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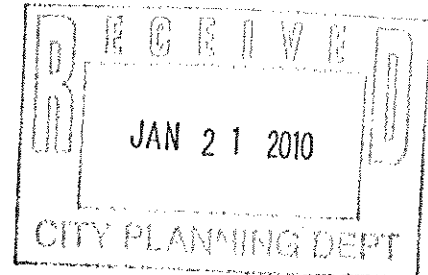
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January 19, 2010

VIA EMAIL, FACSIMILE, AND U.S. POST

email: kthomas@ci.santa-cruz.ca.us

Fax: (831) 420-5101



Mr. Ken Thomas
 City of Santa Cruz Planning and Community Development Dept.
 809 Center Street, Room 107
 Santa Cruz, CA 95060

Re: Habitat And Watershed Caretakers' Comments on the Draft Environmental Impact Report for the City of Santa Cruz's Sphere of Influence Amendment and Provision of Extraterritorial Water & Sewer Service

Dear Mr. Thomas:

On behalf of Habitat And Watershed Caretakers ("HAWC"), we submit the following comments on the Draft Environmental Impact Report ("DEIR") for the City of Santa Cruz's Sphere of Influence Amendment and Provision of Extraterritorial Water & Sewer Service. HAWC is a grass-roots organization of citizens concerned about the health and protection of environmental resources, particularly sensitive species habitats and watersheds. As shown below, the DEIR is profoundly flawed.

1 **The City of Santa Cruz Does Not Have Adequate Water Supply to Meet Current Demands, and Therefore Should Not Be Committing to Supply More Water for Growth of UC Santa Cruz.**

The City of Santa Cruz ("City") is seeking to extend its Sphere of Influence ("SOI") to include a 374-acre portion of the University of California Santa Cruz ("UCSC") campus known as "North Campus." If this Project is approved, the City will provide extraterritorial water and sewer services to the North Campus.

The largest impact of the Project, which has also been deemed "Significant and Unavoidable" in the DEIR, is that:

The proposed project would result in future provision of water service to the North Campus portion of the UCSC campus that would support new planned

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development and growth to the year 2020. There are adequate supplies to serve the project in normal years, but there are inadequate water supplies to serve the project under existing and future multiple dry year (drought) conditions.

DEIR, p. 2-5. The City's existing adopted Integrated Water Plan ("IWP") and Urban Water Management Plan ("UWMP") predict a shortfall in water supply, during normal years, without the Project, as early as 2015. DEIR Footnote 8, p. 4.1-33. The Water Supply Assessment ("WSA") prepared for the Project concludes that the City does *not* currently have sufficient water to meet current needs during dry years, *even without the Project*. The WSA predicts that based on a water demand growth rate consistent with historic growth (0.4%) the City will have sufficient water supply to supply the City and the Project during normal years until 2030. Based on a 0.8% growth rate consistent with the general plans for the City and County of Santa Cruz and the City of Capitola, however, the City could face a supply shortfall during *normal* years after 2025.

It would be irresponsible for the City to commit to providing water to the Project when it does not have adequate water supply for its current commitments. "Cumulative development and growth in the City's water service area would result in a *significant cumulative water impact*, as it results in additional demand in a system that does not currently have adequate water supplies to meet existing or future demands during drought conditions or adequate long-term supplies during normal years potentially at some time after the year 20205." DEIR, p. 6-12.

Future changes in water supply and demand will further exacerbate this problem. As discussed below, it is a near certainty that supplies from the San Lorenzo River will be limited in the future to protect endangered and threatened coho and steelhead salmon.

2 Furthermore, "[t]he total water demand projected for the City's service area included in [the] WSA does not explicitly identify the increase in water use associated with non-UCSC development that may occur as a result of the Project." WSA, p. 26.

3 **If Fish Species Are to Be Protected, Current Water Supplies to the City of Santa Cruz Will Be Reduced, Thereby Further Limiting the City's Ability to Supply Water to UC Santa Cruz.**

The City's water sources support populations of Central California Coast (CCC) Distinct Population Segment (DPS) steelhead (*Oncorhynchus mykiss*), a threatened species (62 FR 43937), and CCC Evolutionarily Significant Unit (ESU) coho salmon (*Oncorhynchus kisutch*), an endangered species (70 FR 37160).

The National Marine Fisheries Service believes that the CCC coho is close to extinction, and that the San Lorenzo River watershed will be identified as a priority watershed for recovery

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of the CCC coho. *See* NMFS comment letter on DEIR, dated January 5, 2010. The prospects for recovery of the CCC steelhead and coho are dependent on suitable habitat being maintained. Certain minimum levels of flow are required in streams for the proper development, growth and spawning of salmonids.

Currently, in critically dry years, the City does not have enough water to meet the City's existing needs. During these same dry years retention of surface flows will be even more important for the survival of the salmonids as rearing juveniles are typically unable to rear in small tributaries and will need adequate water flow in the body of the San Lorenzo River.

The National Marine Fisheries Service believes that any more diversions from the San Lorenzo River watershed will preclude the recovery of both the CCC steelhead and coho salmon in Santa Cruz County. Likewise, in order to protect the salmon, it is more than likely that supply reductions will be required in the future, thereby further limiting the City's ability to meet current water demands. Both the DEIR and the WSA should have taken this possibility into account when calculating the City's ability to meet water demand.

4 Furthermore, the DEIR and the WSA should analyze the impacts that would occur if the City was forced to resort to pumping groundwater to make up for reduced supply due to surface supply reductions in the future.

5 **Alternative Water Supplies Analyzed in the DEIR and the WSA Are Not Sufficient To Meet Water Demand.**

The WSA suggests three alternative sources of water, two of which are not even additional sources of water. The WSA identifies water conservation and curtailment of demand during drought conditions, as well as desalination of seawater as an alternative water source. Conservation is not a source of water, and neither is "curtailment of demand," which is just another way of forcing people to conserve by limiting the available supply of water. Therefore, the only additional source of water analyzed in the DEIR is seawater desalination, which has its own set of environmental impacts that neither the City nor any other agency has yet evaluated.

The Santa Cruz Water District is proposing to construct a seawater desalination plant that will produce 2.5 million gallons of water per day. Seawater desalination is a relatively new and untested technology, and will present a whole new realm of environmental consequences to Monterey Bay and the adjacent counties and cities. Seawater desalination is not only expensive, but it uses massive amounts of energy and will likely vastly increase the City's carbon footprint

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and output of greenhouse gasses. The DEIR and the City both acknowledge the uncertainty related to approval and timing of the desalination plant, but fail to address its potential deleterious impacts. DEIR, p 4.1-35.

The City has concluded that “it cannot ‘confidently determine’ that this source is ‘reasonably likely,’ as spelled out in the guidance provided by the California Supreme Court in its decision in *Vineyard Area Citizens et al. v. City of Rancho Cordova* (2007) 40 Cal.4th 412. Nonetheless, the City has identified a desalination plant as its best option to alleviate shortages in drought conditions, and therefore has committed to pursuing this option.” DEIR, p. 4.1-36.

