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September 10, 2014

Via E-mail and U.S. Mail

Mr. Bruce H. Wolfe
SAN FRANCISCO BAY
REGIONAL WATER QUALITY CONTROL BOARD
1515 Clay Street, Suite 1400
Oakland, CA 94612

Re: Tentative Orders for 07S0132 and 07S0204
Site Cleanup Requirements for 1643 Contra Costa Boulevard and 1705 Contra Costa Boulevard, Pleasant Hill, California, Contra Costa County

Dear Mr. Wolfe:

On July 2, 2014, the San Francisco Bay Regional Water Quality Control Board ("Regional Board") transmitted Tentative Site Cleanup Requirements for 1643 and 1705 Contra Costa Boulevard ("Tentative Orders"). The deadline for submitting written comments was August 4, 2014, and the Central Contra Costa Sanitary District ("District") filed general comments on that date. On August 25, 2014, the Regional Board authorized a second written comment period to allow interested parties an opportunity to provide additional comments or to rebut any previously submitted comments by other parties. The District therefore submits this letter to rebut legal comments previously submitted by Gregory Village Partners, LP ("Gregory Village") on August 4, 2014. A separate letter is being submitted to rebut Gregory Village's technical comments as well.

After more than one year of reviewing extensive documentation filed by both the District and Gregory Village, the Regional Board staff determined that there is insufficient data to support naming the District as a discharger on the Tentative Orders. In its latest comments, Gregory Village raised new legal theories in order to criticize the Regional Board staff's analysis in the Staff Report. The District therefore finds it pertinent to correct and clarify these issues for the Regional Board prior to the meeting. As explained herein, the Regional Board staff's determination to forgo naming the District as a discharger was legally justified.[1]

[1] Please also note that the discussion below should not be construed as any admission of the District's liability or fault. The following legal arguments merely address those raised by Gregory Village.

I. Gregory Village's Assertion that Strict Liability Principles Require the Regional Board to Name the District is Unfounded.

Gregory Village argues that Water Code section 13304 is a strict liability statute, and therefore all "persons" that may fall within the breadth of the statutory definition for "discharger" must be included within the cleanup order. This simplified assertion fails for several reasons. Gregory Village's reliance on strict liability as a requirement for "mandatory joinder" of all known dischargers suggests that the Regional Board has little or no discretion in selecting which potential dischargers to name on a 13304 order. Such result stands in direct contravention of State Water Resources Control Board ("State Water Board") Policy, which expressly states that "[i]t is not necessary to identify all dischargers for the Regional Water Board to proceed with requirements for a discharger to investigate and clean up." (*Policies and Procedures for Investigation and Cleanup and Abatement of Discharges under Water Code section 13304*, Resolution No. 92-49, § I(B).) The State Water Board has also noted, "It is not the responsibility of the Regional Board to track down all possible contributors to the groundwater pollution and apportion their share of the responsibility for treating a point source discharge." (*Santa Clara Transportation Agency*, WQ Order No. 88-2.)

Furthermore, and as explained *infra*, while Gregory Village is correct in observing that "strict liability" in a general sense means liability without fault, it does not ever mean liability without causation. Indeed, causation is an explicit requirement set forth in the statutory text; for liability to attach under Water Code section 13304, subdivision (a), the Regional Board must find that the discharge at issue "creates, or threatens to create, a condition of pollution or nuisance . . . ." The evidence in the record before the Regional Board will not support a finding that alleged discharges from the District's sewer pipes created or threatened to create the solvent plume, so there is no basis to name the District.

