



# Batiquitos Lagoon Foundation

*Preserve, Protect, and Enhance*

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March 15, 2017  
Item No. 11  
Supporting Document No. 7

February 27, 2017

Mr. David W. Gibson

Californian Regional Water Quality Control Board, San Diego Region

2375 Northside Drive, Suite 100,

San Diego, CA 92108-2700

**Subject: Comments on Tentative Resolution No. R9-2017-0038 Supporting a Path Forward for Nutrient Load Reductions in Lake San Marcos and the San Marcos Creek Watershed**

**Reference: (A) Batiquitos Lagoon Foundation Letter to California Regional Water Quality Control Board dated December 23, 2011, Subject: Lake San Marcos Investigation Work Plan Comments and letter**

**(B) Batiquitos Lagoon Foundation Letter dated February 20, 2016 re: Investigative Work Plan Order R9-2011-0033.**

Dear Mr. Gibson:

The Batiquitos Lagoon Foundation (BLF), is an all-volunteer 501(c)(3) non-profit public benefit corporation formed on January 7, 1983 with the strategic charter to *Preserve, Protect and Enhance* the Batiquitos Lagoon Ecological Reserve (BLER) and its associated watershed, riparian coastal sage and upland habitats. The BLF has and continues to work closely with the California Department of Fish and Wildlife (CDFW), with whom the BLF has a formal Memorandum of Agreement (MOA) with. It is to be noted that the Batiquitos Lagoon is an Ecological Reserve and a State Marine Conservation Area (SMCA) – No Take. Accordingly, the BLF appreciates the opportunity to offer comments on the proposed *Tentative Resolution No. R9-2017-0038*.

The BLF expressed its first concern towards the impaired Lake San Marcos (LSM) in a letter dated December 23, 2011, reference (A), to the proposed Investigative Work Plan to conduct sampling and monitoring of LSM influents, the impoundment and specifically the Lower San Marcos Creek watercourse that flows into Batiquitos Lagoon.

The BLF addressed and expressed its concerns again 3-years later in a letter dated February 20, 2016 (Ref (b)), commenting on the Lake San Marcos Investigative Work Plan Order R9-2011-0033. The BLF noted with concern that the referenced RI/FS Report did not address any of the issues that were outlined about the management and operation of LSM where "Selective withdrawal/release" practices continue unabated to this day, under the auspices of the San Diego Regional Water Quality Control Board (SDRWQCB).

Our comment letter specifically addresses paragraphs 5, 8 and 9 of the preamble and paragraphs 1 through 6 of the proposed resolution:

**Paragraph 5:** It is expressed and implied that selective withdrawal of water from Lake San Marcos is an approved method of remediation of the impaired Lake San Marcos by opening the San Marcos Dam safety relief valve. This action is a violation of the current "License to Appropriate Water, No. 7224" dated March 30, 1965, where the license permits the Licensee, Citizens Development Corporation (CDC), to only withdrawal water from San Marcos Creek between November and April of the succeeding year (6 months), not to exceed 480 acre feet per annum, for the purpose of irrigation only. Further, the withdrawn irrigation water can only be used for beneficial use in Sections 16, 17, 20 and 21 in T12S, R3W as per the maps on file with the State Water Rights Board. Any deviation from the use, operation and purpose of withdrawing water from the San Marcos Creek is a violation of the terms and conditions of the license.

Therefore, the BLF requests that the State Water Rights Board appoint a *Water Master* to administer the recorded withdrawals taken from San Marcos Creek and to determine compliance with the Terms and Conditions of the License to Appropriate Water, in accord with the Water Code, Part 5.1.

Setting dates for implementation of a Corrective Action Plan that includes selective withdrawal by August 2019 is totally unacceptable and should be removed as a consideration.

**Paragraph 8:** The Licensees' statement that lake water is released for a short time once a year is totally false. The 6 inch "headworks dam safety valve" has been observed numerous times each year during the past 5 years being left open - with the handle removed - discharging for days. The BLF has videos and photos of the lake water being discharged through this valve.