Since the possibility of a desalination plant being built to provide additional water supply to the City is uncertain, and the two other “additional potential water supplies” are not, in fact, additional water supplies, the City has no certain source of the additional water which the City will need to carry out the Project. Without an adequate supply of water to meet all of its demands, the City should not proceed with the Project.

6

The Direct and Indirect Cumulative Impacts of the Project on Growth Inducement Will Adversely Affect Both Water Quality and the Continued Survival of CCC Steelhead and Coho Salmon in the San Lorenzo River Watershed.

Development of the UC Santa Cruz North Campus will result in substantial changes to the rate and amount of surface water runoff, which will in turn increase erosion, impair water quality and thereby harm CCC steelhead and coho. The DEIR does not mention, let alone analyze these impacts.

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The DEIR admits that the Cave Gulch watershed already has erosion problems, and that the increase in runoff due to an additional 61 acres of impervious area might trigger substantial erosion. DEIR, p. 5-52. The DEIR “therefore conservatively concludes that even with mitigation, the impact would be significant.” *Id.* Although the DEIR thus admits that erosion could be a significant and unavoidable impact, it is not listed as such in section 6.0 of the DEIR. This inconsistency must be remedied.

8

Because Extensions and/or Alterations of the City’s Water Rights Will Adversely Impact Newell Creek and the San Lorenzo River, These Water Rights Applications Should Not Be Relied Upon for Future Water Supply.

The WSA discusses how the City is attempting to amend its water rights to Newell Creek, and enlarge its diversions from the Felton Diversion. WSA, p. 40. The City’s current water rights to water from Newell Creek allow only for diversion for storage and not direct diversion for use. *Id.* The City hopes to obtain direct diversion rights for water from Newell Creek. The

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City's permits for diversion of water at Felton currently require the City to beneficially use all 3,000 AFY by December 2006 to maintain its appropriative rights. *Id.* Currently, the City has used only half the permitted amount, but expects to need the full 3,000 AFY in the future and has therefore filed petitions with the SWRCB to extend the time allowed for beneficial use of the water. *Id.* The City's appropriative water rights expired in 2006 and because of the measures that may be required to ensure the survival of coho and steelhead salmon, as discussed above, it is unclear whether the City will be able to regain appropriative rights to the unused half of the original 3,000 AFY in the future. Therefore the City should not have included this amount in its water supply assessment. This issue is not adequately discussed or analyzed in the DEIR.

Both of the City's applications for alteration/extension of water rights are being challenged by the California Department of Fish and Game ("DFG"), as evidenced by its Memorandum dated December 10, 2008 (also attached as Exhibit 1). The WSA briefly mentions the DFG's protest, but, like the DEIR, does not explain the reasoning supporting the protest.

9 Direct and cumulative impacts to downstream resources, aquatic habitat and species will result from an extension/expansion of the City's current diversions at Newell Creek and the San Lorenzo River. Allowing the requested diversion expansions will reduce instream flow that is necessary to maintain adequate habitat for CCC coho salmon, CCC steelhead trout, California red-legged frog (*Rana aurora draytonii*), foothill yellow-legged frog (*Rana boylei*) and other aquatic species dependent on Newell Creek and the San Lorenzo River.

Currently, the City's diversions at Loch Lomond Reservoir and the Felton Diversion Dam are not meeting the necessary flows required for adequate passage, spawning and rearing flows to keep fish in good condition, as required by Fish and Game Code section 5937. DFG Memo, p. 2. The City's operations at Newell Creek currently bypass just one cfs year-round below the reservoir. DFG Memo, p. 3. According to DF&G's draft Assessment of Streamflow Effects dated November 10, 2008, 20 cfs is the minimum flow necessary for spawning and habitat for coho and steelhead, and 21 cfs is the minimum for adult passage. Additional flows may be necessary to increase salmon populations that are presently suffering decline. Any modification or increase in diversion as proposed by the City would adversely impact these salmonids.

According to DFG, ongoing operations at the Felton diversion dam have the potential to unlawfully take these federally protected fish. *Id.* The City's proposed expansion of water use would result in further unlawful impacts to these imperiled salmon. DFG points out, and we concur, that these impacts have not been adequately addressed, analyzed or disclosed.

Because of its concern for the safety and well being of aquatic species that use the affected resources, DFG created a detailed list of terms that must be met before DFG will dismiss its protest of the City's Petitions. Satisfaction of these terms could significantly reduce the total

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water supply available. Therefore the terms should have been disclosed in the WSA and the DEIR, along with their impact on water supply.

10

Changing the City's Water Rights from Storage Rights to Direct Diversion Rights Is Both Contrary to Law and Not in the Public's Interest.

The DEIR fails to mention that the United States Marine Corps submitted a protest to the State Water Resources Control Board opposing the City of Santa Cruz's Petitions for Change to add Direct Diversion as a "Method of Diversion." State Water Resources Control Board Protest, November 7, 2008, p. 1 (attached as Exhibit 2). The City's proposed change to its water rights from storage to direct diversion would put the Marine Corps' water supply at risk, and therefore it filed a protest against the proposed change.

The proposed change from diversion to storage to direct diversion is not a permissible change allowed under the Water Code or the California Code of Regulations. Statement of Protest, p. 1. Furthermore, there is State Water Resources Control Board precedent that specifically prohibits the change requested by the City. *Id.*

Water Code section 1701 allows for changes to point of diversion, place of use, or purpose of use. The standard Petition for Change form has check-boxes that coincide with these choices. Water Code section 1701 does not allow for change to the "method of diversion," and likewise, the Petition for Change form does not have a check-box for "method of diversion." The City, however, when filling out the Petition for Change form *altered the form* to allow for an additional check-box for "method of diversion."

Not only does Water Code section 1701 not allow for a change in the "method of diversion," but there is precedent on point also prohibiting the very change requested by the City. State Board Order No. WR 85-4 (1985) specifically says that "[i]f the change is a change in the method of diversion, it is *not* a change which can be made under Water Code §1700 et seq." State Board Order No. WR 85-4(1985), p. 8 (attached as Exhibit 3), emphasis added. State Board Decision No. 1308 (1968) also clearly states that changing water rights from direct diversion to storage requires an application for a new water right. The same reasoning applies here, where the change requested is from storage to direct diversion, based on the reasoning that more water may be used during direct diversion than during storage.

The City appears to rely on State Water Board Decision 940 (1959) which states that "[a] direct diversion right can be converted to a storage right only to the extent there is not change in rate of diversion from the stream or in the period of the year during which the water is diverted." The present request by the City is for the opposite change. The City wants to expand its storage rights to direct diversion rights, not change direct diversion rights to storage rights, which was the issue in State Board Decision 940. Further, the water rights at issue in State Board Decision

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940 were pre-1914 rights, to which the Water Code provisions currently at issue are inapplicable. Lastly, State Board Decision 940 was issued long before State Board Decision No. 1308 in 1968 and State Board Order No. WR85-4, in 1985 and therefore is superseded by these later decisions.

