA

9 STATE WATER RESOURCES CONTROL BOARD

10 In the matter of:

11 ORDER NO. R2-2017-0014
12 WASTE DISCHARGE REQUIREMENTS and
WATER QUALITY CERTIFICATION for
13 SANTA CLARA VALLEY WATER DISTRICT
and
14 U.S. ARMY CORPS OF ENGINEERS,
UPPER BERRYESSA CREEK FLOOD RISK
15 MANAGEMENT PROJECT
SANTA CLARA COUNTY

No.

PETITION FOR REVIEW
and
REQUEST FOR PARTIAL STAY

Accompanying papers:
Exhibits 1-33
Declaration of Melanie Richardson

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28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- I. INTRODUCTION1
- II. IDENTIFICATION OF PETITIONER2
- III. REGIONAL BOARD ACTION TO BE REVIEWED.....2
- IV. DATE OF REGIONAL BOARD ACTION3
- V. STATEMENT OF REASONS WHY THE REGIONAL BOARD ACTION WAS IMPROPER.....3
- VI. MANNER IN WHICH PETITIONER IS AGGRIEVED3
- VII. STATE BOARD ACTION REQUESTED BY PETITIONER.....3
- VIII. POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION.....4
 - A. Background.....4
 - 1. The Setting.....4
 - 2. The Project5
 - 3. The Project Will Benefit The Environment5
 - 4. The Project’s Environmental Review7
 - 5. The Regional Board Permits Project Construction.....7
 - 6. The Regional Board Changes Course.....8
 - 7. The Hearings and Order.....9
 - B. Standard of Review.....11
 - C. Additional Conditions On A Project The Regional Board Has Certified Complies With All Laws Are Unjustified12
 - D. The Section 401 Certification Cannot Now Be Rescinded Or Modified.....12
 - E. The Section 401 Certification Cannot Apply To The District.....13
 - F. The District Should Not Be Named As A Discharger For Construction Of The Project13
 - G. Sovereign Immunity Prohibits The Regional Board From Subjecting The Corps To WDRs.....14
 - H. The Regional Board Does Not Have Authority To Adopt WDRs For Non-Waste Discharges.....14
 - I. The Order Ignores Required Watershed-Wide Planning And Other Regional Considerations.....15
 - J. Issuing WDRs To The District Violates CEQA16
 - 1. CEQA Guidelines Section 15096 Prohibits The Regional Board From Second-Guessing The Environmental Analysis Of The Lead Agency.....16
 - 2. CEQA Required The Regional Board To Conduct Environmental Review Of The Large Project Regional Board Staff Is Proposing18
 - K. No Substantial Evidence Supports The Order’s Findings Of Adverse Impacts19
 - 1. Dry-Season Flows.....19
 - 2. Sedimentation20
 - 3. Engineered Streambanks.....20
 - 4. Nutrient Cycling.....20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

5. Effect of Shade Plants on WARM Beneficial Use21

6. Red-Legged Frogs.....21

7. Wetland Vegetation Success.....22

L. The Order Overestimates ‘Waters Of The State’22

M. The Regional Board Violated Procedural Requirements.....23

1. Failure to Separate Functions or Prohibit Ex Parte Communications23

2. Improper Citation To Earlier Regional Board Decisions23

IX. THE PETITION HAS BEEN SENT TO THE REGIONAL BOARD.....24

X. THESE SUBSTANTIVE ISSUES OR OBJECTIONS WERE RAISED BEFORE THE REGIONAL BOARD24

XI. THE ORDER SHOULD BE STAYED24

A. A Partial Stay Would Prevent Substantial Harm24

B. A Partial Stay Would Not Cause Harm26

C. Substantial Questions Of Fact And Law Exist26

XII. CONCLUSION.....26

TABLE OF AUTHORITIES

Cases

City of Shoreacres v. Tex. Comm'n on Env'tl. Quality (Tex. App. 2005) 166 S.W.3d 825..... 13

Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (2006)
40 Cal.4th 1 23

Keating v. Federal Energy Regulatory Comm'n (D.C. Cir. 1991) 927 F.2d 616 12

Laurel Heights Improvement Assn. v. Regents of Univ. of Cal. (1988) 47 Cal.3d 376 18

Morongo Band of Mission Indians v. State Water Res. Control Bd. (2009) 45 Cal.4th 731 23

Ogden Env't'l Serv. v. City of San Diego (S.D. Cal. 1988) 687 F.Supp. 1436..... 17

RiverWatch v. Olivenhain Mun. Water Dist. (2009) 170 Cal.App.4th 1186 17

California Statutes

Government Code § 11126(c)(3) 10

Government Code § 11502(a)..... 10

Government Code § 11503(a)..... 10

Government Code § 11507.6 10

Government Code § 11507.7 10

Government Code §§ 11475 et seq. 10

Government Code §§ 11500 et seq. 10

Government Code 11425.10(a)(7) 23

Public Resources Code § 21165(a) 16

Public Resources Code § 21167.2 19

Water Code § 13050(d)..... 14

Water Code § 13050(e)..... 22

Water Code § 13241 15

Water Code § 13260(a)..... 14

Water Code § 13263 13, 14, 15

Water Code § 13270 1, 14

Water Code § 13320(b)..... 11

Water Code § 13320(c)..... 11

Water Code § 13372(b)..... 15

Water Code § 13381 13

Federal Statutes

33 U.S.C. § 1341 passim

33 U.S.C. § 1341(a) 13

33 U.S.C. § 1344 15

33 U.S.C. § 1344(t) 14

Pub. L. No. 101-640, § 101(a)(5), 104 Stat. 4604, 4606 (1990)..... 5

Pub. L. No. 77-228, § 4, 55 Stat. 638, 650 (1941)..... 5

Regulations

14 Cal. Code Regs. § 15052(a)(3) 16

14 Cal. Code Regs. § 15096..... 17

14 Cal. Code Regs. § 15096(e) 16, 17, 18

14 Cal. Code Regs. § 15096(e)(2) 16

14 Cal. Code Regs. § 15096(f)..... 16, 17

1	14 Cal. Code Regs. § 15096(g).....	16
2	14 Cal. Code Regs. § 15096(g)(1)	16
3	14 Cal. Code Regs. § 15162.....	16
4	14 Cal. Code Regs. § 15162(c)	18
5	23 Cal. Code Regs. § 2053(a)	12
6	23 Cal. Code Regs. § 648(b).....	10
7	23 Cal. Code Regs. § 648(c)	10
8	Other Authorities	
9	State Board Order WQ 90-3 (San Diego Unified Port District)	14

7
8
9
10
11
12
13
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1 **I. INTRODUCTION**

2 The San Francisco Bay Regional Water Quality Control Board (“Regional Board”) has put a
3 major flood protection and regional transportation project to extend the Bay Area Rapid Transit
4 System (“BART”) at risk, together with hundreds of millions of dollars in federal funding, by
5 imposing unjustified but significant new conditions after the Regional Board had already permitted
6 the project. The Santa Clara Valley Water District (“District”) is partnering with the U.S. Army
7 Corps of Engineers (“Corps”) on this project, known as the Upper Berryessa Creek Flood Risk
8 Management Project (“Project”). The District hereby petitions the State Water Resources Control
9 Board (“State Board”) to review the Regional Board’s April 12, 2017 order (“Order”) rescinding the
10 Section 401 certification the Regional Board had previously issued to the Corps for the Project, and
11 issuing a revised Section 401 certification, together with waste discharge requirements (“WDRs”),
12 on both the Corps and the District. The State Board should accept this petition, invalidate the Order,
13 and, in the meantime, partially stay the Order.

14 The District and the Corps had each completed full-blown environmental reviews of the
15 Project, concluding that impacts to water quality, hydrology, species, and other relevant issues
16 would be less-than-significant. Unsurprisingly, then, in March 2016 the Regional Board issued a
17 Section 401 certification, finding that the Project met all State water quality standards. In reliance
18 on that certification, the Corps began construction of the Project last Fall. But in April 2017, over
19 the objections of the Corps and the District, the Regional Board changed its mind, rescinded the
20 existing Section 401 certification, and issued the Order containing significant new mitigation
21 requirements. The Corps repeatedly warned the Regional Board that the new mitigation
22 requirements added new risks to continued federal funding and completion of the Project.

