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Commission on
State Mandates

EDMUND G. BROWN JR. ■ GOVERNOR

915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

August 29, 2018

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Response to Test Claim 17-TC-04, Waste Discharge Requirements and Water Quality Certification for: Santa Clara Valley Water District and U.S. Army Corp of Engineers, Upper Berryessa Creek Flood Risk Management Project

Dear Ms. Halsey:

The Department of Finance (Finance) has reviewed Test Claim 17-TC-04 submitted to the Commission on State Mandates (Commission) by the Santa Clara Valley Water District (District). The test claim alleges state-mandated, reimbursable costs associated with the San Francisco Bay Regional Water Control Board's (Regional Board) Order No. R2-2017-0014.

The Order takes the form of a Waste Discharge Requirements and Clean Water Act Water Quality Certification Permit (Permit). The Permit requires the District to perform "compensatory mitigation" as part of the Upper Berryessa Creek Flood Risk Management Project (Project). The Project provides flood control for the expansion of Bay Area Rapid Transit service to San Jose. The compensatory mitigation involves specified improvements to Lake Almaden in Santa Clara County.

The Permit is a requirement of federal law, the Permit was sought at the District's discretion, and the compensatory mitigation requirement applies to governmental and non-governmental entities. Further, the District has the authority to levy service charges, fees, or assessments to pay for the Project, and in fact has the funding through the proceeds of Measure B. The Commission should therefore deny the test claim.

The Permit is a Requirement of Federal Law

The federal Clean Water Act requires states to gain Environmental Protection Agency (EPA) approval of water quality standards governing bays, lakes, rivers, streams, and similar navigable waterways. "Antidegradation" policies are a mandatory element of water quality standards, to protect waterways from activity that can partially or completely eliminate any existing use. Dredging and filling operations can impact existing use and, consequently, must be addressed by a state's water quality standards.

If a state certifies (i.e. approves) a project that will impact a waterway's existing use, the certification must include compensatory mitigation, or improvements to another waterway to offset the harm caused by the project. Compensatory mitigation is required by the federal "No Net Loss Policy," implemented in 1989 by Executive Order, and included in EPA and Army

Corps of Engineers regulations. A project impacting navigable waterways cannot proceed unless certified by the state where the project is located.

The District applied to the Regional Board in September 2015 for Project certification. The Project includes dredging and filling operations that will impact existing use of the Upper Berryessa Creek. Because those impacts could not be mitigated as part of the Project, the Regional Board required compensatory mitigation, as required by federal laws and regulations. The District elected to conduct compensatory mitigation at Lake Almaden.

We will defer to the State Water Resources Control Board as to the details of the factual and statutory background involving the Project and the Permit, but it is clear that compensatory mitigation activities are the result of a federal mandate. The District argues the compensatory mitigation is “the product of a series of discretionary actions by the Regional Board, not any particularized federal mandates.” The District ignores the fact that federal law and regulation require compensatory mitigation for projects that, like the Project in question, involve dredging and filling operations.

The District also argues that Regional Board certification of the Project “cannot be a federal mandate because it does not regulate State or local agencies...it regulates an “applicant”...under the Clean Water Act by requiring them to provide the federal permitting agency with a “certification” from the State...(o)nce a federal permit applicant requests a certification from the State, Section 401 gives the State a number of choices – including the choice to ignore the request altogether.”

It is the Regional Board’s duty to process requests to perform projects in public waterways. When the District applied to the Regional Board for Project certification, the District initiated a process where the Regional Board could either certify the Project in accordance with federal laws and regulations, or deny the certification. The federal laws and regulations require compensatory mitigation for undertakings like the Project, which involve dredge and fill activities that impact existing waterway use. Federal laws and regulations afforded the Regional Board no discretion concerning the compensatory mitigation requirement.

The State Water Resources Control Board states in its August 15, 2018 response to this test claim (pp. 26-27) that the District sought assistance from a United States Senator and a Member of Congress in acquiring Project certification from the Regional Board. This indicates the District would not have supinely accepted a Regional Board decision to “ignore” its certification request. The District wanted, sought, and received Project certification, and it did so in full knowledge that compensatory mitigation was required by federal laws and regulations.