Gregory Village's reliance on a memorandum from then-Chief Counsel William Attwater, dated April 27, 1992, to support its argument that the District is strictly liable is not well taken. The memorandum concludes that public agencies that own or operate a sanitary sewer system *may* be ordered to clean up discharges of waste from their collection and treatment systems under section 13304. Although this memorandum uses the example of PCE discharged into the sewer system from dry cleaning operations, the conclusion offers little support to Gregory Village's argument because (1) its focus is largely on whether the owner or operator of a POTW can be responsible for releases from the sewer; (2) it assumes causation; and (3) it predates the majority of State Water Board precedent that requires a finding of substantial evidence to name a discharger. The District does not dispute its ownership and operation of its collection system. However, the District has submitted a considerable amount of documentation to the Regional Board to prove that its sewer lines

did not contribute to the solvent plume, and both Gregory Village and the Regional Board staff lack substantial evidence to prove otherwise.[2]

Even under CERCLA, which establishes a strict liability scheme, the U.S. EPA is not obligated to name every potentially responsible party ("PRP") on a given administrative order. For example, when issuing a unilateral administrative order ("UAO") pursuant to CERCLA section 106(a), the U.S. EPA takes into account, *inter alia*, each PRP's financial viability and technical capability to perform the response action, as well as the PRP's relative contribution to the contamination. (See, e.g., U.S. EPA, *Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions*, Direction # 9833.0-1a, March 7, 1990; U.S. EPA, *Documentation of Reason(s) for Not Issuing CERCLA §106 UAOs to All Identified PRPs*, Aug. 2, 1996; see also 40 C.F.R. § 300.415(a)(2) [requiring the lead agency to determine whether known PRPs "can and will perform the necessary removal action promptly and properly."].) Courts have also rejected plaintiffs' attempts to join all necessary and indispensable parties in a section 107(a) cost recovery action, because CERCLA allows defendants to file contribution claims against other PRPs not named by the government to recoup a portion of their costs. (See, e.g., *U.S. v. Kramer* (D.N.J. 1991) 757 F. Supp. 397, 423 ["The Government is not required to sue all PRPs in a section 107(a) cost recovery action."]; *U.S. v. Dickerson* (D. Md. 1986) 640 F. Supp. 448, 450 ["The courts have consistently rejected attempts by CERCLA defendants to compel the government to round up every other available defendant, noting that defendants can protect themselves through the impleader provision of Rule 14."].) The Supreme Court has further recognized that "[o]nce an entity is identified as a PRP, it may be compelled to clean up a contaminated area or reimburse the Government for its past and future response costs." (*Burlington Northern & Santa Fe Ry. Co. v. U.S.* (2009) 556 U.S. 599, 609 [emphasis added].) In other words, just because a statute may hold persons strictly liable does not mean that the regulatory authority is required to seek redress from every known responsible party.

II. The Regional Board Staff's Analysis is Legally Supported.

A. The Staff Report's Conclusions are Based Upon Substantial Evidence and There is No Substantial Evidence to Support Naming the District as a Discharger.

Gregory Village argues that Regional Board staff's application of four criteria to determine whether the District should be named as a discharger has no basis in California law. According to Gregory Village, staff improperly "adopt[ed] some concept of CERCLA defenses as a justification for not naming CCCSD as a discharger." (GV Letter, p.6.) These are specious arguments that only undermine Gregory Village's claims. On the contrary, the

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2 See the District's technical rebuttal to Gregory Village's comments, dated September 10, 2014.

Regional Board staff's determination is supported by controlling California appellate decisions and longstanding State Water Board precedential orders and policies.

It is well settled that the Regional Board must have substantial evidence in the record to support a finding that a party is responsible for the detected contamination. (See, e.g., *In the Matter of the Petition of Chevron Products Co.*, WQ Order No. 2004-0005 ["[T]he Regional Board must show substantial evidence to support naming a party in a cleanup order"]; *In the Matter of the Petition of Larry and Pamela Canchola*, WQ Order No. 2003-0020 ["There must be substantial evidence, however, to support a finding of responsibility."].) Given the dubious quality of the "evidence" offered by Gregory Village, it is worth noting the familiar rules describing what does and does not qualify as substantial evidence. The State Water Board has opined that, "In reviewing an action of a Regional Board, we look at the record to determine whether, in light of the record as a whole, there is a reasonable and credible basis to name a party." (*U.S. Cellulose and Louis J. and Shirley D. Smith*, WQ Order No. 92-04.) The State Water Board has not prescribed any specific criteria that a Regional Water Board must apply in order to justify a finding of substantial evidence. However, in other decisions where the same standard is applied, the State Water Board has offered definitions of the substantial evidence requirement.