23 There is no legal basis for the Order. The Regional Board may not rescind a Section 401
24 certification, as here, where circumstances have not changed, significant time has passed, and
25 construction has already begun. Sovereign immunity also protects the Corps from being subjected to
26 WDRs. Nor may a Section 401 certification be imposed on the District, because such certifications
27 may only be required for applicants for federal permits, and the District has not applied for any
28 federal permits for this Project. Water Code section 13270 also prohibits the District from being

1 subject to WDRs where, as here, one public agency (the Corps) is constructing the Project on the
2 property of another public agency (the District).

3 The Order also violates CEQA. CEQA prohibits responsible agencies, here the Regional
4 Board, from requiring mitigation for impacts that a lead agency, here the District, found to be less-
5 than-significant. Yet that is exactly what the Order does: require significant mitigation for impacts
6 to water quality, species, hydrology, and other issues that the certified EIR found all to be less-than-
7 significant. That mitigation requirement also constitutes a “project” under CEQA, for which the
8 Regional Board should have, but did not, conduct environmental review before imposing.

9 The Order is invalid for other reasons as well, including because it is not supported by any
10 substantial evidence and because it was adopted in violation of procedural requirements.

11 The State Board should invalidate the Order in its entirety. To mitigate the risk that the
12 Order poses to construction of the Project, the State Board should also partially stay the Order.

13 **II. IDENTIFICATION OF PETITIONER**

14 The Petitioner is the Santa Clara Valley Water District, a California Special District.

15 Petitioner can be reached through counsel at:

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25 **III. REGIONAL BOARD ACTION TO BE REVIEWED**

26 San Francisco Bay Regional Water Quality Control Board Order No. R2-2017-0014, “Waste
27 Discharge Requirements and Water Quality Certification for Santa Clara Valley Water District and
28

1 U.S. Army Corps of Engineers, Upper Berryessa Creek Flood Risk Management Project, Santa
2 Clara County” (“Order”), enclosed as Exhibit 1.

3 **IV. DATE OF REGIONAL BOARD ACTION**

4 The Regional Board adopted the Order on April 12, 2017.

5 **V. STATEMENT OF REASONS**
6 **WHY THE REGIONAL BOARD ACTION WAS IMPROPER**

7 The Regional Board action was inappropriate and improper for the reasons set out in section
8 VIII, below.

9 The District incorporates section VIII, below, as its basis for this petition and request for
10 stay. In addition, the District further states that the basis for its appeal and request for stay is that the
11 April 12, 2017 Order contains requirements that are (1) arbitrary and capricious and contrary to law,
12 (2) unsupported by technical and scientific evidence, (3) beyond the Regional Board’s statutory
13 authority, and the Order is inconsistent with State Board rules and policies, and the California
14 Administrative Procedure Act (“APA”).

15 **VI. MANNER IN WHICH PETITIONER IS AGGRIEVED**

16 The District is aggrieved because the Order requires the District and the Corps to comply
17 with conditions, including a significant mitigation project, that are not legally or factually warranted,
18 and that put a major flood protection and transportation-infrastructure project—together with
19 hundreds of millions of dollars in federal funding—at risk. The District, the Corps, and the public
20 are counting on this Project to be completed without further delay from unjustified regulatory
21 obstructions.

22 **VII. STATE BOARD ACTION REQUESTED BY PETITIONER**

23 The District requests that, within 60 days (i.e., by July 11, 2017), the State Board partially
24 stay the Order pending the State Board’s review of this petition so that, if a stay is not granted by
25 that date, the District will have enough time to obtain relief from the Superior Court before the
26 Order’s October 2, 2017 deadline to submit an approved mitigation plan. Specifically, the State
27 Board should stay every provision of the Order except that part of Finding 21, and any associated
28 part of Provision 18, that would require an additional 10 percent of mitigation for each year that
construction of the mitigation project, if any is ultimately required, is delayed.

1 The District also requests that the State Board find that the Order is not legally or factually
2 warranted, and invalidate the Order.

3 **VIII. POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES**
4 **RAISED IN THE PETITION**

5 **A. Background**

6 **1. The Setting**

7 This matter concerns a reach of Upper Berryessa Creek in urban Santa Clara County, an
8 entirely manmade channel dug by farmers in the 1920s and repeatedly reengineered since then. (Ex.
9 2 at 185:12-19.) Upper Berryessa Creek is located in the central part of Berryessa Creek, which
10 flows westerly from its origin in the Los Buellis Hills in the Diablo Range through the cities of
11 Milpitas and San Jose before turning north and flowing into Lower Penitencia Creek, a tributary to
12 Coyote Creek, and thence to San Francisco Bay. (Ex. 3 at 2-1.)

13 The Coyote Creek drainage basin is heavily urbanized and industrialized area. (*Id.* at 3-38.)
14 Vegetation in Upper Berryessa Creek is dominated by non-natives that offer low quality habitat. (*Id.*
15 at 3-41.) Special-status plant species have not been observed in Upper Berryessa Creek, and none
16 are likely to occur there owing to low quality habitat potential. (*Id.* at 3-51-3-53.) Not a single tree
17 is growing along the lower banks of this reach. (Ex. 2 at 188:14-19.) Upper Berryessa Creek offers
18 only “discontinuous patches of highly disturbed wildlife habitat”. (Ex. 3 at 3-50.) This reach is not
19 supportive of fish, largely because water temperatures are too high. (*Id.* at 3-51.) No special-status
20 fish or wildlife have been observed in this reach, and none are likely to occur there owing to poor
21 habitat quality. (*Id.* at 3-53-3-56.)

22 No jurisdictional wetlands exist in the project reach. (Ex. 4 at 6.) Water does not flow in the
23 creek during the dry season, except in one section which carries small amounts of industrial water
24 discharges from a nearby manufacturing facility. (Ex. 2 at 243:22-25.)

25 Upper Berryessa Creek is straight, with no meanders that might slow water flows. (Ex. 1 at
26 Attachment A.) When it rains here, stormwater does not infiltrate the urbanized ground well, but is
27 rapidly delivered to the drainages, where it rapidly flows through. (Ex. 5 at Exhibit 1 at 2 (District
28 technical memorandum on sedimentation issues).) Because of these rapid storm flows, the
historical, field, and modeling evidence all confirm that Upper Berryessa Creek is eroding. (*Id.*)

1 Upper Berryessa Creek overtops its banks often: about once every 10 to 20 years. (Ex. 3 at
2 2-7.) A BART station in Milpitas—part of the BART expansion to San Jose—is planned within the
3 current Upper Berryessa Creek floodplain. (*Id.* at 3-156.)

4 **2. The Project**

5 The Project is a flood-risk management project authorized by Congress. (Pub. L. No. 77-
6 228, § 4, 55 Stat. 638, 650 (1941) (study authorization); Pub. L. No. 101-640, § 101(a)(5), 104 Stat.
7 4604, 4606 (1990) (construction authorization).) The Project includes construction, and then
8 operations and maintenance (O&M), of channel modifications and associated structures along 2.2
9 miles of Upper Berryessa Creek in the cities of Milpitas and San Jose. (Ex. 6 at 1.) This Project will
10 provide 100-year flood protection for a new Milpitas BART station, a necessary part of the \$2.3
11 billion (including \$900 million in federal funding) project to extend BART to San Jose. (*Id.*) The
12 Project will also result in the removal of 680 parcels from the flood plain. (*Id.*)

13 The U.S. Army Corps of Engineers (Corps) is responsible for design and construction of the
14 Project, and the District is responsible for acquiring real property rights needed for the Project,
15 making the land available to the Corps for construction, and conducting operations and maintenance
16 of the creek channel once the Project is constructed and the Corps releases the Project to the District.
17 (*Id.*; Ex. 7 at III.A (District responsible for acquiring property for project).)