The Lake Almaden compensatory mitigation required by the Permit is clearly mandated by federal law, and the Regional Board was prohibited by federal law from certifying the project absent compensatory mitigation. Therefore, under Government Code section 17556(c), no costs are mandated by the state because the claimed activities are the result of a federal mandate.

The Permit was Sought at the District’s Discretion

The District chose to initiate the Project, knowing the Project would require Regional Board certification. The District also knew that compensatory mitigation would be required when the Regional Board certified the Project. This did not dissuade the District from proceeding with the Project under the terms and conditions established by the Regional Board in conformance with federal laws and regulations.

The costs allegedly incurred by the District are downstream of the District's discretionary decision to initiate the Project, to seek Project certification from the Regional Board, and to proceed with the Project under the terms and conditions the Regional Board established in conformance with federal laws and regulations. Because a local agency may not receive state reimbursement for costs incurred pursuant to discretionary actions, the Permit-related costs incurred by the District are not reimbursable.

Compensatory Mitigation Also Applies to Non-Government Entities

In its August 15, 2018, response to the test claim, the State Water Resources Control Board states on page 47 that "...the San Francisco Bay Water Board has issued around 800 water quality certifications over the past 5 years. Approximately half of the water quality certifications are issued to private entities and the other half to public agencies."

As the California Supreme Court held in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, "(w)e conclude that when the voters adopted article XIII B, section 6...the electorate had in mind subventions for the expense or increased cost of programs administered locally and for expenses occasioned by laws *that impose unique requirements on local governments and do not apply generally to all state residents or entities* (emphasis added).

The Permit-related costs incurred by the District are not state-reimbursable for the same reasons. The Regional Board's federally mandated project certification and compensatory mitigation requirements apply equally to local agencies and to private entities.

Fee Authority

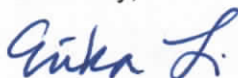
The District argues that under Proposition 218, there is no fee authority to cover the alleged mandated costs incurred for the claimed activities. Finance believes claimants do have fee authority undiminished by Propositions 218.

As the State Board makes clear in its comments on this test claim, not only does the District have fee authority, it has already exercised it. Funding through Measure B is sufficient fee authority pursuant to Government Code section 17556(d), and the District has identified this as an available source of funding in its test claim. Because the District is not required to expend its proceeds of taxes, there are no increased costs mandated by the state and reimbursement is not required under article XIII B, section 6 of the California Constitution.

Finally, the District claims a number of costs are reimbursable, including communications with staff and the costs of pursuing the test claim. These alleged costs and others claimed are not the focus of wetlands mitigation and are not properly included in the test claim as costs arising pursuant to the Permit.

For all of the reasons stated above, the Commission should deny the test claim in its entirety.

Sincerely,



ERIKA LI
Program Budget Manager

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On August 31, 2018, I served the:

- **Finance's Comments on the Test Claim filed August 29, 2018**

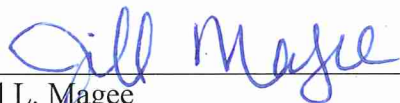
Waste Discharge Requirements and Water Quality Certification for: Santa Clara Valley Water District and U.S. Army Corps of Engineers, Upper Berryessa Creek Flood Risk Management Project, 17-TC-04

San Francisco Bay Regional Water Quality Control Board (SFRWQCB) Order No. R2-2017-0014, Provision B. 19, effective April 12, 2017

Santa Clara Valley Water District, Claimant

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 31, 2018 at Sacramento, California.



Jill L. Magee

Commission on State Mandates

980 Ninth Street, Suite 300

Sacramento, CA 95814

(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 8/23/18

Claim Number: 17-TC-04

Matter: Waste Discharge Requirements and Water Quality Certification for: Santa Clara Valley Water District and U.S. Army Corps of Engineers, Upper Berryessa Creek Flood Risk Management Project

Claimant: Santa Clara Valley Water District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

Marni Ajello, Attorney, Office of Chief Counsel, *State Water Resources Control Board*
San Francisco Bay Regional Water Quality Control Board, 1001 I Street, 22nd Floor, Sacramento, CA 95814
Phone: (916) 327-4439
marnie.ajello@waterboards.ca.gov

Socorro Aquino, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-7522
SAquino@sco.ca.gov