Because direct diversion rights and storage rights are two different rights, the public's interest will not be served unless the City is required to acquire direct diversion rights as a new water right entirely. Approving the Petition for Change will grant the City a completely new water right with a senior priority date, which would undermine the "first in time, first in right" principle of appropriative water rights. In order to protect the public's interest in a stable water supply and to protect the interest of other holders of water rights, the City's Petition for Change must be denied. The DEIR fails to address the foregoing issues.

11

The DEIR's Discussion of Alternatives Is Inadequate.

CEQA mandates that an EIR must provide the public with a full assessment of alternatives to the proposed project. Pub. Res. Code § 21001(g). CEQA confirms "it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives . . . available which would substantially lessen the significant environmental effects of such projects . . ." Pub. Res. Code § 21002.

To this end, the Legislature directed that an "[EIR] shall include a detailed statement setting forth . . . [a]lternatives to the proposed project," (Pub. Res. Code § 21100, subd. (b)(4)), and declared that one of "[t]he purpose[s] of the [EIR] is . . . to identify alternatives to the project." Pub. Res. Code §§ 21002.1, subd. (a) and 21061. CEQA requires an EIR to describe a reasonable range of alternatives that could feasibly attain most of the basic objectives of the project while avoiding or substantially lessening any of the significant effects of the project. 14 C.C.R. § (CEQA Guidelines) 15126.6(a) and (f). The DEIR failed to identify and evaluate a reasonable range of alternatives to the proposed Project. The alternatives examined by the DEIR were not reasonably calculated to significantly reduce the Project's adverse impacts.

The DEIR only analyzes two alternatives, a No Project alternative, and a Modified Sphere of Influence Amendment alternative. The No Project alternative is inadequate, because the DEIR claims that even if the Project is not approved, the impacts identified in the DEIR would not be eliminated since "water demand and wastewater generation would remain unchanged." DEIR, p. 6-35. The DEIR states that the No Project alternative might actually result in an *increase* in impacts due to increased traffic, decreased on-campus housing and infill and expansion of the existing UCSC campus. The DEIR must consider a No Project alternative that does not involve massive new development of the UC Santa Cruz Campus.

The only action alternative analyzed in the DEIR is the "Modified Sphere of Influence Amendment Area" alternative. DEIR, p. 6-36. This alternative would "exclude some resource

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lands from inclusion within the Sphere of Influence amendment area,” which would “tighten the line to include those areas designated for future development (and limited intervening lands designated for Natural Reserve), and thus, provision of services.” *Id.* However, the description goes on to admit that “[s]ince the amount of development that could occur in the North Campus under the 2005 LRDP is specified in the Settlement Agreement, reducing future potential development is not feasible.” *Id.* This assertion is untrue. The settlement agreement only requires the preparation of an EIR, not the approval of more campus development. If, as we have shown above, there are insufficient water supplies to support campus growth, applicable law including CEQA requires disapproval of that growth. Nothing in the settlement agreement suggests otherwise.

The DEIR goes on to claim that because the amount of development cannot be limited, “water demand would remain unchanged” and impacts would not be reduced or avoided. *Id.* at 6-37. Because future campus development can, and indeed should, be limited under CEQA, this claim is mistaken. Although this alternative does not have any new significant impacts of its own, and does meet the basic project objectives, it does not avoid or substantially lessen any of the Project’s significant effects. Because this alternative, the only action alternative, fails to substantially lessen or avoid any of the Project’s significant effects, it does not satisfy the requirements of an alternative under CEQA.

Without a valid action-alternative, the DEIR only analyzes one alternative, the No Project alternative. With only one alternative, the DEIR does not analyze a reasonable range of alternatives, and therefore violates CEQA.

12 **The DEIR’s Discussion of Mitigation Measures Is Inadequate.**

CEQA directs that “agencies shall not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects” Pub. Res. Code § 21002.

The DEIR does not comply with these CEQA requirements for mitigation measures. Many of the mitigation measures proposed in the 2005 LRDP EIR are inadequate because they are too vague, incomplete, ineffective or unenforceable. Impact 1-1 states that even though there is adequate supply to serve the Project in normal years, the City does not have an adequate supply to serve the Project under existing and future dry year conditions. DEIR, p. 4.1-30. To mitigate this impact, the DEIR falls back on only the mitigation measures provided for in the 2005 LRDP since seawater desalination is “inherent[ly] uncertain[.]” Many of these mitigation measures are toothless, committing the University to do nothing more than studies, perform audits and implement vague future conservation strategies. These mitigation measures include *no* mandatory actions to be taken if the studies demonstrate that a significant environmental impact exists. Without mitigation measures that require an actual reduction in water usage, and

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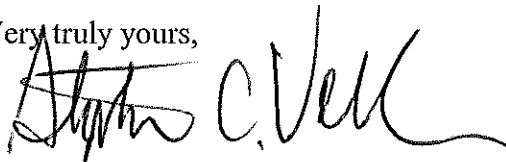
measurable achievement of environmental standards, the Project cannot be approved.

Conclusion

HAWC respectfully requests that the deficiencies in the DEIR and the WSA outlined above be addressed and corrected before review of the Project proceeds any further.

Thank you for considering our views on this important matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Stephan C. Volker". The signature is written in a cursive, flowing style with a long horizontal tail stroke.

Stephan C. Volker
Attorney for Habitat and Watershed Caretakers

SCV:taf

EXHIBIT 1



State of California
Department of Fish and Game

Memorandum

Date: December 10, 2008

To: Ms. Victoria Whitney
State Water Resources Control Board
Division of Water Rights
Post Office Box 2000
Sacramento, CA 95812

Attention: Mr. Norm Ponferrada

From: 
Charles Armor, Regional Manager
Department of Fish and Game – Bay Delta Region, Post Office Box 47, Yountville, California 94599

Subject: Protest of Petitions to Extend Time for Water Applications (WA) 23710 and 22318 and Petitions for Change for WA 2370, 22318 and 17913, Filed by the City of Santa Cruz to Divert Water from San Lorenzo River and Newell Creek in Santa Cruz County

The Department of Fish and Game's (DFG) interest in this petition is based on its status as trustee agency for California's fish and wildlife resources and as a responsible agency under Fish and Game Code Section 1600 et. seq. and the California Endangered Species Act (CESA). DFG's right to protest this petition is based on State Water Code §1330 and other associated provisions of law.

Basis of Protest

Granting an Extension for the project will result in direct and cumulative adverse impacts to public trust resources of Newell Creek and the San Lorenzo River, and DFG is concerned that ongoing activities have been occurring without appropriate authorization from DFG and the State Water Resources Control Board (SWRCB). Granting an extension to expand current operations could impact instream resources by further reducing instream flow and water availability necessary to maintain riparian and fish¹ habitat in good condition. In particular, impacts to coho salmon (*Oncorhynchus kisutch*), steelhead trout (*Oncorhynchus mykiss*), California red-legged frog (*Rana aurora draytonii*), foothill yellow-legged frog (*Rana boylei*), and other aquatic and terrestrial species are already occurring and could be further aggravated by the proposed extension. The current Petition does not adequately disclose the current operations nor does it adequately analyze the effects of either the current operations or additional effects of the new diversions. Direct and cumulative impacts to downstream resources from the additional diversions proposed in the WA must be assessed and appropriately minimized and mitigated.