18 **3. The Project Will Benefit The Environment**

19 The Project will widen the channel of Upper Berryessa Creek, resulting in a net increase of
20 3.18 acres in Waters of the United States and 7.4 acres of channel banks, above the ordinary-high-
21 water mark, that the Order calls “riverine wetlands”. (Ex. 1 at 13; Ex. 3 at 3-65.) The habitat value
22 of this increased area would also be improved over existing conditions as non-native and invasive
23 vegetation would be removed and the area would be seeded with native wetland plant species to
24 accelerate growth of such vegetation. (Ex. 8 at 7; *see* Ex. 3 at 3-64 (EIR analysis noting increased
25 wetland acreage and native wetland plantings).) Senior staff with expertise in biology and related
26 topics at both the Corps and the District agree that these wetland plants are likely to thrive under
27 Project conditions. (Ex. 8 at 7.)¹ Additionally, grassland habitat, which the U.S. Fish and Wildlife

28 ¹ Corps Biologist William DeJager opined that wetland plants “will grow rapidly” in the Project:

1 Service has identified as an important habitat type in this area, would increase in area by 3 acres, and
2 would be seeded with native grass and forbs, replacing the existing predominantly non-native
3 vegetation cover. (*Id.* at 2.) The Project would preserve existing upland trees and shrubs wherever
4 possible; the EIR requires replacement of removed native trees and shrubs with native plantings at a
5 more than 2:1 ratio (Ex. 3 at 3-70 (BIO-B)), while the final design plans contemplate a nearly 5:1
6 ratio of new tree and shrub plantings (*see* Ex. 32 at L-101-L-103 (53 trees and shrubs replaced with
7 257); Ex. 8 at 11.).

8 By widening the channel, the Project will also slow flows, reduce erosion, and bring
9 sedimentation in the channel closer to equilibrium. (Ex. 6 at Exhibit 1 at Section 3.)

10 The Project will result in overall improvements to the beneficial uses of the creek, identified
11 in the Basin Plan for Upper Berryessa Creek as REC1 (water-contact recreation), REC2 (non-contact
12 water recreation), WARM (warm water habitat), and WILD (wildlife habitat). (Ex. 1 at 16.) Very
13 little if any water-contact recreation currently occurs (primarily because there is rarely any water in
14 the creek). (Ex. 8 at 5; Ex. 3 at 3-149 (EIR analysis of existing conditions).) Indeed, the Project
15 may benefit this use by slowing storm flows, as discussed above. Non-contact water recreation will
16 also be improved because the District will be constructing a Class 1 pedestrian and bicycle trail

17 Given the size of the riprap (9-15”), there will be many voids on the surface. The soil
18 placement process planned (“choking”) will not only fill these voids but will also
19 force soil into the deeper voids. So wetland plants will have much more than four
20 inches of soil at very frequent intervals, about one foot or so. Herbaceous (non-
21 woody) upland plants will grow rapidly in moist soil (winter moist conditions
22 anywhere or dry-season moist conditions near the water level). Herbaceous wetland
23 plants will grow rapidly in the warmer months of the year in areas of wet soil. Soil
24 will be rapidly knit together and stabilized by the roots of these plants.”

25 (Ex. 8 at 7.)

26 Water District Senior Water Resources Specialist Doug Titus likewise opined that the Project would
27 provide habitat for wetland vegetation and benthic organisms “equivalent” to current conditions:

28 Rock riprap sized 9 to 15-inches in diameter placed in a single layer with 4 inches of
topsoil offers substrate for herbaceous wetland vegetation and benthic organisms. It
may be equivalent to existing site conditions, especially if dense clay subsoil
underlies the creek. Water in the creek, topsoil, and voids in the rock riprap allow the
native vegetation proposed to survive, and creates habitat for associated benthic, and
soil biota. As a result, the creek post-Project should have sufficient hydrology,
substrate, and herbaceous vegetation to maintain beneficial uses, functions, and
values. Algae will certainly flourish and there will be habitat for worms, diatoms,
micro- and macroinvertebrates, and warm-water fish larvae given creek hydrology
does not change from existing conditions.

(*Id.*)

1 along the creek. (Ex. 8 at 5.) Warmwater habitat will be improved by the Project’s replacement of
2 non-native vegetation with native hydrophytic vegetation and enlarging riparian habitat. (*Id.*)
3 Wildlife habitat will be improved by replacing non-native vegetation with native vegetation and
4 increasing what Regional Board staff call “riverine wetlands” by 7.4 net acres. (*Id.*)

5 **4. The Project’s Environmental Review**

6 The Corps prepared a full Environmental Impact Statement (“EIS”) under the National
7 Environmental Policy Act (“NEPA”). (Ex. 9.) The EIS concluded that impacts to water quality,
8 biological resources, and other issues would be mitigated to less-than-significant levels. (*Id.* at
9 PAC-14 through PAC-15.) The Corps also prepared an alternatives analysis that concluded that the
10 Project would comply with all State water quality standards, and would be the least environmentally
11 damaging project alternative. (Ex. 10 at 12.)

12 The District is the lead agency under the California Environmental Quality Act (“CEQA”)
13 for the Project, and the Regional Board is a responsible agency under CEQA. Pursuant to CEQA,
14 the District prepared a draft environmental impact report (“EIR”) for the Project and circulated the
15 draft EIR for public review and comments. The Regional Board submitted extensive comments on
16 the draft EIR, including on the Project’s impacts to waters of the State and on sedimentation. (Ex.
17 11 at Appendix G letter 3.) Each of those comments was responded to, and changes were made as
18 appropriate in the final EIR. (Ex. 3 at 7-5 through 7-15.) The District certified the final EIR in
19 February 2016, finding that impacts to biological resources, soils, hydrology, and water quality
20 (among other issues) would be mitigated to less-than-significant levels. (*Id.* at es-viii, es-xiii.) No
21 suit was filed to challenge the EIR.

22 **5. The Regional Board Permits Project Construction**

23 In 2015, the Corps, who is responsible for the design and construction of the Project, applied
24 to the Regional Board for certification as sole permittee, under Section 401 of the federal Clean
25 Water Act, that the Project does not violate State water quality standards. (Ex. 4 at 1.) Staff from
26 the Regional Board, the Corps, and the District proceeded to meet and communicate about the
27 permitting of the Project. Regional Board staff proposed conditioning the certification on the
28 issuance of additional mitigation requirements in the future, but the Corps and the District objected.

1 (Ex. 2 at 175:6-25 (District “always said we didn’t agree”); Ex. 12 (written record of Corps’s
2 objection).) In response to those objections, Regional Board staff modified the draft certification to
3 make clear that the certification would *not* imply that the Project “requires compensatory
4 mitigation”. (*Id.*)

5 On March 14, 2016, the Regional Board issued to the Corps a “Certification And Waste
6 Discharge Requirements”, confirming that construction of the Project, as conditioned in that order,
7 would comply with the federal Clean Water Act and with “applicable requirements of State law.”
8 (Ex. 4 at 11.) The Regional Board’s 2016 order thus certified the Project, as conditioned in that
9 order, was consistent with all applicable laws.

10 The Corps began construction in October 2016. (Ex. 2 at 54:7-9.) No changes to the Project
11 have been proposed since the Regional Board issued the Section 401 certification. (Ex. 5 at 3.)

12 **6. The Regional Board Changes Course**

13 In August 2016, Regional Board staff unilaterally proposed to issue Waste Discharge
14 Requirements jointly to the District and the Corps. (Ex. 13.) This proposal included a significant
15 new requirement to provide a “mitigation package” of “approximately twice the 10.1-acre area and
16 10,072-linear-foot length feet of creek waters, or the equivalent”. (*Id.* at 23.)

17 Both the District and the Corps submitted lengthy comment letters objecting to this proposal.
18 (Ex. 6 (District’s letter); Ex. 14 (Corps’s letter).) The District explained, among many other issues,
19 that the new mitigation requirements would represent a State-law mandate for which the State would
20 be financially responsible, according to recent Supreme Court precedent. (Ex. 6 at 3-4.) The
21 Corps’s letter also warned that the “unwarranted mitigation requirements could adversely impact the
22 benefit cost ratio of the Project thereby leading to its cancellation”, and that other requirements in
23 the proposal “could result in either a stop work order or termination of the Project”. (Ex. 14 at 1.)