Tamarin Austin, Attorney, Office of Chief Counsel, *State Water Resources Control Board*
San Francisco Bay Regional Water Quality Control Board, 1001 I Street, 22nd Floor, Sacramento, CA 95814
Phone: (916) 341-5171
Tamarin.Austin@waterboards.ca.gov

Harmeet Barkschat, *Mandate Resource Services, LLC*
5325 Elkhorn Blvd. #307, Sacramento, CA 95842
Phone: (916) 727-1350
harmeet@calsdrc.com

Lacey Baysinger, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
lbaysinger@sco.ca.gov

Dale Bowyer, Section Leader, *San Francisco Bay Regional Water Quality Control Board*
1515 Clay Street, Suite 1400, Oakland, CA 94612

Phone: (510) 622-2323
Dale.Bowyer@waterboards.ca.gov

Allan Burdick,
7525 Myrtle Vista Avenue, Sacramento, CA 95831
Phone: (916) 203-3608
allanburdick@gmail.com

J. Bradley Burgess, MGT of America
895 La Sierra Drive, Sacramento, CA 95864
Phone: (916)595-2646
Bburgess@mgtamer.com

Evelyn Calderon-Yee, Bureau Chief, State Controller's Office
Local Government Programs and Services, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-5919
ECalderonYee@sco.ca.gov

Norma Camacho, Chief Executive Officer, Santa Clara Valley Water District
5700 Almaden Expressway, San Jose, CA 95118
Phone: (408) 265-2600
ncamacho@valleywater.org

Gwendolyn Carlos, State Controller's Office
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-0706
gcarlos@sco.ca.gov

Annette Chinn, Cost Recovery Systems, Inc.
705-2 East Bidwell Street, #294, Folsom, CA 95630
Phone: (916) 939-7901
achinnrcs@aol.com

Carolyn Chu, Senior Fiscal and Policy Analyst, Legal Analyst's Office
925 L Street, Sacramento, CA 95814
Phone: (916) 319-8326
Carolyn.Chu@lao.ca.gov

Anita Dagan, Manager, Local Reimbursement Section, State Controller's Office
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740,
Sacramento, CA 95816
Phone: (916) 324-4112
Adagan@sco.ca.gov

Marieta Delfin, State Controller's Office
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-4320
mdelfin@sco.ca.gov

Donna Ferebee, Department of Finance
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
donna.ferebee@dof.ca.gov

Susan Geanacou, Department of Finance
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
susan.geanacou@dof.ca.gov

Dillon Gibbons, Legislative Representative, *California Special Districts Association*
1112 I Street Bridge, Suite 200, Sacramento, CA 95814
Phone: (916) 442-7887
dillong@csda.net

Heather Halsey, Executive Director, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
heather.halsey@csm.ca.gov

Chris Hill, Principal Program Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Chris.Hill@dof.ca.gov

Justyn Howard, Program Budget Manager, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 445-1546
justyn.howard@dof.ca.gov

Edward Jewik, *County of Los Angeles*
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-8564
ejewik@auditor.lacounty.gov

Jill Kanemasu, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-9891
jkanemasu@sco.ca.gov

Anita Kerezsi, *AK & Company*
2425 Golden Hill Road, Suite 106, Paso Robles, CA 93446
Phone: (805) 239-7994
akcompanysb90@gmail.com

Eric Koch, Deputy Director, *Department of Water Resources*
Flood Management and Dam Safety, P.O. Box 942836, Room 1115-9, Sacramento, CA 94236-0001
Phone: (916) 654-7180
Eric.Koch@water.ca.gov

Lisa Kurokawa, Bureau Chief for Audits, *State Controller's Office*
Compliance Audits Bureau, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 327-3138
lkurokawa@sco.ca.gov

Michael Lauffer, Chief Counsel, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828
Phone: (916) 341-5183
michael.lauffer@waterboards.ca.gov

Keith Lichten, Division Chief, *San Francisco Bay Regional Water Quality Control Board*
Watershed Management, 1515 Clay Street, Suite 1400, Oakland, CA 94612
Phone: (510) 622-2380
klichten@waterboards.ca.gov

Selina Louie, Water Resource Control Engineer, *San Francisco Bay Regional Water Quality Control Board*
1515 Clay Street, Suite 1400, Oakland, CA 94612