¹ "Fish" means wild fish, mollusks, crustaceans, invertebrates, or amphibians, including any part, spawn, or ova thereof.

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Project Description

Under WA 30546, the applicant seeks to extend the time available to put water to beneficial use for 25 years. The City of Santa Cruz (City) also wishes to add direct diversion activities to its water right in conformance with actual operations. The City currently has a Water Right License 9847 (WA 17913) for collection of 5,600 acre-feet (af) of water and storage of 8624 af of water in Loch Lomond Reservoir on Newell Creek, tributary to the San Lorenzo River. The application includes additional diversion of direct flow from Loch Lomond Reservoir but indicates that the change will not increase the amount of water diverted.

It is important to note that DFG has been working with the City and NOAA's National Marine Fisheries Service in developing a Habitat Conservation Plan (HCP) to address the impacts associated with the City's operations that impact listed coho salmon and steelhead. The measures to protect listed species are still in development.

Statement of Facts

- Fish and Game Code Section 5937² requires that sufficient water be passed over, around or through to maintain fish in good condition. CCR Title 23 Section 782 emphasizes the requirement for compliance with this section of the Fish and Game Code. Current operations at Loch Lomond Reservoir and the Felton Diversion Dam are bypassing a minimum flow of one cubic feet per second (cfs) and 20 cfs, respectively. Substantial evidence indicates that these minimum flow requirements are considerably lower than flows necessary to maintain adequate passage, spawning and rearing flows necessary to keep fish in good condition.
- State and federally listed coho salmon have historically used the San Lorenzo River watershed, and on-going operations of the Felton diversion structure have the potential to take³ State listed endangered coho salmon. The City does not currently have a CESA Incidental Take Permit issued by DFG pursuant to Fish and Game Code Section 2081(b) and California Code of Regulations, Title 14, Section 783 et seq. CESA prohibits the take of any species of wildlife designated as an endangered, threatened, or candidate species by the Fish and Game Commission without authorization.
- The proposed expansion of water use and subsequent development beyond existing conditions may result in undisclosed direct and cumulative adverse impacts to sensitive instream resources. Effects to sensitive resources including State and federally listed species have not been sufficiently analyzed or disclosed. The application has failed to accurately disclose current operations and identify whether sufficient water exists for expansion without unreasonably affecting other water users

² Fish and Game Code Section 5937 states, "The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam. During the minimum flow of water in any river or stream, permission may be granted by DFG to the owner of any dam to allow sufficient water to pass through a culvert, waste gate, or over or around the dam, to keep in good condition any fish that may be planted or exist below the dam when, in the judgment of DFG, it is impracticable or detrimental to the owner to pass the water through the fishway.

³ Pursuant to Fish and Game Code Section 86, "'Take' means hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture or kill."

or adversely affecting sensitive resources in downstream reaches. The Petition has not provided substantial evidence that current operations or additional diversions are not adversely affecting sensitive resources.

Considerations in Developing Protest Dismissal Terms

Newell Creek

DFG has recently received a draft Assessment of Streamflow Effects (Assessment) dated November 10, 2008 for the City operations including those at Newell Creek and San Lorenzo River. Though the Assessment does not cover the San Lorenzo River above the Tait Diversion in the City, it does include an assessment of flows needed to keep fish in good condition in Newell Creek below Loch Lomond Reservoir. The City is currently bypassing a total of one cfs year-round below the reservoir. According to the Assessment, 20 cfs is the minimum flow necessary to maintain peak spawning habitat for both coho and steelhead and 21 cfs is necessary to allow for adult passage at critical riffles. The site-specific analysis included in the Assessment provides substantial evidence that the current bypass flow of one cfs is insufficient to keep fish in good condition. Further, the historic timing of spills from Loch Lomond Reservoir has varied according to water year but in most years does not occur until February if at all. Though the release of one cfs during the late summer months may provide enhanced flows for summer rearing, the release of one cfs during the fall, winter and spring has impaired downstream habitat by preventing adult migration and severely restricting spawning habitat. Until such time as more information is available, DFG is recommending that operations at Newell Creek be revised to allow for a minimum flow of 20 cfs and that a schedule be developed to release additional peak flows for adult migration.

Felton Diversion

Diversion operations at the Felton Diversion are currently required to bypass a minimum of 20 cfs for in-stream beneficial uses. However, the City is currently not able to divert water when levels drop below 40 cfs or during high flow events above 300 cfs. Although DFG does not consider the current bypass requirement of 20 cfs sufficient to keep fish in good condition, the operational constraints at the Felton Diversion Dam allow for sufficient flow to bypass the structure to allow for some fish passage and possible spawning. Due to these operational constraints, DFG had determined that it is likely that sufficient water is available for salmonids to pass during peak flow events and that dam operations are not significantly affecting the amount of time that those passage flows are available. As such, any modification of the Felton diversion facility or increases in diversion amount may adversely impact salmonids and will require additional analysis in consultation with DFG staff. Although the current operation of the diversion structure is sufficient to protect adult migration, DFG remains concerned that current dam operations may continue to have an adverse effect on spring and summer spawning and rearing habitat below the diversion site. It is unclear whether current operation of the diversion dam, including dam installation and diversion, modifies flows to downstream habitat during times when salmonids may be spawning or rearing. Inflation of the dam and diversion operations have the potential to abruptly dewater downstream reaches potentially stranding fish and dewatering redds. Further, when water collected behind the dam is released during deflation, elevated flows have the potential to scour downstream reaches and salmonid redds. The Petition request and subsequent California Environmental Quality Act (CEQA) document should analyze the effects of current operations on downstream flows and the potential effects caused by additional diversions. Specifically, the analysis should determine whether 20 cfs is sufficient

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to maintain spawning and rearing habitat, as well as whether operation of the facility abruptly modifies downstream flows likely taking salmonid species. The analysis of these baseline issues is currently lacking and is necessary to determine whether extension of the existing Permit will adversely affect listed resources.

Protest Dismissal Terms

Protest dismissal terms, if adopted as enforceable conditions of the water right permit, are intended to minimize and mitigate adverse impacts to fisheries and wildlife resources. The lack of sufficient analysis to date prevents DFG from developing complete appropriate site-specific flows for all diversions. DFG will provide draft protest dismissal terms and recommendations with the understanding that final terms are dependent on the analysis of further information. Dismissal terms for these diversions may include, but are not limited to:

1. No work shall commence and no additional water shall be diverted, stored, or used under this permit until a signed copy of a Lake and Streambed Alteration Agreement (LSAA) between DFG and the Permittee addressing the diversion of water and providing seasonally adequate bypass flows is filed with the SWRCB, Division of Water Rights. Compliance with the terms and conditions of the agreement is the responsibility of the Permittee.
2. No work shall commence and no additional water shall be diverted, stored, or used under this permit until the City receives an Incidental Take Permit for State and federally listed coho salmon from DFG. Compliance with the terms and conditions of the permit is the responsibility of the Permittee.
3. The bypass shall be a passive system that is designed to only divert flow when the terms of the SWRCB permit will be met. Outside the diversion season and at low flows, water will automatically bypass all points of diversion.
4. No water shall be diverted, even within the allowable diversion season, until the measure of flow being bypassed around all existing points of diversion are of sufficient quantity and quality to allow upstream and downstream fish passage, and maintain in good condition any aquatic resources that would exist in downstream reaches under unimpaired flows. Determination of the bypass flow shall be based on site-specific biological investigations approved by DFG and NOAA Fisheries personnel. A final site-specific study including the San Lorenzo River shall be conducted to determine the specific life history needs of coho salmon, steelhead trout and other aquatic resources and propose species-specific protective bypass flows and channel maintenance flows. The study should include, at a minimum:
 - a. A hydrologic study of the undisclosed modifications and proposed operations to determine if the production of the watershed is sufficient to provide the water requested without having significant adverse impacts to aquatic and riparian resources of the subject streams or downstream reaches.
 - b. An assessment of potential impacts to sensitive species due to diversions at San Lorenzo River and its tributaries. The assessment shall include a discussion of adverse impacts from operation of diversion facilities, as well as

effects of operations on instantaneous flows on downstream habitat. The use of additional water under a riparian claim should also be disclosed to allow adequate assessment of the full potential impacts of the project.

- c. An assessment of the impacts of the proposed on-stream reservoirs on channel forming flows with a specific proposal to provide periodic channel maintenance and flushing flows that are representative of the natural hydrograph. A plan to monitor compliance, the effectiveness of the stipulated flows on maintaining channel form, and procedures for making subsequent modifications, if necessary.
 - d. The diversion rate and quantity of water available for this diversion project while providing adequate flows for channel maintenance, breeding, fish migration and spawning during the diversion period. The study shall be provided for DFG's written concurrence prior to expansion of any diversion facility.
6. To reduce impacts due to abrupt changes in released or diverted flows to downstream fish resources, inflation of the diversion dam at Felton and bypass flows shall be modified incrementally to avoid sudden changes in flow which may cause fish stranding downstream of PODs. An Operations Plan including a ramping plan shall be provided to DFG for review and concurrence prior to construction. By July 1 of each year, a summary monitoring report conducted over the previous season shall be provided to DFG. The report shall provide a summary of the flow data collected in a manner that clearly demonstrates whether or not the flow and diversion rate conditions of the Agreement were met.
7. The Applicant shall submit an effectiveness monitoring plan for approval by DFG. The intent of this monitoring plan is to document and verify that project operations, including operations of Felton Diversion Dam and minimum bypass flows, are achieving the stated resource goals and providing sufficient rearing, spawning and passage for salmonids downstream of each diversion facility. The plan shall include the following elements:
- a. Identification of a date on which the annual report will be submitted.
 - b. Identification of monitoring points at critical passage areas, such as riffles or barriers, which will be monitored to ensure that passage has been achieved.
 - c. Identification of the methods and criteria used to evaluate the critical areas to determine whether habitat value and/or passage ability has been improved and, if so, by how much.
 - d. If the observed flows are not sufficient to keep fish in good condition, a description of possible additional measures that could achieve the desired ends.

Ms. Victoria Whitney

6

December 10, 2008

8. All pumping and diversion facilities shall be fitted with a fish screen that meets the NOAA Fisheries fish screening criteria. Screens shall be in place prior to any diversion of water and shall be maintained in good condition at all times when water is being diverted.
9. If unforeseen conditions arise which may cause adverse impacts to fish and/or wildlife resources or as further data is accumulated for analysis, the applicant may be required to remediate the situation to the satisfaction of DFG.
10. Permittee must agree to allow access for DFG personnel to monitor compliance.

All or some of these terms may be subject to modification or cancellation should facts warranting such action come to light at a later date.

If you have questions regarding this protest, please contact Ms. Corinne Gray, Environmental Scientist, at (707) 944-5526; or Mr. Greg Martinelli, Water Conservation Supervisor, at (707) 944-5570; or by writing to DFG at the memorandum address listed above.

cc: Mr. Chris Berry
City of Santa Cruz
Water Department
Post Office Box 682
Santa Cruz, CA 95061

Mr. Jon Ambrose
Ms. Joyce Ambrosius
NOAA Fisheries
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

Mr. Bryan T. Matsumoto
United States Army Corps of Engineers, San Francisco District
Regulatory Branch
1455 Market Street, 16th Floor
San Francisco, CA 94103

EXHIBIT 2



UNITED STATES MARINE CORPS
 WESTERN AREA COUNSEL OFFICE
 BOX 555231
 CAMP PENDLETON, CALIFORNIA 92055-5231

IN REPLY REFER TO:
 5090
 WACO
 7 Nov 2008

City of Santa Cruz
 Attn: Bill Kocher
 Director, Water Department
 P.O. Box 682
 Santa Cruz, CA 95061

Dear Mr. Kocher:

The Western Area Counsel Office, on behalf of the Marine Corps Base, Camp Pendleton, has submitted the enclosed administrative protest to the State Water Resources Control Board opposing the City of Santa Cruz's Petitions for Change to add Direct Diversion as a "Method of Diversion" for License 9847 (Application 17913) and Permits 16123 and 16601 (Applications 22318 and 23710, respectively). Santa Cruz's stated reason for these Petitions is to "increase operational flexibility and conform water rights to actual conditions."

Marine Corps Base, Camp Pendleton has no desire to interfere with the City of Santa Cruz meeting the water needs of its citizens. However, the manner in which Santa Cruz is attempting to change the operation of its water supply system cannot be ignored because it will have a profound impact on Marine Corps Base, Camp Pendleton. The Santa Margarita River was a principal reason for selection of Rancho Santa Margarita y Las Flores as the site of a United States Marine Corps amphibious training base in 1942. Water from the River remains critical to the mission of the Base today. For decades, Marine Corps Base, Camp Pendleton has relied upon State Water Resources Control Board precedents to help protect that water supply. Board approval of Santa Cruz's proposed change would establish precedent that would fundamentally alter Marine Corps Base, Camp Pendleton's standing within the Santa Margarita River watershed and place its water supply at risk.

Marine Corps Base, Camp Pendleton makes every effort to work with the surrounding communities and the State of California to improve the quality of life for all citizens—many of whom are active duty Marines and Sailors. Regrettably, in this instance, we simply cannot allow the State Board to consider Santa Cruz's Petitions for Change without our comment. This decision was made by the Commanding Officer, Marine Corps Base Camp Pendleton after due deliberation and a thorough examination of all alternatives. The potential impact on Camp Pendleton water rights dictates that we take this action.