24 In response, in November 2016, Regional Board staff made another surprising proposal: to
25 *rescind* the Section 401 certification, and reissue a modified Section 401 certification, together with
26 Waste Discharge Requirements, to both the Corps and the District—including the off-site mitigation
27 condition. (Ex. 15.) The Corps and the District wrote letters objecting to this revised proposal. (Ex.
28 5 (District’s letter); Ex. 16 (Corps’s letter).)

1 On January 4, 2017, Regional Board staff posted a slightly modified draft order (Ex. 17), and
2 lengthy responses to comments (Ex. 18). Many of the responses raised issues about environmental
3 impacts that Regional Board staff did not raise during the CEQA comment period on the EIR.
4 (*Compare* Ex. 11 at Appendix G letter 3 (Regional Board staff’s comments about draft EIR) with
5 Ex. 18 at C-13-a (new comments on environmental impacts).)² Other responses took the position
6 that, while “[c]ommunications to Board members in the absence of all parties are prohibited unless
7 there is notice and an opportunity for all parties to comment”, there was no need to maintain an
8 internal separation of administrative functions. (Ex. 18 at S-76.)

9 On January 10, the District submitted a lengthy letter responding to the new comments and
10 issues raised by Regional Board staff. (Ex. 19.)

11 **7. The Hearings and Order**

12 The Regional Board held a hearing on this third version of the draft order the next day. At
13 the start of the hearing, the Regional Board’s Chair stated that the “Board will accept any evidence
14 or testimony that is reasonably relevant to the issues”. (Ex. 20 at 44:34-44:39.) But the Regional
15 Board chair nevertheless decided to exclude the District’s January 10 letter from the record, even
16 after the District counsel explained that the letter responded only to issues and evidence raised for
17 the first time by Regional Board staff less than a week before the hearing. (Ex. 2 at 48:11-15;
18 251:25-252:18).

19 Regional Board staff then spoke in support of the proposed order, including representing to
20 the Regional Board that the Corps and the District had “agreed” to the permitting approach advanced
21 by Regional Board staff—contrary to the written record. (*Compare* Ex. 2 at 92:18-93:15 (transcript
22 of hearing) with Ex. 12 (written record of Corps’s objection).) No third parties or environmental
23 groups spoke in favor of Regional Board staff’s proposal.

24 The Corps and District then spoke in opposition to the proposed order. The Corps’s
25 comments included that, if new mitigation requirements were imposed, that would be beyond the

26 ² For example, while the Regional Board staff commented on the draft EIR that it disagreed with the
27 Project’s bank stabilization design including use of rip rap, very little explanation was provided on
28 how such erosion control methodologies could impact water quality. (Ex. 11 at Appendix G letter 3
at 5-6.) When responding to the comments received on the draft order, the Regional Board staff for
the first time raised specific issues with how some elements of the Project design could result in
adverse impact on habitats for benthic organisms. (Ex. 18 at C-13-a.)

1 Corps’s statutory authorization and there was “fear” that the Corps might be accused by Congress of
2 not “proceeding in good faith”. (E. 2 at 134:20-135:8.)

3 Several community leaders also spoke against the proposal. Reverend Jethroe Moore II,
4 president of the Silicon Valley NAACP and Gubernatorial appointee to the Commission on Peace
5 Officer Standards and Training, testified that, in his more than 34 years of public life, he had never
6 “seen a Commission, or group of people who represent the Governor, tell me, as a community
7 member, that they really don’t have time to listen to me, or that I need to rush this thing through.”
8 (Ex. 2 at 218:7-11.) The Regional Board—which has no members from Santa Clara County—did
9 not “come down and interview one member of the community, and ask what the community
10 wanted”. (*Id.* at 219:11-13.)

11 At the close of the hearing, over the District’s objection, the Regional Board went into closed
12 session,³ with staff, to deliberate. The Regional Board emerged from closed session more than an
13 hour later and continued the matter, without taking any formal action. (Ex. 21 at 4-5.)

14 In early April, Regional Board staff circulated another revision to the draft order containing
15 significant revisions. (Ex. 22.) This revision rewrote the findings on environmental impacts, while
16 reducing the mitigation condition from 20 acres to 15. (*Id.*) The revision also deleted a non-
17 enforcement letter related to soil testing that had been appended to the original Section 401
18 certification. (Compare Ex. 4 Exhibit B (non-enforcement letter) with Ex. 1 at Provision 16 (new
19 condition; non-enforcement letter removed).)

20
21 _____
22 ³ Regional Board staff cited Government Code section 11126(c)(3) as the authority to deliberate on
23 this matter with its staff in closed session. But that provision allows closed sessions only “in a
24 proceeding required to be conducted pursuant to Chapter 5 [of the Administrative Procedure Act] or
25 similar provisions of law”. Chapter 5 of the APA governs formal hearings. (Gov. Code §§ 11500 et
26 seq.) Chapter 5 hearings are conducted before administrative law judges (*id.* § 11502(a)), are
27 initiated by verified pleadings (*id.* § 11503(a)), provide for formal discovery and motion practice (*id.*
28 §§ 11507.6-11507.7), and are subject to the Administrative Adjudication Code of Ethics (*id.* §§
11475 et seq.). But Regional Board regulations expressly provide that its proceedings are *not*
subject to Chapter 5. (23 Cal. Code Regs. § 648(c).) Those regulations do not provide for
adjudication before administrative law judges, verified pleadings, or formal discovery or motion
practice, and they are expressly exempt from the Administrative Adjudication Code of Ethics. (*Id.*
para. (b).) Because Regional Board proceedings are not required to be conducted pursuant to
Chapter 5, but are required to be conducted pursuant to different provisions of law which govern
different—and much more informal—proceedings, the Regional Board had no basis for going into
closed session with its staff to deliberate about this matter.

1 The Regional Board held a hearing on the revised order on April 12. At the hearing, the
2 District objected, on its behalf and the Corps's, to the issuance of the revised order.⁴ Again, no third
3 parties spoke in favor of the revised order, but many community leaders spoke in opposition.
4 Reverend Moore again spoke and invited the Regional Board members to Santa Clara County to talk
5 with members of the public who would be adversely affected should the issuance of the order cause
6 any delays to the project, but the Board Chair responded—incorrectly—that ethical rules prohibit
7 Board members from speaking directly with the public.

8 The Regional Board then invited staff to make a recommendation. The Regional Board's
9 executive director recommended adoption of the proposed revised order, while also stating that the
10 Project—as the Regional Board had already approved it in March 2016—was the least
11 environmentally damaging project alternative (LEDPA). (*See also* Ex. 10 (Corps's Section
12 404(b)(1) alternatives analysis).)

13 At the close of the hearing, and after deliberations,⁵ the Regional Board adopted the order
14 with only one change: extending the deadline for submission of an approved mitigation plan from
15 June to October 2017. (Ex. 1.)

16 **B. Standard of Review**

17 The State Board exercises independent judgment in evaluating whether the Regional Board's
18 decision was appropriate. (*See* Water Code § 13320(c) (“[t]he state board may find that the action of
19 the regional board, or the failure of the regional board to act, was appropriate and proper[;] ... [i]n
20 taking any action, the state board is vested with all the powers of the regional boards under this
21 division”).) The State Board is not constrained by the record before the Regional Board, but shall
22 also include “any other relevant evidence which, in the judgment of the state board, should be
23 considered to effectuate and implement the policies of this division.” (Water Code § 13320(b).) .

24 The State Board should stay a Regional Board order if a petitioner makes a showing,
25 supported by a declaration, of (i) “substantial harm to petitioner or to the public interest if a stay is

26 ⁴ Neither the transcript nor the audio of the April 2017 hearing is yet available.

27 ⁵ In their deliberations, Regional Board members questioned the credibility of District staff's
28 witnesses for not having mentioned that, in another flood protection project, rock rip-rap was not
placed all the way across the bed of a creek. On the contrary, District staff, in their testimony, were
explicit that rock rip-rap was not placed all the way across the bed of that other creek.

1 not granted”, (ii) “a lack of substantial harm to other interested persons and to the public interest if a
2 stay is granted”, and (iii) “substantial questions of fact or law regarding the disputed action” exist.
3 (23 Cal. Code Regs. § 2053(a).)

4 The Regional Board’s Order is not supported by the law or the evidence. The State Board
5 should partially stay the Order while this matter is pending, and ultimately invalidate the Order in its
6 entirety.

