



County of San Diego

DEPARTMENT OF PUBLIC WORKS

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September 2, 2011

VIA E-MAIL

Mr. David Gibson, Executive Officer
Ms. Catherine Hagan, Senior Staff Counsel
Attn: Chiara Clemente
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

TENTATIVE INVESTIGATIVE ORDER NO. R9-2011-0033

Dear Mr. Gibson and Ms. Hagan:

The County of San Diego supports the San Diego Regional Water Quality Control Board's (Regional Board's) issuance of Tentative Investigative Order No. R9-2011-0033 (the "Order") to Citizens Development Corporation (CDC), which is currently scheduled to be heard on September 14, 2011. The Order directs CDC to conduct an investigation of nutrient impairments to Lake San Marcos (the "Lake"). For the reasons set out below, the County urges the Regional Board to issue the Order on September 14, and not to grant a continuance.

Background:

Since April 2009, CDC has known that the Regional Board viewed CDC as legally obligated to address the nutrient impairment in the Lake. For the past two years, CDC has known that they had an alternative to either work on a voluntary basis to provide diagnostic information about the Lake's nutrient impairment, or that they could provide such information pursuant to the traditional enforcement authority of the Regional Board. In addition, for the past two years CDC has participated in the majority of the stakeholder meetings and for the majority of the development of the current Participation Agreement.

CDC had a seat at the table in Spring 2010 when the Public Work Group selected and retained Armand Ruby Consulting (ARC) to develop the San Marcos Creek ("Creek") and Lake diagnostic scope of work. CDC fully participated when the budget for that work was developed

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with ARC and voted on by all participants in that process as a final budget and scope, including the work and budget required to get critical diagnostic data and assessment of the Lake. The budget and scope of work associated with the investigation efforts required at the Lake from the ARC scope and budget effort, which CDC approved, are currently identified in the Order.

During the summer of 2010, the Public Work Group along with CDC, applied to the State Water Resources Control Board for financial assistance from the Cleanup and Abatement Account. CDC insisted that they be added as a party applicant, and even though inclusion of the private Lake owner as an applicant was detrimental to public entities application, the Public Work Group agreed. The application was later denied.

In August 2010, CDC filed for Chapter 11 bankruptcy protection. CDC became a Debtor and Debtor in Possession of the Lake and other properties surrounding the Lake. This change in status caused concern about CDC's ability to perform and about continuing to include CDC in the voluntary effort of the Public Work Group. However, the Executive Officer of the Regional Board insisted that all parties join in a unified group, so the Public Work Group continued to negotiate with CDC.

The Voluntary Agreements:

The framework for the Public Work Group's participation in the Lake San Marcos effort is through a coordinated set of agreements that unify the Public Work Group. These include the *Participation Agreement Among the Lake San Marcos Work Group* ("Participation Agreement") and Addendum B to the Participation Agreement, an agreement between Members to the Participation Agreement¹ and the Regional Board. Under Addendum B, the Members promise to conduct work necessary to abate the nutrient impairment in the Creek and Lake in exchange for the Regional Board's agreement to forebear from pursuit of an enforcement action. The City of Escondido entered into a separate *Cooperation Agreement* with the Members to the Participation Agreement to fund and conduct the diagnostic work. Although Escondido is not a Member to the Participation Agreement, they are part of the Public Work Group.

The Public Work Group have all paid into a diagnostic fund that provides more than \$400,000 over the next two years in addition to over \$200,000 the Public Work Group has expended to collect diagnostic data for the past two years for this effort.

CDC had promised to pay what it considered to be its fair share of the diagnostic work in the amount of \$150,000 for the first two years of the diagnostic work. That representation was documented in a declaration filed in the Bankruptcy Court earlier this year. See Exhibit A, Declaration of Attorney Wayne Rosenbaum. When it came time to sign the Participation Agreement, CDC changed their contribution from \$150,000 to \$5,000 the first year and \$15,000 for the second year of the diagnostic work. See Exhibit B, correspondence from CDC's counsel in June 2011. The Public Work Group felt betrayed and that they had wasted almost a year of time listening to hollow promises.

¹ The Members of the participation Agreement are the City of San Marcos (San Marcos), the County of San Diego (County), the California Department of Transportation (CalTrans), the San Marcos Unified School District (School District), and Vallecitos Water District (Vallecitos), (collectively, the "Members to the Participation Agreement").

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Now that the Order has been set for a hearing, CDC would have this Regional Board delay adoption of that Order on that same promise. Furthermore, it is hard to trust CDC since just a few months ago they told us they did not have \$150,000 to pay us over the next two years, but now CDC wants us to believe that they really do have the money and that "this time they mean it".

Need for Parallel Development of Lake and Watershed Diagnostic Data:

It is important that CDC conduct the Lake diagnostic work at the same time that the Public Work Group conduct their watershed diagnostic work because both sets of data are needed to run the predictive models that will allow for source identification and proposal for remedial action. Because the watershed diagnostic work is already in progress any further delay on the Lake work will result in overall project delay.

Risk to Promised Financial Assistance:

In cooperation with the Executive Officer, the Public Entities have obtained a grant from the U.S. EPA. The Public Entities are concerned that they will lose that money if it is not spent within the next 20 months. Granting CDC a delay may result in that outcome.

Due Process:

In February, Dr. Anderson completed his work and reported his findings during a public meeting at the Regional Board. His report noted that the dam impounding the water that forms the Lake also traps sediment and that particular forms of nutrients are retained in the Lake sediment. This trap creates an enriched sediment bed that results in recycling of nutrients from the sediment to the water column. This process can account for more than 95% of the overall annual nutrient loading to the Lake water column. For the past 18 months CDC has been aware of Dr. Anderson's report and the fact that the Public Work Group and the Executive Officer believe that the dam is perhaps the most significant cause contributing to the nutrient impairment of the Lake.

CDC's contribution to the Lake nutrient impairment is not limited to the impact of the dam on the water quality. CDC has not maintained nor properly operated the Lake to assure bypass and circulation to avoid stagnant water conditions. It does not appear to have a Lake water volume and water quality management plan despite requests for them to provide one during the Dr. Anderson effort, nor has it implemented appropriate actions to protect against the nutrient impairment. CDC has abused the water rights license granted by the State Water Resources Control Board and cannot show that it has limited the impoundment of the Creek to a maximum of 480 acre feet a year, nor that it only impounds that water during the six wettest months of the year (i.e., between November and April). We know that it does not limit the use of the impounded to waters to irrigation, which is the only use that it was licensed to make of the impounded water. Furthermore, CDC collects \$108,000 a year for private use of the Lake water.

Conclusion:

For the reasons set out above, we urge that the Regional Board adopt the Order on September 14, and that it not continue this matter to a later date. The County will be present on September 14 for the scheduled hearing and plans to address the Board at that time.

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Sincerely,



CID TESORO, LUEG Program Manager
Department of Public Works

CT:ti

cc: Laurie Walsh
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