> It has been said that if the word "substantial" means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with "any" evidence. It must be reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case.

(*In The Matter Of Application 27868, Enviro Hydro, Inc., et al.*, WR Order No. 85-3, 1985 WL 20020 (Order Denying Petition for Reconsideration of Decision 1605) [quoting *Bank of America N.T. and S.A. v. State Water Resources Control Board* (1974) 42 Cal.App.3d 198] (some internal quotations omitted).) Furthermore, rank speculation and conjecture cannot be substantial evidence: "Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence." (*Cal. Assn. of Med. Prod. Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286, 308 [quoting *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651].)

Without substantial evidence, the State Water Board will reverse the Regional Board's decision. For example, in *Chevron*, the State Water Board granted the petitioner's request to be removed from a 13267 order, because it found that Chevron was not responsible for and had no part in the discharge of contamination on or emanating from the site:

> There is not substantial evidence in the administrative record to support the Regional Board's finding that high concentrations of gasoline constituents

> detected in soil and groundwater at the former Chevron site are a result of discharges from the Chevron facility. The weight of evidence indicates that the contamination originates from the Opal Cliffs site....Under these circumstances, we are unable to conclude that the Regional Board appropriately named Chevron as a party responsible for the ongoing investigation and remediation of a plume originating off-site.

(WQ Order No. 2004-0005.) Otherwise stated, the evidence offered against Chevron did not meet the substantial evidence requirement needed to support a finding of responsibility.

Here, the Regional Board staff reviewed an extraordinary record of information and evidence filed both by the District and Gregory Village. As one way of gauging the adequacy of this evidence, Regional Board staff likely evaluated more specific factors to help determine whether substantial evidence supported naming the District on the Tentative Orders. The Regional Board staff considered whether (1) there was a release from the sewer main that contributed to the plume; (2) the sewer owner/operator knew of leaks and failed to repair them; (3) the sewers were in poor condition and/or were not maintained; and (4) the sewer owner/operator was aware of/or permitted discharges into a leaking sewer. Applying the four criteria, the Regional Board staff concluded the following: The District has a robust sewer maintenance program; there is no evidence of major leakage or deferred maintenance of the sewer lines during the time when dry cleaners would have disposed of separator wastewater; the District had no specific knowledge that PCE-laden wastewater in excess of the District's Ordinance's levels was being discharged into the sewer system; and there is no direct evidence that incidental leakage from the District's sewer contributed substantially to the creation of the groundwater plume.

Gregory Village attacks the staff's reliance upon this specific set of criteria as being without legal basis. The District disagrees. According to the Staff Report, this specific set of criteria is based upon the *only* Regional Water Board order that names a sewer owner/operator, the City of Lodi, as a responsible party for cleanup of soil and groundwater contamination that originated from dry cleaning operations.[3] Due to the shortage of State and Regional Water Board guidance for naming sewer districts on administrative orders, Regional Board staff acted well within its discretion to consider this set of criteria to lend further support to its conclusion that the District is not a discharger. Without analyzing the quality and maintenance of the District's sewers or whether the sewers leaked and contributed to the plume, the Staff Report's conclusions would be unsubstantiated and meaningless. Gregory Village does not offer an alternative method for determining substantial evidence, because there is none.

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[3] The Staff Report notes on page 12, "Staff is only aware of one instance which a Regional Water Board named a sewer owner/operator as a discharger, and in that case there was evidence to support each of [ ] the [four] criteria."

Moreover, as will become apparent from the discussion in the next section, the factors considered by the Regional Board staff are entirely consistent with binding appellate authority on the law of causation under Water Code section 13304. The Regional Board staff acted within its discretion to consider the available evidence in light of relevant factors that apply to a sewer district. Based upon the four criteria and the totality of the evidence submitted, there is no substantial evidence to support naming the District on the Tentative Orders.

B. Controlling Appellate Decisions Support the Staff Report's Conclusions and Demonstrate a Lack of Causation for Allegations Against the District.