7 **C. Additional Conditions On A Project The Regional Board Has Certified Complies With**
8 **All Laws Are Unjustified**

9 The original Section 401 certification already found that construction of the Project, as
10 conditioned in that order, “will comply with the applicable provisions” of federal and state law. (See
11 Section VIII.A.5 above.) The Project has not changed since this certification was issued. The
12 Regional Board, having certified that construction of the project complies with all applicable laws,
13 had no legal authority or justification for imposing additional construction-related mitigation
14 conditions on the District or anybody else now.

15 Regional Board staff’s response to this argument was that the Section 401 certification
16 “explicitly directs that mitigation would be deferred to the WDRs to be considered later this year.”
17 (Ex. 23 at 1.) Although the certification referred to the *possibility* that the Regional Board might
18 subsequently “consider[]” construction-related WDRs, the certification was not conditioned in any
19 way on the Regional Board issuing additional construction-related WDRs. In fact, Regional Board
20 staff revised the original certification to make clear that it would *not* pre-commit the Regional Board
21 to issuing a subsequent permit requiring additional mitigation. (See Section VIII.A.5 above.)

22 The Regional Board’s decision was illegal and should be vacated.

23 **D. The Section 401 Certification Cannot Now Be Rescinded Or Modified**

24 The Order rescinds the Section 401 water quality certification previously issued by the
25 Executive Director, and supersedes that certification with a “reissued water quality certification” with
26 additional conditions. Once the Executive Director issued the original Section 401 certification in
27 March 2016, however, the Clean Water Act gave the Regional Board only 60 days to modify or
28 rescind that certification, and only if there was some change in circumstances. (*See Keating v.*
Federal Energy Regulatory Comm’n (D.C. Cir. 1991) 927 F.2d 616, 624 (“[i]f either of these

1 conditions is not met--if the state's decision comes too late or if it is not pursuant to changed
2 circumstances--then the attempted revocation is invalid as a matter of federal law and no further
3 inquiry is needed”); *City of Shoreacres v. Tex. Comm'n on Envtl. Quality* (Tex. App. 2005) 166
4 S.W.3d 825, 834-35 (noting that “[t]he Clean Water Act allows a state to revoke a prior certification
5 only within this specified time limit and only pursuant to these defined circumstances”).) The
6 previous certification, in condition 27, reserved whatever rights the Regional Board might have to
7 cancel or reissue the certification to cases where conditions were violated or new or revised water
8 quality standards and implementation plans were adopted or approved. (Ex. 4 (March 2016 Section
9 401 certification); *see also* Water Code § 13381 (permits may be modified only “for cause”).) In
10 this case, those 60 days have long since run, and there has been no change in circumstances,
11 standards, or plans. The Order’s attempt to rescind the prior certification and reissue a new and
12 revised certification is a nullity and invalid.

13 **E. The Section 401 Certification Cannot Apply To The District**

14 The Order issues a Section 401 certification to both the Corps and the District. But Section
15 401 applies only to an “applicant for a federal license or permit”. (33 U.S.C. § 1341(a).) The
16 District has not applied for a federal license or permit in relation to this project; the Corps was the
17 applicant and it did receive a Section 401 certification in March 2016. Because the District has not
18 applied for a federal license or permit, the Regional Board has no authority to unilaterally subject the
19 District to a Section 401 certification related to this Project.

20 **F. The District Should Not Be Named As A Discharger For Construction Of The Project**

21 The Order names both the District and the Corps as a “Discharger” relative to construction of
22 the Project. (Order Finding 4.) The District is not a discharger relative to construction of the
23 Project.

24 The Order invokes Water Code section 13263 as the source of the Regional Board’s authority
25 to issue WDRs to the District for construction-related discharges. (Order Findings 5 & 24.) Section
26 13263 authorizes the Regional Board to issue WDRs for a “proposed discharge”, but the District is
27 not proposing any discharges related to construction of the Project. Rather, the Corps is solely
28 responsible for constructing the Project. Because the District is not proposing any construction-

1 related discharges, Section 13263, on its face, does not authorize the Regional Board to name the
2 District as a construction-related discharger.

3 Regional Board staff have argued that the District should also be named as a construction-
4 related discharger because the District owns the property on which the Project will be built. But
5 Water Code section 13270 prohibits the Regional Board from issuing WDRs to one public agency
6 for discharges on that agency’s property by another public agency. “Section 13270 prohibits a
7 Regional Board from requiring a report of waste discharge and from issuing requirements to any
8 lessor public agency which leases land to another public agency” (State Board Order WQ 90-3
9 (San Diego Unified Port District).) Here, because the District, a public agency, is effectively leasing
10 land to the Corps, another public agency, for construction of the Project, Section 13270 prohibits the
11 Regional Board from issuing WDRs to the District and impose mitigation conditions for
12 construction of the project on the District’s property.

13 **G. Sovereign Immunity Prohibits The Regional Board From Subjecting The Corps To**
14 **WDRs**

15 The Project involves the discharge of dredged or fill material to construct a beneficial
16 infrastructure and flood protection project. Section 404(t) of the Clean Water Act, 33 U.S.C. §
17 1344(t), provides a limited waiver of sovereign immunity by the United States for state-law
18 requirements related to dredge-and-fill discharges. However, California law does not regulate
19 dredge-and-fill discharges; it regulates only discharges of “waste”, and dredge-and-fill discharges
20 are not “waste”. (Ex. 24 at 3; see also Section V.H below.) Because California law does not
21 regulate dredge-and-fill discharges, the limited waiver of sovereign immunity under Section 404(t)
22 for such discharges does not apply here. The Regional Board lacks authority to subject the Corps to
23 waste discharge requirements under California law for the dredge-and-fill discharges associated with
24 this Project.

25 **H. The Regional Board Does Not Have Authority To Adopt WDRs For Non-Waste**
26 **Discharges**

27 The Regional Board has authority to issue Waste Discharge Requirements for discharges of
28 “waste”. (Water Code § 13260(a).) Waste is defined as “waste substances” used for purposes of
“disposal”. (Water Code § 13050(d).) This Project is construction of a beneficial flood-protection

1 project to protect property and important infrastructure project, not the disposal of waste substances.
2 Because the Project does not involve the discharge of waste, there is no basis for issuing Waste
3 Discharge Requirements. (*See also* Ex. 24 at 3. (Corps letter agreeing that dredge-and-fill
4 discharges are not “waste”.)

5 Regional Board staff never disputed that construction of the Project does not involve the
6 discharge of waste. Rather, Regional Board staff argued that the Regional Board has authority “to
7 regulate discharges of dredge and fill materials with WDRs”. (Ex. 18 at RTO-S-05.) This is wrong.
8 Water Code section 13372(b) gives this authority to the Regional Board only once “the state has an
9 approved permit program” under Section 404 of the Clean Water Act. The Regional Board does not
10 yet have an approved permit program under Section 404, so it does not have authority to regulate
11 discharges of dredge and fill materials via WDRs.

12 **I. The Order Ignores Required Watershed-Wide Planning And Other Regional**
13 **Considerations**

14 Focusing on the entire watershed, rather than just this one Project, is required by the Water
15 Code. Section 13263(a) requires waste discharge requirements to “take into consideration ... the
16 provisions of Section 13241.” Section 13241, in turn, requires consideration of regional issues, such
17 as the “coordinated control of all factors which affect water quality in the area”, “[e]conomic
18 considerations”, and “[t]he need for developing housing within the region”. The Order considers
19 none of these things. Rather, by imposing mitigation conditions, the Order makes it more difficult
20 for the District to fund environmentally beneficial projects it otherwise could fund through existing
21 bond measures. (Ex. 2 at 178:7-17.) It also could hurt housing in the region by adding new
22 uncertainties to a flood protection project designed to protect housing, businesses, and BART
23 expansion. (See Section VIII.A.7 above.) The Regional Board was criticized by community leaders
24 for not respecting regional concerns, and improperly refused to meet with members of the
25 community. (*Id.*) The Order failed to consider the required regional issues, in violation of Sections
26 13263 and 13241.
27
28

1 **J. Issuing WDRs To The District Violates CEQA**

2 **1. CEQA Guidelines Section 15096 Prohibits The Regional Board From**
3 **Second-Guessing The Environmental Analysis Of The Lead Agency**

4 CEQA also significantly restricts the Regional Board’s authority to impose mitigation
5 measures arising from impacts that the certified EIR found to be less-than-significant. Section
6 15096(e) of the CEQA Guidelines provides that, if a responsible agency thinks that a certified EIR is
7 “not adequate for use by the responsible agency”, then it “must” either: (i) “[t]ake the issue to court
8 within 30 days”, or (ii) prepare a subsequent EIR “if permissible under Section 15162”, or (iii)
9 assume the lead agency role per Section 15052(a)(3). If the responsible agency does not take one of
10 these three actions, it shall “[b]e deemed to have waived any objection to the adequacy of the EIR”.
11 (Section 15096(e)(2).) If the responsible agency does not challenge the EIR, then “the responsible
12 agency must consider the environmental effects of the project *as shown* in the EIR”. (Section
13 15096(f), emphasis added.) These provisions leave no room for a responsible agency to second-
14 guess the EIR’s findings about less-than-significant environmental impacts beyond the three ways
15 specified in Section 15096(e).