Sincerely,

RALPH E. PEARCY II
 Counsel, Western Bases

Encl. (1) Protest
 Copy to: Martha Lennihan

State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS
P.O. Box 2000, Sacramento, CA 95812-2000
Info: (916) 341-5300, FAX: (916) 341-5400, Web: http://www.waterrights.ca.gov

PROTEST - (Petitions)

BASED ON ENVIRONMENTAL OR PUBLIC INTEREST CONSIDERATIONS
Protests based on Injury to Vested Rights should be completed on other side of this form

APPLICATION _____ PERMIT 16601 and 16123 LICENSE 9847

I, (We,) Marine Corps Base, Camp Pendleton
Name of protestant

of Box 555231, Camp Pendleton, CA 92055-5231 have read carefully
Post Office address of protestant

a notice relative to a petition for change or extension of time.

under APPLICATION 23710 of City of Santa Cruz
22318
11913
State name of petitioner

to appropriate water from San Lorenzo River (Permits 16601 and 16123) and Newell Creek (License 9847)
Name of source

It is desired to protest against the approval thereof because to the best of our information and belief:
my or our

the proposed change/extension will

- (1) not be within the State Water Resources Control Board's (SWRCB) jurisdiction
- (2) not best serve the public interest
- (3) be contrary to law
- (4) have an adverse environmental impact

State facts, which support the foregoing allegations See Attached Statement of Protest.

Under what conditions may this protest be disregarded and dismissed? None.
State conditions that will relieve protest, or if none, so state

A true copy of this protest has been served upon the petitioner at the address listed on the notice by certified mail.
Personally or by mail

Date 11/7/2008
Ralph E. Pearson II
Protestant(s) of Authorized Representative sign here

COUNSEL / WESTERN AREA COUNSEL / OFFICE
Protests MUST be filed within the time allowed by the SWRCB as stated in the notice relative to the change or such further time as may be allowed.

(NOTE: Attach supplemental sheets as necessary)

STATEMENT OF PROTEST

This is a statement protesting the approval of the Petitions for Change to add Direct Diversion as a "Method of Diversion" for License 9847 (Application 17913) and Permits 16123 and 16601 (Applications 22318 and 23710, respectively). This License and these Permits authorize collection to storage only, and do not authorize direct diversion. The Petitions for Change in Method of Diversion ("Petitions for Change") were filed on behalf of the City of Santa Cruz ("Petitioner") on December 21, 2006. The State Water Resources Control Board ("SWRCB") noticed these Petitions for Change on October 9, 2008, and the protest period is open until November 10, 2008.

Marine Corps Base, Camp Pendleton ("Protestant"), having relied upon the SWRCB precedents that Petitioner seeks to avoid and thereby overturn, has a material interest in the outcome of this proceeding and has a right to file a protest under Water Code Section 1330. According to those precedents, these changes in "Method of Diversion" should not be granted. The Protestant has complied with all protest requirements as identified in Water Code Section 1331 and California Code of Regulations Section 745. The Protestant's specific objections to the approval of the Petitions for Change are: (1) the proposed change is contrary to law; and (2) the proposed change will not serve the public interest. These objections are discussed in detail below.

I. THE PROPOSED CHANGE IS CONTRARY TO LAW

The petitioner has submitted Petitions for Change, under Water Code Section 1700, et seq., requesting that the SWRCB add direct diversion as a "method of diversion" for its License 9847, and Permits 16123 and 16601. This is not a permissible change under either the Water Code or the California Code of Regulations. Furthermore, SWRCB precedents prohibit the change requested by the Petitioner. Specifically, State Board Order No. WR 85-4 (1985) and State Board Decision No. 1308 (1968) expressly prohibit the very change that Petitioner has requested.

THE PROPOSED CHANGE IS NOT PERMISSIBLE UNDER EITHER THE WATER CODE OR THE CALIFORNIA CODE OF REGULATIONS

Water Code Section 1701 clearly sets forth the changes that may be made, with permission of the SWRCB, to an application, permit or license: (1) Point of Diversion, (2) Place of Use, or (3) Purpose of Use. The SWRCB has astutely determined the permissible changes under Water Code Section 1700, et seq. and formulated its standard Petition for Change form accordingly. The standard Petition for Change form provides a prospective petitioner 4 choices (each with a bracketed space in which to designate the change for which the petition is being made) for changes under Water Code 1700, et seq. – (1) Point of Diversion, (2) Point of Rediversion (a subset of Point of Diversion), (3) Place of Use, and (4) Purpose of

Use. The standard Petition for Change form does NOT provide the option to change the "Method of Diversion" to increase operational flexibility or to conform water rights to actual conditions, as requested by the Petitioner.

The Petitioner, without any authority to do so and contrary to the law and the provisions on the face of the official SWRCB form, deliberately altered the SWRCB's standard Petition for Change form by creating an additional bracketed space to allow for a "Change in Method of Diversion" and designating that "option" as its proposed change under Water Code 1700, et seq. The mere fact that the Petitioner altered the Petition for Change form to add its requested "Change in Method of Diversion" is an acknowledgment by the Petitioner that its requested change does not fall within the changes provided for by the SWRCB under Water Code 1700, et seq. Additionally, Petitioner's characterization of its effort to add direct diversion as a "Method of Diversion" under the change provisions of Water Code 1700, et seq. is an obvious attempt to avoid and thereby overturn SWRCB precedent, State Board Order No. WR 85-4 (1985), which expressly prohibits the very change proposed by the Petitioner.

The statutory language of Water Code section 1700, et seq. demonstrates that there is authority only for changes to "the Point of Diversion, Place of Use, or Purpose of Use." Attention is directed to the language found in the following sections of Water Code 1700, et seq.

- (1) Section 1701 is captioned "Change of Point of Diversion, or Place or Purpose of use; Permission", and expressly limits the changes for which Board permission may be sought to only changes to "Point of diversion, Place of Use, or Purpose of Use."
- (2) Section 1705 is captioned "Grant or refusal of permission", and expressly limits the changes for which Board permission may be granted to only changes to "the Point of Diversion, Place of Use, or Purpose of Use."

This language indicates that the California legislature intended only three possible changes under Water Code section 1700, et seq. The interpretive canon, *expressio unius exclusio alterius* (the express mention of one thing excludes all others) stands for the proposition that items not included on the list are assumed not to be included by the statute. *Chevron U.S.A. v. Echazabal*, 536 U.S. 73 (2002). When a list is intended to be illustrative, vice exclusionary, it is indicated as illustrative by placing a word (or phrase) before the list such as "including" or "including by not limited to." *Burgess v. United States*, 128 S. Ct. 1572 (2008). The language of the statute can only be interpreted to mean that the list of permissible changes under Water Code Section 1701 is exclusive.

The structure and purpose of the Water Code as a whole further demonstrates that the California legislature intended only three possible changes under Water Code section 1700, et seq. In Water Code section 1700, et seq., the California Legislature has provided the *water right holder* (applicant, permittee, or

licensee) *flexibility to change* certain features of their water right; however, this flexibility only extends to changes in the Point of Diversion, Place of Use, or Purpose of Use and is conditioned upon a showing of no injury and SWRCB approval. The term "Method of Diversion" is not mentioned anywhere in Water Code section 1700, et seq.; however, that term is found in other provisions of the Water Code, as in sections 100 and 275:

§ 100. Fullest beneficial use of water resources

It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. **The right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. (Emphasis added)**

275. Proceedings or actions by department and board

The department and **board shall take all appropriate proceedings or actions** before executive, legislative, or judicial agencies **to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state. (Emphasis added)**

In Water Code section 100, the California State Legislature makes it clear that the right to use water of the State does not extend to waste or the unreasonable method of diversion of water. In Water Code section 275, the California Legislature mandates that the SWRCB take all appropriate actions to prevent waste and the unreasonable method of diversion of water. In these Water Code provisions, the California Legislature has provided the *State Water Resources Control Board authority to limit or condition* certain features of a water right, such as Method of Diversion, for the purpose of preventing waste.