The Regional Board Staff's determination is further supported by state and federal appellate court decisions concerning the application of Water Code section 13304. Liability under Water Code section 13304 follows the law of public nuisance, which requires active, affirmative, or knowing contribution to the specific nuisance condition. (*City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28, 40-41; *Redevelopment Agency of the City of Stockton v. BNSF Railway Co.* (9th Cir. 2011) 643 F.3d 668, 675.) In *City of Modesto*, the City brought an action against dry cleaning solvent and equipment manufacturers and distributors as responsible for directing dry cleaners to discharge chlorinated solvents into the public sewer and sought cost recovery under the Polanco Act. Because Water Code section 13304(a) supplies the definition of "responsible party" for the Polanco Act, the issue before the Court of Appeal was whether the prevailing defendants were responsible parties under section 13304. The Court of Appeal noted that the Porter-Cologne Act is harmonious with the common law of nuisance and considered the definition of "responsible party" in light of these principles. (119 Cal.App.4th at 36-38.) In analyzing the type of conduct that would give rise to nuisance liability, the Court held:

> [T]hose who took affirmative steps directed toward the improper discharge of solvent wastes—for instance, by manufacturing a system designed to dispose of wastes improperly or by instructing users of its products to dispose of wastes improperly—may be liable under that statute, but those who merely placed solvents in the stream of commerce without warning adequately of the dangers of improper disposal are not liable under that section [13304] of the Porter–Cologne Act.

(*Id.* at 43 (citing *Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal.App.3d 605, 619).)

The *City of Modesto* court accepted and applied the common-law nuisance rules that a party can only be liable for a nuisance if its actions or inactions were a substantial factor that created or assisted in the creation of the nuisance. (119 Cal.App.4th at 38-40.) *City of Modesto* carefully analyzed and, as relevant to this matter, adopted the reasoning of the court of appeal in *Selma Pressure Treating Co. v. Osmose Wood Preserving Co.* (1990) 221 Cal.App.3d

1601. Thus, the applicable law establishes different standards of nuisance liability for parties that dispose of their own waste on land they control on the one hand (Gregory Village, in this case), and parties alleged to have somehow affected that disposal on the other hand (allegedly, according to Gregory Village, the District). For the first group of parties, nuisance liability is truly strict. For the second group of parties, however, the normal strict liability rule is supplanted by a consideration of factors regarding the relative knowledge of the parties and the foreseeability of harm.

> The Court of Appeal [in *Selma*] concluded the cross-complainants had pled, or could plead, facts showing the cross-defendants might be liable for the nuisance—specifically, that the installer of the equipment recommended creation of an unlined dirt pond for disposing of the waste products; that it knew or should have known that such disposal could threaten the safety of the water supply; that the cross-complainants did not know of the danger; and that the installer failed to warn of that danger. The court reasoned that this kind of direct involvement in the design and installation of the disposal system, coupled with the installer's knowledge and the user's lack of knowledge of the dangers, could support a finding that the designer/installer created or assisted in the creation of a nuisance.

(*City of Modesto*, 119 Cal.App.4th at 40 [emphasis added]; see also *Redevelopment Agency of the City of Stockton v. BNSF Railway Co.* (9th Cir. 2011) 643 F.3d 668, 675 [holding that nuisance liability under Water Code section 13304 requires active, affirmative, or knowing conduct].)

The evidence establishes that any alleged discharges from District sewer pipes were not a substantial factor in the creation of the solvent plume. Gregory Village can certainly demonstrate that the District owned and operated its collection system, but Gregory Village has failed to point to any evidence demonstrating that the District actively, affirmatively, or knowingly created or assisted in the creation of the plume. If anything, the District took active and affirmative steps to proactively maintain its sewer system, oftentimes more than what the industry standard requires. As Regional Board staff noted, the District has an aggressive source control and sewer maintenance program that "include[s] video inspections, regular cleaning of the sewer pipes, and spot repairs, to identify and address problem areas." (Staff Report, p. 14.)