16 Regional Board staff read Section 15096(g) to allow the Regional Board, when acting as a
17 CEQA responsible agency, to find significant effects, and impose additional mitigation measures,
18 even if the EIR finds those effects to be less-than-significant, and without taking any of the actions
19 listed in Section 15096(e). (See Ex. 18 at S-18.) But Section 15096(g) does not say this.
20 Subsection (g)(1) begins by noting that a responsible agency’s role “is more limited than a lead
21 agency.” The responsible agency’s authority to review “any significant effect the project would
22 have on the environment” can only be referring to significant effects *identified in the lead agency’s*
23 *EIR*, not to effects the responsible agency might think are significant but which are not identified as
24 such in the EIR.

25 The District’s interpretation is bolstered by the fact that CEQA prescribes that, where a
26 project is to be carried out or approved by more than one agency, “the determination of whether the
27 project may have a significant effect on the environment shall be made by the *lead agency*.” (Pub.
28 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

1 paragraph are taken) and Section 15096(f) (which requires the responsible agency to consider the
2 environmental effects “as shown” in the EIR) of all meaning.

3 In short, the Regional Board may not adopt additional mitigation for the Project for impacts
4 identified in the EIR as less-than-significant without at least taking one of the three actions in
5 Section 15096(e). Otherwise, the Regional Board is deemed to have waived any objection to the
6 EIR’s findings about less-than-significant impacts and to the adequacy of the EIR’s mitigation
7 measures, and the Regional Board cannot impose additional mitigation.

8 The case law on this issue supports the District. The only published case to interpret Section
9 15096, *Ogden*, turned on whether a responsible agency could second guess the lead agency’s
10 determination that an impact was less than significant without taking the steps identified in Section
11 15096(e). (*Ogden Env’t Serv. v. City of San Diego* (S.D. Cal. 1988) 687 F.Supp. 1436, 1450-1452.)
12 *Ogden* found for the lead agency, holding that if the responsible agency believes that the lead
13 agency’s environmental review was inadequate, the responsible agency “must take the necessary
14 steps to challenge the lead agency’s findings or otherwise be deemed to have waived any objection.”
15 (*Id.* at 1451, citing Section 15096(e).) Because the Regional Board did not take any of the necessary
16 steps to challenge the District’s findings about less-than-significant impacts on waters, the Regional
17 Board waived any objection.

18 Another case held that a responsible agency violated CEQA by not giving adequate
19 consideration to the lead agency’s EIR. (*RiverWatch v. Olivenhain Mun. Water Dist.* (2009) 170
20 Cal.App.4th 1186, 1207.) To reach that result, *RiverWatch* applied the rule that a responsible agency
21 “must consider the environmental effects of the project *as shown in the EIR*”, and that, before
22 approving the project, the responsible agency must “find either that the project’s *significant*
23 environmental effects *identified in the EIR* have been avoided or mitigated, or that unmitigated
24 effects are outweighed by the project’s benefits.” (*Id.*, emphasis added.) *RiverWatch* does not
25 authorize responsible agencies to second guess the findings in the EIR; rather, *RiverWatch*
26 effectively cautions responsible agencies, such as the Regional Board, against second guessing the
27 findings in the EIR.

1 The Regional Board’s adoption of the Order without taking any of the steps in Section
2 15096(e) violated CEQA.

3 **2. CEQA Required The Regional Board To Conduct Environmental Review Of**
4 **The Large Project Regional Board Staff Is Proposing**

5 The certified EIR concludes that both temporary and permanent impacts on waters of the
6 state and riparian habitat would be less than significant. Putting aside that the Regional Board could
7 have but did not challenge the certified EIR, and even assuming, for the sake of argument, that the
8 Regional Board had authority to impose additional mitigation for impacts on waters (which the
9 District contends it does not), CEQA would have required the Regional Board to conduct additional
10 environmental review before WDRs with additional mitigation could be adopted. The off-site
11 mitigation required by the Order includes a requirement to restore about 15 acres of waters and
12 15,000 linear feet of aquatic habitat. (Order Finding 21 & Provision 16.) Such a large off-site
13 mitigation project is likely to have significant environmental effects; its ostensible purpose is to
14 mitigate for other supposed significant environmental effects of the Project on waters. This is a
15 “project” under CEQA for which the Regional Board would have to conduct environmental review
16 before imposing. (*See Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47
17 Cal.3d 376, 401 (“mitigation measures must be discussed in an EIR”).)

18 The Order contains none of the findings required by CEQA, and gives no reason why any
19 exemption or exclusion should apply—and the District is aware of none.

20 Regional Board staff have suggested that, if additional environmental review is required, it
21 will be up to “the District to prepare CEQA documentation.” (Ex. 23 at 2.) The District disagrees.
22 The District, as the lead agency, has already approved the project as-is. If additional environmental
23 review were required at this point because the Regional Board has identified new significant effects
24 or proposed substantial project changes as mitigation, such review would be the Regional Board’s
25 responsibility. (*See CEQA Guidelines* § 15162(c) (after project approval by lead agency, “a
26 subsequent EIR or negative declaration shall only be prepared by the public agency which grants the
27 next discretionary approval”).) Failure by the Regional Board to conduct additional environmental
28 review before adopting the Order violated CEQA.

1 **K. No Substantial Evidence Supports The Order’s Findings Of Adverse Impacts**

2 The Order finds adverse impacts to various beneficial uses. But no evidence supports that
3 finding. Rather, the evidence is that the Project will be good for the environment. (See Section
4 VIII.A.3 above.)

5 Regional Board staff’s analysis of environmental impacts is primarily contained in response
6 C-13-a. As an initial matter, under Public Resources Code section 21167.2, since no action
7 challenging the EIR’s adequacy was filed, the District’s conclusions in the certified EIR are
8 conclusively presumed to comply with CEQA for purpose of use by a responsible agency such as the
9 Regional Board.

10 **1. Dry-Season Flows**

11 Regional Board staff stated that the expanded channel cross-section will cause dry-season
12 flows (“estimated at less than 1 cubic foot per second”) to “spread out and ultimately infiltrate into
13 the substrate”. (Ex. 18 at C-13-a.) However, the width of the channel does not now, nor will it
14 under Project conditions, determine dry season flows. During the dry season, water does not flow
15 throughout most of the Project reach, and the water that does flow is from industrial discharges.
16 (See Section VIII.A.1 above.) The channel is being widened to better manage *flood* flows. There is
17 no evidence, or any reason to believe, that the wider channel will affect dry season flows.

18 Regional Board staff went on to state that these allegedly slower dry season flows “may”
19 reduce diversity and abundance in lower trophic species. (Ex. 18 at C-13-a.) This was not identified
20 as a significant impact in the certified EIR, and the Regional Board does not have authority to
21 impose new mitigation on the basis of impacts the EIR did not find to be significant. (See Section
22 VIII.J.1 above.) No credible evidence was offered to support that this is likely to occur, and so the
23 stated impact is speculative. This statement also conflicts with the opinions of Corps and District
24 biologists, who believed that the Project’s low-flow channel would support successful habitat and
25 species development. (See Section VIII.A.3 above.)