Phone: (510) 622-2383
SLouie@waterboards.ca.gov

Jill Magee, Program Analyst, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
Jill.Magee@csm.ca.gov

Michelle Mendoza, *MAXIMUS*
17310 Red Hill Avenue, Suite 340, Irvine, CA 95403
Phone: (949) 440-0845
michellemendoza@maximus.com

Meredith Miller, Director of SB90 Services, *MAXIMUS*
3130 Kilgore Road, Suite 400, Rancho Cordova, CA 95670
Phone: (972) 490-9990
meredithcmiller@maximus.com

Lourdes Morales, Senior Fiscal and Policy Analyst, *Legal Analyst's Office*
925 L Street, Sacramento, CA 95814
Phone: (916) 319-8320
Lourdes.Morales@LAO.CA.GOV

Thomas Mumley, Assistant Executive Officer, *San Francisco Bay Regional Water Quality Control Board*
1515 Clay Street, Suite 1400, Oakland, CA 94612
Phone: (510) 622-2395
thomas.mumley@waterboards.ca.gov

Karla Nemeth, Director, *Department of Water Resources*
P.O Box 942836, Room 1115-1, Sacramento, CA 94236-0001
Phone: (916) 653-7007
Karla.Nemeth@water.ca.gov

Andy Nichols, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819
Phone: (916) 455-3939
andy@nichols-consulting.com

Arthur Palkowitz, *Artiano Shinoff*
2488 Historic Decatur Road, Suite 200, San Diego, CA 92106
Phone: (619) 232-3122
apalkowitz@as7law.com

Steven Pavlov, Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Steven.Pavlov@dof.ca.gov

Jai Prasad, *County of San Bernardino*
Office of Auditor-Controller, 222 West Hospitality Lane, 4th Floor, San Bernardino, CA 92415-0018
Phone: (909) 386-8854
jai.prasad@atc.sbcounty.gov

Peter Prows, Partner, *Briscoe Ivester & Bazel LLP*
Claimant Representative
155 Sansome Street, 7th Floor, San Francisco, CA 94104

Phone: (415) 402-2700
pprows@briscoelaw.net

Mark Rewolinski, *MAXIMUS*
808 Moorefield Park Drive, Suite 205, Richmond, VA 23236
Phone: (949) 440-0845
markrewolinski@maximus.com

Theresa Schweitzer, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3140
tschweitzer@newportbeachca.gov

Camille Shelton, Chief Legal Counsel, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
camille.shelton@csm.ca.gov

Carla Shelton, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
carla.shelton@csm.ca.gov

Eileen Sobeck, Executive Director, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828
Phone: (916) 341-5183
Eileen.Sobeck@waterboards.ca.gov

Jim Spano, Chief, Mandated Cost Audits Bureau, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-5849
jspano@sco.ca.gov

Dennis Speciale, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
DSpeciale@sco.ca.gov

Joe Stephenshaw, Director, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814
Phone: (916) 651-4103
Joe.Stephenshaw@sen.ca.gov

Derk Symons, Staff Finance Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Derk.Symons@dof.ca.gov

Jolene Tollenaar, *MGT of America*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 243-8913
jolenetollenaar@gmail.com

Evelyn Tseng, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3127
etseng@newportbeachca.gov

Brian Uhler, Principal Fiscal & Policy Analyst, *Legislative Analyst's Office*

925 L Street, Suite 1000, Sacramento, CA 95814

Phone: (916) 319-8328

Brian.Uhler@LAO.CA.GOV

Emel Wadhvani, Senior Staff Counsel, *State Water Resources Control Board*

Office of Chief Counsel, 1001 I Street, Sacramento, CA 95814

Phone: (916) 322-3622

emel.wadhvani@waterboards.ca.gov

Renee Wellhouse, *David Wellhouse & Associates, Inc.*

3609 Bradshaw Road, H-382, Sacramento, CA 95927

Phone: (916) 797-4883

dwa-renee@surewest.net

Bruce Wolfe, Executive Officer, *San Francisco Bay Regional Water Quality Control Board*

1515 Clay Street, Suite 1400, Oakland, CA 94612

Phone: (510) 622-2314

bwolfe@waterboards.ca.gov

Hasmik Yaghobyan, *County of Los Angeles*

Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012

Phone: (213) 974-9653

hyaghobyan@auditor.lacounty.gov