Again, it is a false statement that CDC opens the dam safety valve in anticipation of a storm event that could potentially clog the valve with sediment. CDC uses the storm event, if any, as an opportunity to reduce the sediment constituent loading at the foot of the dam by diluting the "withdrawal water" with spill water to avoid obvious and deliberate intent. The BLF requests CDC to provide proof of valve clogging via their

Operations Log Book and copies of their annual reports to the State Water Rights Board indicating their compliance with the terms and conditions of their license.

It is to be noted that the Application AO10711\_01 aka 10711, for the License for Diversion and Use of Water does state that San Marcos Creek in San Diego County is a tributary (natural watercourse) to the Pacific Ocean and in so doing provides water replenishment to Batiquitos Lagoon, via the Carlsbad Watershed.

**Paragraph 9:** The Terms and Conditions (T&C) of the "License to Appropriate Water No. 7224" dated March 30, 1965, is so stated in the above comments towards Paragraph 5 and are referenced here as if fully set forth. The T&C is also subject to the California Water Code.

The release of lake water from the headworks valve is not an entitlement of the licensee to operate, knowing that the quality of the lake water exceeds statutory limits and therefore such release is more than a public nuisance when initiating releases under the guise of protecting the "Headworks" drain valve

#### **RESOLUTION COMMENTS:**

**Paragraph 5:** The Batiquitos Lagoon has been the recipient of the San Marcos Creek tributary for millennia. It follows that if any body of water is declared impaired and is located within the Carlsbad Watershed upstream of the Batiquitos Lagoon, and then the untreated nutrient effluent that resides in Lake San Marcos when released will flow into and impact the Carlsbad Watershed including Batiquitos Lagoon. To deny the obvious just does not pass muster!

Numerous water samples of the Batiquitos Lagoon at various locations have been taken and analyzed over the past 10 years. Urban surface water runoff during storm events have also contributed to high levels of constituents, thereby impacting Batiquitos Lagoon. Since it is stated that insufficient data is available to assess the lagoon for listing of nutrients, i.e., constituents, it is requested that the SDRWQCB provide for funding to develop an Environmental Impact Report that would assess both the current Carlsbad Watershed Management Plan and the Encinitas Watershed Management Plan for a determination of the point source of the nutrients/constituents that are contributing to the impairment of Batiquitos Lagoon.

The BLF additionally requests from the SDRWQCB a copy of the San Diego Water Board approved listing that includes Batiquitos Lagoon as an impaired body of water meeting the definition prescribed within California 303(d) for sediment toxicity, etc. Further, it is implied that the State Water Resources Control Board and the U.S. Environmental Protection Agency (EPA) are in process of evaluating the same "listing"

documentation that the San Diego Water Board has approved. The BLF can only presume that the SDRWQCB is the proponent of this listing.

**Supplemental Information:** It is to be noted that the EPA has defined the Waters of the U.S. (WOTUS) under the "Clean Water Rule" through the Code of Federal Regulations (CFR) 40 CFR Parts, 110, 112, 116, 117, etc. The existing regulations define impoundments as "Waters of the United States", and LSM is an impoundment and therefore is under the jurisdiction of the U.S. EPA and is subject to the definition of WOTUS. Further, the subject impoundment is a contributory source to the Carlsbad Hydrologic Unit that flows through the watershed, ultimately into the BLER and SMCA – No Take coastal marine sanctuary, a body of water which is further defined as Waters of the U.S. (WOTUS) and is connected directly in the Pacific Ocean and thereby is subject to tidal flow.

LSM as a defined impounded body of water of the U.S requires a U.S. EPA National Pollution Discharge and Elimination System Permit (NPDES) in order to operate legally and thereby comply with the applicable U.S.C. regulations of the Clean Water Act (CWA).

It is noted through the above referenced RI/FS Report that the constituents of LSM exceed by an order of magnitude of 10 to 50 the stipulated allowed discharge identified constituents levels of the CWA. Therefore, since the LSM Impoundment is known to be impaired and toxic to fish and wildlife, the owner and operator of the LSM Dam must immediately cease and desist discharging toxic effluent through the dam's headworks into the Lower San Marcos Creek and impacting the surrounding watershed in violation of the U.S. CWA. The following pictures depict a recent release event.