According to the Petition for Change, Petitioners stated reason for the proposed change is to "increase operational flexibility and conform water rights to actual conditions." While the California State Legislature has provided the *water right holder flexibility to change* certain features of their water right, this flexibility does not extend to changes to the Method of Diversion. The *State Water Resources*

Control Board is granted authority to limit and condition certain features of a water right, such as the Method of Diversion, for the purpose of preventing waste of the water resources of the State. Accordingly, the Method of Diversion may be limited or conditioned to prevent waste by the SWRCB, but it cannot be changed to increase the water right holders "operational flexibility" or to "conform water rights to actual conditions".

The SWRCB does enjoy broad authority over the administration of previously issued water rights, including authority to control and condition water use to protect the public interest and to ensure use of water consistent with public interest and protection of the environment. (See: *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District, et al*, 26 Cal.3d. 183, 198 (1980).) The SWRCB routinely uses this broad authority to control and condition water use by attaching terms and conditions to permits and licenses. The SWRCB has adopted administrative regulations that provide "Standard Permit Terms" designed to protect public trust uses and to prevent waste. Under Title 23, Chapter 2, Article 14 of the California Code of Regulations, the following term is included in every water right permit:

§ 780. Standard Permit Terms

(a) Continuing Authority. Pursuant to California Water Code Sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water.

The California Code of Regulations that provide the SWRCB with continuing authority over the Method of Diversion are designed to prevent waste of water; not increase flexibility for the water right holder. The California Regulations that provide the water right holder flexibility to change certain features of their water right is found in Title 23, Chapter 2, Article 15 of the California Code of Regulations, captioned "Changes in Point of Diversion, Place of Use, or Purpose of Use". Much like Water Code section 1700, et seq., the California Regulations governing change petitions provide an exclusive list of permissible changes: Point of Diversion, Place of Use, and Purpose of Use.

§ 791. Change Petitions

(a) After notice of an application to appropriate water has been given pursuant to Article 3, changes in point of diversion, place of use, or purpose of use as stated in the application, permit, or license may be allowed only

upon petition and provided that the petitioner establishes that the proposed change(s) will neither in effect initiate a new right nor injure any other legal user of water.

While not argued by the Petitioner, section 791(e) appears, at first glance, to allow changes other than Point of Diversion, Place of Use, and Purpose of Use. Section 791(e) provides:

(e) The procedures set forth in Articles 15, 16, 16.5 and 17 shall be followed as nearly as possible when filing and processing petitions for changes in permits or licenses other than changes in point of diversion, place of use, and purpose of use.

This regulation does not, and legally cannot, expand the list of permissible changes under Water Code 1700, et seq.,. It is a fundamental principle of administrative law that a regulation cannot abridge or enlarge the scope of a statute. *United States v. George*, 228 U.S. 14 (1913). Section 791(e) provides the SWRCB a mechanism to change or alter the *terms and conditions* it has imposed on water use under its broad authority over the administration of previously issued water rights. In recognition of the need to change the terms and conditions in permits and licenses from time to time, the SWRCB has created a mechanism to provide for changes in permits or licenses other than changes in Point of Diversion, Place of Use, and Purpose of Use. A review of SWRCB Orders demonstrates that Section 791(e) has been used to change *terms and conditions* imposed by the SWRCB and has not been used to change substantive features of the water right.¹

The language, structure, and purpose of the pertinent Water Code provisions and California Code of Regulations demonstrate that there is no legal authority to grant Petitioner's Change Petition. A *water right holder's flexibility to change* certain features of their water right extends only to Point of Diversion, Place of Use, and Purpose of Use. The *SWRCB's authority to limit or condition* certain features of a water right is exercised for the purpose of preventing waste – not to “increase operational flexibility” or to “conform water rights to actual conditions”, as the Petitioner requests.

SWRCB PRECEDENTS PROHIBIT THE PROPOSED CHANGE

Noticeably absent from the Petitions for Change is any reference to State Board Order No. WR-85-4 (1985) or State Board Decision No. 1308 (1968), which explicitly prohibit the very change that Petitioner requests. Petitioner has; however, submitted a copy of State Board Decision 940 (1959) with its Petitions for

¹ The following SWRCB Orders change “terms and conditions” pursuant to 791(e): WRO 2006-0009, WRO 2004-0035, WRO 2004-0033-DWR, WRO 2004-0005-DWR, WRO 2007-0028-DWR, WRO 2008-0029-EXEC

Change. Presumably, Petitioner submits this State Board Decision for the language included within the Decision that appears to support its Petitions:

“A direct diversion right can be converted to a storage right only to the extent there is no change in rate of diversion from the stream or in the period of the year during which the water is diverted”.

The Petitioner appears to be suggesting that a storage right can be converted to a direct diversion right based on the language in Decision 940. Decision 940 suggests that it might be possible to convert a direct diversion right to a storage right in limited circumstances. In the present case, Petitioner is requesting that a portion of its existing storage right be converted to a direct diversion right. This is a significant logical leap and there is no SWRCB precedent that allows such a change – converting a storage right to a direct diversion right. Decision 940 deals with a pre-1914 water right, to which the Water Code provisions under which Petitioner seeks its changes in this proceeding are inapplicable.² Perhaps more importantly, Decision 940 was issued long before State Board Order No. WR85-4 and State Board Decision No. 1308 and therefore was clearly overruled by the by the two later decisions.

Petitioner’s characterization of its effort to add direct diversion as a “Method of Diversion” under the change provisions of Water Code 1700, et seq. is an obvious attempt to overturn State Board Order WR 85-4. In State Board Order No. WR 85-4 (“Madera”), the SWRCB held that a change in method of diversion is not a change which can be made under Water Code Section 1700, et seq. Madera Irrigation District, the Petitioner in State Board Order No. WR-4, requested a change from direct diversion to diversion to storage and characterized their proposed change as a “change in place and purpose of use”. Madera Irrigation District, unlike the Petitioner in the present matter, attempted to characterize its proposed change as “change in place and purpose of use”, which are permissible changes under Water Code 1700, et seq. The SWRCB recognized that Madera’s requested change (direct diversion to diversion to storage) was actually a change in the Method of Diversion, and held that such a change cannot be made under Water Code Section 1700, et seq.

Petitioner notes in its cover letter: “There will be no change in the amount of water allowed to be diverted, the rate or season of diversion, or points of diversion.” Presumably the Petitioner makes this statement to highlight the similarities between its proposed change and the language included in Decision 940; as well as to alert the SWRCB Staff that their proposed change will not physically impact any other water users. In State Board Decision No. 1308, the State Board held that a diversion to storage undertaken pursuant to a direct diversion right, even at the authorized rate, quantity, and season, would necessarily be under a new right with a new priority date. State Board Decision No. 1308 makes clear that you can not simply change a direct diversion right to a storage right – any such attempt will be

² It is noted, however, that Water Code Section 1706, which is applicable to pre-1914 rights also limits changes under that statute to Point of Diversion, Place of Use, Purpose of Use.

treated like a new application to appropriate water and subject to a finding by the Board that water is available to appropriate.