Moreover, even if it were assumed that releases of PCE from District pipes were a substantial factor in the creation of the contamination plumes (something the District disputes and which has not been shown), Gregory Village has not, and cannot, demonstrate that the District created or assisted in the creation of a nuisance. There is no evidence in the record that the District knew or should have known that Gregory Village would violate the

restrictions on PCE discharges in the District's ordinances[4] or that the District knew there was any danger a nuisance could be created by the specific PCE discharges through the specific pipes at issue here. Similarly, there is no evidence, nor could there be, that the District had superior knowledge to Gregory Village as to the dangers presented by Gregory Village's own unlawful discharges of PCE. Absent evidence of the District actively, affirmatively, or knowingly contributing to the contamination, there is simply no legal basis to name the District on the Tentative Orders.

III. Gregory Village's Assumption that Liability Insurance is Available to Pay for the District's Cleanup Costs is Both Improper and Mistaken.

Gregory Village asserts that the District's burden of paying investigation and remediation costs would fall upon the insurance companies rather than the taxpayers and ratepayers because the District likely has "general liability insurance coverage from the pre-1986 period that could be triggered to help pay" for these costs. (GV Letter, fn 12.) Gregory Village's suggestion is both inappropriate and incorrect for two reasons.

First, evidence that a person or entity has insurance is irrelevant to the question of liability. If Gregory Village suggested that the District was covered by insurance in court, such evidence would be inadmissible under Evidence Code section 1155[5] and may even constitute reversible error. (See, e.g., *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469; *Schaefer/KARPF Productions v. CNA Ins. Companies* (1998) 64 Cal.App.4th 1306, 1313.) Evidence that a defendant is insured against liability is also prejudicial, because a jury might unfairly view the defendant as a "deep pocket" and inflate its award of damages to the plaintiff. (*Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 350-51; *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1122.) The fact that the District may have insurance is thus entirely irrelevant to the Regional Board's determination of whether to name the District on the Tentative Orders. Moreover, the fact that Gregory Village even raised the issue of insurance in an attempt to further inculpate the District was improper and should be disregarded.

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[4] Indeed, in 1974 the District only permitted solvent concentrations in amounts less than 0.002 mg/L for 50% of time and not exceeding 0.004 mg/L for 10% of time in Ordinance No. 99, and in 1981, only permitted amounts less than 0.50 mg/L in Ordinance No. 147. As the Regional Board Staff correctly explained, these limits "were far lower than what would be expected in PCE-impacted wastewater, which would be on the order of 150,000 µg/L." (Staff Report, p. 16.) Assuming the District were responsible for the plume, then millions of gallons of PCE well above the permitted limits would have needed to be discharged into the District's sewers in order to create the plume. There is no evidence in the record that this ever occurred.

[5] Evidence Code section 1155 provides: "Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing."

Second, Gregory Village's assumption that insurance would pay for cleanup costs required by a Regional Board order is incorrect as a matter of law. The California Supreme Court has held that an insured's liability for cleanup costs pursuant to an administrative cleanup order is not entitled to indemnity or defense under most comprehensive general liability ("CGL") policies. (See *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945 [no duty to indemnify]; *Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857 [no duty to defend].) Rather, the insurer's duty to indemnify and defend is limited to civil actions prosecuted in court; it does not extend to expenses required by an administrative agency. (*Certain Underwriters at Lloyd's of London*, 24 Cal.4th at 964, 966; *Foster-Gardner*, 18 Cal.4th at 878-888.) Although the express wording used in the insurance policies is ultimately determinative of coverage, the prevailing rule in California is that an administrative cleanup order does not trigger an insurance company's duty to indemnify or defend under a typical CGL policy. (See *Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 383 [specific language in nine excess/umbrella policies unambiguously included indemnification coverage for environmental cleanup costs ordered by an administrative agency]; but see *County of San Diego v. Ace Property & Cas. Ins. Co.* (2005) 37 Cal.4th 406, 421 [specific language in the insuring clause did not cover environmental cleanup costs to implement administrative orders].) Gregory Village is therefore wrong to assume that the District's pre-1986 CGL policies will unquestionably cover costs to implement the Tentative Orders. The Regional Board should disregard Gregory Village's reliance upon the District's insurance policies to provide coverage for investigation and remediation costs.

The District prospectively thanks you and your staff for taking into consideration the legal authorities and factual references included in this letter.

Very truly yours,

Sarah N. Smith FOR

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Enclosure
cc: See attached Interested Party List (by email only)

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