Photographic evidence of LSM Dam management activities random illegal discharge of contaminated effluent, as above, supports the BLF discharge issue. Engineering

calculations indicates that during another witnessed discharge event, a discharge trajectory of 35 feet at 4 foot height provided a flow rate of 14 cubic feet per second (CFS) or 1 acre foot of water discharged every 51 minutes, and in less than 3 hours, more than 1 million gallons of toxic effluent had been released into the Lower San Marcos Creek. The benthic layers of LSM contain microbiological invertebrates, e.g., midge-larvae and decomposing matter. The effluent turbulent flow caused by the discharge, liberates hydrogen sulfide ( $H^2S$ ) as a fine extremely toxic mist which in turn oxidizes to form a sulfuric acid ( $H^2SO^4$ ) cloud which is airborne promoted by the prevailing wind and condenses, thereby impacting the surrounding property and habitat. Further, the acidic pond outflows as the Lower San Marcos Creek and impacts the watershed area, to the detriment of the indigenous amphibians, mammals, birds and flora. The  $H^2S$  and the  $H^2SO^4$  odors parts per million (ppm) levels are categorized as extreme and harmful. Personal Protective Equipment is required. This is not a good and healthful situation for the community.



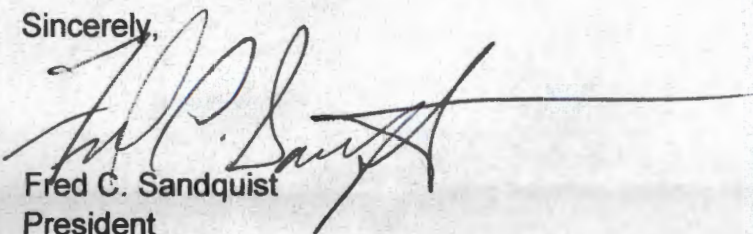
The LSM Dam is registered with the California Department of Water Resources (DWR), ID No. 848-00 and National ID No. CA00782. The Federal Emergency Management Agency (FEMA) is the Federal Agency with jurisdiction of all dams and reservoirs in the U.S. The California DWR Statutes and Regulations Pertaining to Supervision of Dams and Reservoirs do not allow the discharge of effluent through the "Headworks" control valve for the purpose of "Selective withdrawal/release" to dilute the toxicity level of the impoundment. FEMA Safety Guidelines for Dam Operations also does not allow for the "Selective withdrawal/release" of toxic effluents through the "Headworks" safety valve. Therefore, it is again emphasized that the LSM Dam operations/management must cease and desist this routine practice as noted above, immediately.

The BLF requests that soil sampling be conducted at depths not less than 20 feet to ascertain the long term impact of discharging toxic effluent for more than 50 years into the Lower San Marcos Creek and its watershed. A development plan of such soil

samplings and analysis is considered critical to the overall understanding of the impaired LSM impact to the Carlsbad Hydrologic Basin and must be implemented post haste by the SDRWQCB.

The BLF looks forward to positive actions towards improving the water quality of LSM via Best Available Control Technology (BACT) and CDC, Licensee, to cease deliberate acts of illegal discharges from the LSM Dam.

Sincerely,

A handwritten signature in black ink, appearing to read "Fred C. Sandquist", is written over a horizontal line. The signature is stylized and cursive.

Fred C. Sandquist  
President

cc: See attached list

**Copy to List**

U.S. EPA Region 9 (Pacific Southwest), 75 Hawthorne Street, San Francisco, CA 94105

FEMA Public Safety Office, 1124 16<sup>th</sup> Street, Oakland, CA 94607

U.S. Army Corps of Engineers

Matthew Rodriguez, Secretary for Environmental Protection Agency, P.O. Box 2815, Sacramento, CA 95812-2815

Mark Cowin, Director, California Department of Water Resources, Dam Safety, Southern Region Office, P.O. Box 942836, Sacramento CA 94236-0001

U.S. Department of Fish and Wildlife

California Department of Fish and Wildlife, South Coast Region Office, San Diego, CA

California Coastal Commission

California State Coastal Conservancy

Office of Ocean and Coastal Resource Management, National Oceanic and Atmospheric Administration

SANDAG

City of Escondido

City of San Marcos

City of Carlsbad

City of Encinitas

Honorable Bill Horn, Supervisor, District 5, San Diego County

Honorable Kristin Gaspar, Supervisor, District 3, San Diego County

Vallecitos Water District.

Leucadia County Water District