26 Regional Board staff’s conclusions about slower dry season flows also conflict with the
27 certified EIR which concluded that impacts to “any native resident or migratory fish or wildlife
28 species, or with established resident or migratory wildlife corridors, or impede the use of native

1 wildlife nursery sites” would be less than significant with the mitigation measures identified in the
2 EIR. (Ex. 3 at 3-71.) The Order does not provide any credible evidence suggesting that those
3 mitigation measures would not be sufficient in reducing the impact, if any, to a level of less than
4 significant.

5 Regional Board staff wrote that these alleged diminished dry season flows have the
6 “potential” to harm fish or “may” reduce diversity and abundance in lower trophic species, but there
7 is no credible evidence that these potentials would be realized, and thus the stated impact is
8 speculative. (Ex. 18 at C-13-a.) The certified EIR concluded that impacts to already-degraded
9 habitats or to the minimal fish and wildlife present in this reach would be less than significant after
10 the mitigation measures identified in the EIR were implemented. (See Section VIII.A.4 above.) No
11 additional mitigation is now required.

12 **2. Sedimentation**

13 The Order found that the Project will make the system more depositional and thereby cause
14 sedimentation problems. (Order Finding 16.) But historical, observational, and modeling data all
15 show that the system is currently eroding, so making the system more depositional, bringing the
16 system closer to equilibrium and reducing downstream sedimentation. (See Section VIII.A.3 above.)

17 **3. Engineered Streambanks**

18 Regional Board staff cited a paper by Sudduth and Meyer for the proposition that
19 bioengineered streambanks adversely affect species biomass. (Ex. 18 at C-13-a; Ex. 25 (Sudduth
20 and Meyer paper).) The Project will increase biomass along this degraded stream by hydroseeding
21 with native species and by replacing any trees or shrubs removed at a 2:1 ratio. (See Section
22 VIII.A.3 above.) In any event, that Sudduth and Meyer study actually concluded that
23 “bioengineered bank stabilization can have positive effects on bank habitat and macroinvertebrate
24 communities in urban streams” such as this one. (Ex. 25 at 1.) That study does not support Regional
25 Board staff’s proposed finding about project impact on species biomass.

26 **4. Nutrient Cycling**

27 Regional Board staff also stated that the project has the “potential” to adversely affect water
28 quality through a loss of nutrient cycling potential. (Ex. 18 at C-13-a.) This finding contradicts the

1 findings in the certified EIR, which found that impacts to water quality would be mitigated to less-
2 than-significant levels. (Ex. 3 at es-xiii.) That finding was based, in part, on the fact that the Project
3 will create new waters and will replace non-native species with native wetland vegetation, which
4 both the Corps's and the District's biologists believe will thrive. (See Section VIII.A.3 above.) In
5 any event, Regional Board staff cited a 2005 EPA report that analyzed the effectiveness of riparian
6 buffers at reducing nitrogen. (Ex. 18 at C-13-a; see Ex. 26 (EPA report).) However, that report
7 supports the finding in the EIR, and undermines Regional Board staff's analysis. That report stated
8 that projects "to re-establish geomorphic stability" in streams "may promote conditions for
9 denitrification" if they "control erosion". (Ex. 26 at 15, emphasis added.) That is exactly what this
10 Project is intended to do: re-establish geomorphic stability by widening the channel and controlling
11 erosion. The Project thus will not adversely affect water quality by reducing nutrient cycling
12 potential.

13 **5. Effect of Shade Plants on WARM Beneficial Use**

14 Regional Board staff wrote that the Project will reduce riparian shade plants and cause
15 warmer temperatures in the water thereby adversely affecting the WARM beneficial use. (Ex. 18 at
16 C-13-a.) But warmer water could not possibly adversely affect the WARM beneficial use. In any
17 event, the Project area does not contain any woody vegetation growing below the ordinary high-
18 water mark and none would be removed by the project. (See Section VIII.A.1 above.) Although the
19 project does contain a small number of widely spaced trees and shrubs growing on the upper banks
20 and top of bank, some of which would be removed, removed trees and shrubs will be replaced at a
21 nearly 5:1 ratio. (See Section VIII.A.3 above.) As a result, there will be no adverse temperature
22 impacts to WARM that require further mitigation.

23 **6. Red-Legged Frogs**

24 Regional Board staff stated that California Red-Legged Frog (CRLF) "could be flushed into
25 or travel across the Project area" from upstream (Ex. 18 at C-15) to support the contention that
26 endangered species and thus the RARE beneficial use would be adversely impacted. But there is no
27 evidence that this is a real possibility. CRLF have been observed upstream, but no listed species
28 have been observed in the Project reach. (See Section VIII.A.1 above.) That CRLF has been

1 observed upstream, but has not in the Project reach, undermines the assertion that they could be
2 flushed into or travel across the Project reach.

3 **7. Wetland Vegetation Success**

4 The Order questioned whether the native wetland vegetation that will be hydroseeded as part
5 of the project are likely to succeed because of limited soil depth. (Order Finding 20.a, page 11.) But
6 biologists from both the Corps and the District believe that this wetland vegetation will thrive under
7 these conditions. (See Section VIII.A.3 above.)

8 Because the Order’s findings about environmental impacts are not supported by the evidence,
9 the Order should be vacated.

10 **L. The Order Overestimates ‘Waters Of The State’**

11 Finding 18 in the Order claims that the Project will affect 9.83 acres of waters of the State.
12 This conflicts with the finding in the certified EIR, which found less than 5 acres of affected waters
13 of the State. (Ex. 3 at 3-64-3-65.) The Regional Board does not have authority to second-guess the
14 findings in the certified EIR. (See Section VIII.J.1 above.)

15 Included in the 9.83 acres of “waters of the State” alleged in the Order⁶ is a non-wetland
16 “area of 5.63 acres from the ordinary high water mark elevation to the tops of banks”. (Order,
17 finding 18.) There is no authority supporting the assertion that *non-wetland* areas above the ordinary
18 high water mark are “waters of the State”. The Water Code defines “waters of the State” as “any
19 surface water or groundwater”. (Water Code § 13050(e).) No regulations exist further refining this
20 definition. The statutory phrase “surface water or groundwater” cannot reasonably be interpreted to
21 include non-wetland areas above the ordinary high water mark. This area is not waters of the State.

22 What is more, the Order’s requirement to provide 15 acres of mitigation for an alleged 10
23 acres of impacts is arbitrary and not authorized by law or policy. Section 4.23 of the Basin Plan
24 provides that the “Water Board will evaluate both the project and the proposed mitigation together to
25 ensure that there will be no net loss of wetland acreage and no net loss of wetland function.” The
26 Project will not impact wetlands at all, and will improve other aquatic habitat. (See Section VIII.A.3

27 _____
28 ⁶ This 10.1-acre number is inconsistent with other parts of the Order, such as Finding 6.c.i and
Finding 20, which both assert that 9.81 acres of waters will be impacted.

1 above.) Because there will be no net loss of wetland acreage or function, and aquatic habitat will be
2 improved, no mitigation is appropriate.

3 **M. The Regional Board Violated Procedural Requirements**

4 **1. Failure to Separate Functions or Prohibit Ex Parte Communications**

5 When acting in an adjudicatory proceeding, agencies must institute an internal separation of
6 functions between prosecutors, decision-makers, and the decision-makers' advisors, and prohibit ex
7 parte communications between them. (*Morongo Band of Mission Indians v. State Water Res. Control*
8 *Bd.* (2009) 45 Cal.4th 731,737-739; *Dep't of Alcoholic Beverage Control v. Alcoholic Beverage*
9 *Control Appeals Bd.* (2006) 40 Cal.4th 1, 10-15.) Regional Board staff stated that the requirement to
10 separate functions exists primarily in enforcement proceedings. (Ex. 18 at S-74.) But this effectively
11 is an enforcement proceeding: the District has not asked or applied for any approvals by the
12 Regional Board, but instead Regional Board staff are prosecuting a case to have waste discharge
13 requirements and a Section 401 certification imposed on the District unilaterally. Accordingly, the
14 Regional Board must separate functions and prohibit ex parte communications. When the Regional
15 Board refused to separate functions, and went into closed session with its staff who were advocating
16 for adoption of the Order, it violated the separation-of-functions requirement and the prohibition on
17 ex parte communications.

18 **2. Improper Citation To Earlier Regional Board Decisions**

19 The Regional Board staff's responses to comments made by the District and the Corps cite
20 numerous earlier Regional Board decisions.⁷ The APA prohibits reliance on prior decisions, except
21 when those decisions have been designated and indexed as precedential. (Gov. Code §
22 11425.10(a)(7).) The District is not aware of any of the cited Regional Board decisions having been
23 designated or indexed as precedential. To the extent the Order relies on those prior Regional Board
24 decisions, it violates the APA.

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26 _____
27 ⁷ For example, response to Comment C-02 cites past Regional Board orders to support Regional
28 Board decisions to include both the Corps and the local sponsor as co-permittees; response to
Comment C-13-a cites past Regional Board orders requiring changes in design or mitigation; and
response to Comment RTO-C-01 cites WDRs issued to the Corps for maintenance dredging. (Ex.
18.)

1 the Project, the District understands that local Corps staff feel obliged to report the Order up the
2 chain of command to D.C. headquarters. (*Id.* ¶ 2.) Recent efforts by the new administration to
3 justify new restrictions on funding already-planned transportation infrastructure projects in the Bay
4 Area, such as the electrification of CalTrain, are concerning.⁸ The District is concerned about the
5 consequences to the Project should the Order receive a negative reaction in Washington.
6 (Richardson Decl. ¶ 3.) If the Project is delayed or cancelled, hundreds of parcels in Santa Clara
7 County would remain at risk of flooding, and the BART extension to San Jose could be jeopardized.
8 (*Id.* ¶ 4.)

9 The District’s concerns about the harm the Order could cause to the public interest are
10 corroborated by the letters and testimony given by the Corps to the Regional Board. (See Section
11 VIII.A.7 above.)

12 A stay would also prevent substantial harm to the District. The Order imposes an October 2,
13 2017 deadline for the submission of an acceptable mitigation plan to the Regional Board. (Order,
14 Provision 19.) But it would be impossible for the District to submit an acceptable mitigation plan to
15 the Regional Board by October 2, 2017, thus guaranteeing that the District would be in violation of
16 the Order and potentially subject to very serious penalties.

17 All of the environmental enhancement projects that the District might consider offering the
18 Regional Board in satisfaction of the Order’s mitigation requirement are only in the early stages of
19 the planning process. (Richardson Decl. ¶ 5.) In order for the District to be in a position to propose
20 any of those enhancement projects to the Regional Board as mitigation, planning would need to be
21 completed, environmental review done,⁹ and approval and funding given by the District’s Board of
22 Directors. (*Id.* ¶ 6.) In the District’s experience, it takes about 18-30 months for projects in the early
23 stages of planning to get all the way through this process. (*Id.*) It would simply be impossible for
24 the District to submit an approved mitigation project to the Regional Board by October 2. The Order

25 ⁸ See Samantha Weigel, *Daily Journal*, “Electrification funds in peril: Federal Transit
26 Administration delays \$647 million Caltrain decision” (May 10, 2017), available at
27 <http://www.smdailyjournal.com/articles/news/2017-02-18/electrification-funds-in-peril-federal-transit-administration-delays-647-million-caltrain-decision/1776425176103.html> and as Exhibit 33.

28 ⁹ The District and the Regional Board disagree about who would be responsible for environmental review of the mitigation project, but there has been no dispute that environmental review would be required.

1 should be stayed to prevent the harm that would befall the District from being in unavoidable
2 violation of the Order.

3 **B. A Partial Stay Would Not Cause Harm**

4 A partial stay would not cause harm because the Order accommodates delay by increasing
5 the amount of mitigation required (if any ultimately is), and the District is not asking for that
6 provision of the Order that accommodates delay to be stayed. (*See* Order Finding 21, p. 13
7 (requiring increased mitigation should there be delay); Richardson Decl. ¶ 7.) Because the Order
8 accommodates delay, there will be no harm if the rest of the Order is stayed.

9 **C. Substantial Questions Of Fact And Law Exist**

10 The District has written lengthy letters over many months explaining, supported by legal
11 authorities as well as technical memoranda, why the Order is unfounded in fact and law.
12 (Richardson Decl. ¶ 8; *see* section X above.) Many of those explanations are captured in this
13 petition. At the January hearing before the Regional Board, the Regional Board members admitted
14 that the Order was “a challenging issue from a legal perspective” (Ex. 2 at 138:21), that the District’s
15 arguments “may have some legal merit” (*id.* at 276:7), and that the Regional Board couldn’t “make
16 heads or tails” of the differences between the parties about the facts (*id.* at 139:4-19). Because
17 substantial questions about the Order exist, the requested stay should be granted.

18 **XII. CONCLUSION**

19 Within 60 days, the State Board should partially stay the Order pending the State Board’s
20 review of this petition; specifically, the State Board should stay every provision of the Order except
21 that part of Finding 21, and any associated part of Provision 18, that would require an additional 10
22 percent of mitigation for each year that construction of the mitigation project, if any is ultimately
23 required, is delayed.

24 The State Board should also find that the Order is not legally or factually warranted, and
25 invalidate the Order.

1 DATED: May 12, 2017

2 BRISCOE IVESTER & BAZEL LLP

3
4 By: /s/ Peter Prows

Peter Prows

Attorneys for Santa Clara Valley Water District

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8 STATE OF CALIFORNIA

9 STATE WATER RESOURCES CONTROL BOARD

10 In the matter of:

11 ORDER NO. R2-2017-0014
12 WASTE DISCHARGE REQUIREMENTS and
13 WATER QUALITY CERTIFICATION for
14 SANTA CLARA VALLEY WATER DISTRICT
and
15 U.S. ARMY CORPS OF ENGINEERS,
UPPER BERRYESSA CREEK FLOOD RISK
MANAGEMENT PROJECT
SANTA CLARA COUNTY

No.

DECLARATION OF MELANIE
RICHARDSON
IN SUPPORT OF REQUEST
FOR PARTIAL STAY

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Petition for Review of SF Bay Regional Quality Control Board Order No. R2-2017-0014

Index of Exhibits

- Exhibit 1--Final Adopted Order
- Exhibit 2--Hearing Transcript
- Exhibit 3--Upper Berryessa Final EIR
- Exhibit 4--March 2016 401 Certification
- Exhibit 5--December 2016 District comment letter
- Exhibit 6--September 2016 District comment letter
- Exhibit 7--District-Corps Project Partnership Agreement
- Exhibit 8--James Manidakos presentation
- Exhibit 9--Upper Berryessa Final EIS
- Exhibit 10--Corps 404(b)(1) alternatives analysis
- Exhibit 11--Regional Board staff comments on draft EIR
- Exhibit 12--Corps objection to draft 401 certification
- Exhibit 13--August 2016 draft order
- Exhibit 14--September 2016 Corps comment letter
- Exhibit 15--November 2016 revised draft order
- Exhibit 16--December 2016 Corps comment letter
- Exhibit 17--January 2017 second revised draft order
- Exhibit 18--Regional Board staff responses to comments
- Exhibit 19--January 2017 District comment letter
- Exhibit 20--Audio of January 11, 2017 Regional Board hearing
- Exhibit 21--Minutes of Regional Board's January 2017 hearing
- Exhibit 22--April 2017 third revised draft order
- Exhibit 23--Regional Board counsel email on legal issues
- Exhibit 24--Corps letter to State Board re dredge-and-fill discharges not being waste
- Exhibit 25--Sudduth and Meyer paper - Effects of Bioengineered Streambank Stabilization
- Exhibit 26--EPA report on bioengineered streambanks
- Exhibit 27--March 2016 District comment letter
- Exhibit 28--April 2016 District comment letter
- Exhibit 29--May 2017 District comment letter
- Exhibit 30--May 2016 Corps comment letter
- Exhibit 31--July 2016 District comment letter
- Exhibit 32--100% Berryessa Creek Tree Mitigation Drawings 11x17
- Exhibit 33--Federal Transit Administration delays \$647 million Caltrain decision - - San Mateo Daily Journal