Pursuant to California State legislation that requires state agencies to designate its precedent decisions, the SWRCB has designated "all decisions and orders adopted by the SWRCB at a public meeting to be precedent decisions, except to the extent that a decision or order indicates otherwise, or is superseded by later enacted statutes, judicial opinions, or actions of the SWRCB". (See: State Board Order WR96-1) Accordingly, State Board Order No. WR 85-4 and State Board Decision No. 1380 have been designated as precedential and can be relied upon as such. Further, State Board Order No. WR 85-4 and State Board Decision No. 1380 are later in time than State Board Decision 940. To the extent that State Board Decision 940 cannot be distinguished from the later Board Order and Decision, it has been overruled.

The SWRCB is not writing on a blank slate with regard to the issue raised by Santa Cruz' Petitions for Change. Accordingly, if the SWRCB intends to approve the Petitions for Change, it must provide a principled explanation for its departure from existing SWRCB precedent – State Board Order No. 85-4 and State Board Decision No. 1380. It is a well-settled proposition of administrative law that when an agency deviates from established precedent, it must provide a reasoned explanation for its failure to follow its own precedents. (See *Democratic Union Organizing Committee, etc. v. NLRB*, 195 U.S. App. D.C. 280 (1979).)

Nor is the SWRCB writing on a blank slate with regard to this specific request. As explained in a February 11, 1999 SWRCB contact report by Mark Stretars, an earlier attempt by Petitioner to make this same change was not even noticed because of the prohibition of such change decided in State Board Order No. 85-4.

II. THE PROPOSED CHANGE DOES NOT SERVE THE PUBLIC INTEREST

The proposed change to add Direct Diversion as a Method of Diversion to the existing storage rights does not serve the public interest. A direct diversion right and a storage right are physically and legally two different things. Approval of the Petitions for Change would establish precedent for a water right holder to fundamentally alter the nature of its water right – providing the water right holder an avenue to establish a new water right with a senior priority date. This would create uncertainty in the existing and time-tested system for the administration of water rights and, therefore, would not serve the public interest. Additionally, approving the Petitions for Change will encourage illegal and unauthorized diversions of water – allowing the water right holder the opportunity to "conform their water rights to actual conditions" (e.g., unauthorized diversions) sometime in the future. Furthermore, approving the Petition for Change will upset existing precedent that downstream entities have relied upon for decades in some instances.

A direct diversion right and a storage right are not the same thing. The purpose of a storage right is to collect water during times of higher stream flows and hold that water for use during a time of insufficient stream flow. Storage rights are quantified in "acre-feet per year" and a "collection season" is identified. SWRCB regulations require that water collected under a storage right be stored for more than 30 days before use. The purpose of a direct diversion right is to put water to immediate beneficial use – and a direct diversion right is limited to the amount of water that can be beneficially used – (e.g., you cannot put excess water into storage for later use). Direct Diversion Rights are quantified by a "rate" – (cubic feet per second or gallons per day) and a "diversion season" is identified. Approving the Petitions for Change will grant the Petitioner a new, and very different, water right that carries with it a senior priority date. This would undermine the fundamental principle of Appropriative Water Rights – "first in time, first in right".

Petitioners stated reason for the proposed change is "increased operational flexibility and conform water rights to actual conditions". This indicates that Petitioner has already obtained its operational flexibility through unauthorized direct diversions and is now requesting that the SWRCB change its water right to permit its currently unauthorized diversion. Approving this Petition for Change will only encourage other water right holders to inflate their current water rights with unauthorized diversions so that they can later request the SWRCB to conform its water right to its "new-and-improved actual condition". The SWRCB has rebuffed Water Right holders that have attempted to use unauthorized diversions as justification for a particular position. (See State Board Order WR 85-4 (concluding that the permittee's diversion of water at an unauthorized point of diversion and outside the season of diversion did not support an extension of time).) Quite simply, actual conditions should reflect existing water rights – this will ensure consistency in the administration of water rights and best serve the public interest.

The public interest is always served by consistency and predictability in Agency decision-making. Establishing a body of precedent that can be relied upon increases the consistency and predictability in Agency decision-making. Approving the Petitions for Change would result in overturning existing SWRCB precedents that have been relied upon by both the SWRCB³ and other entities, such as Camp Pendleton. Reasonable reliance on all precedential orders and decisions serves the public interest. Camp Pendleton has relied upon two very specific SWRCB precedents – State Board Order No. 85-4 and State Board Decision No. 1380 – to protect our standing in our particular watershed.

CONCLUSION

The Petitioner's proposed change to its water rights is not permitted under either the Water Code or the California Code of Regulation. There is established SWRCB precedent that prohibits Petitioners requested change and, for several

³ State Board Order No. 85-4 has been cited by the SWRCB in State Board Order WRO 2004-0029.

reasons, the change would not best serve the public interest. For all of these reasons, the Protestant believes that the Petitions for Change to add Direct Diversion as a "Method of Diversion" for license 9847 (Application 17913) and Permits 16123 and 16601 (Applications 22318 and 23710, respectively) should be denied. Further, Protestants request that the SWRCB deny the Petitions for Change without conducting a hearing, pursuant to Water Code Section 1704(c)(3), as the Petitions are defective and there are no disputed issues of material fact.

EXHIBIT 3

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permit 10472)
(Application 15287))
MADERA IRRIGATION DISTRICT,)
Permittee and Petitioner,)
UNITED STATES BUREAU OF RECLAMATION,)
Protestant.)

ORDER: WR 85-4
SOURCE: Fresno River
COUNTY: Madera

ORDER REGARDING PETITIONS FOR
EXTENSION OF TIME AND CHANGES FOR PERMIT 10472

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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permit 10472
(Application 15287)

MADERA IRRIGATION DISTRICT,

Permittee and Petitioner,

UNITED STATES BUREAU OF RECLAMATION,

Protestant.

ORDER: WR 85-4

SOURCE: Fresno River

COUNTY: Madera

ORDER REGARDING PETITIONS FOR
EXTENSION OF TIME AND CHANGES FOR PERMIT 10472

BY THE BOARD:

1.0 Madera Irrigation District (hereinafter "MID") having filed petitions for (1) an extension of time to complete construction and application of water to use under Permit 10472; (2) a change in the point of diversion and addition of two points of redirection; (3) a change from direct diversion at Franchi Weir to diversion to storage at Hidden Dam (termed by MID a change in place and purpose of use); (4) addition of a point of diversion at Island Tract; notice having been given and a protest received; notice of hearing having been given; a hearing having been held on November 16, 1982 to consider the petitions and to consider whether to revoke Permit 10472; the Board having considered all evidence in the record; the Board finds as follows:

2.0 BACKGROUND

On April 26, 1956 the State Engineer (predecessor to the Board) adopted Decision D 854, approving Water Right Application 15287.

Permit 10472 was subsequently issued on Application 15287, authorizing MID to divert up to 200 cubic feet per second from the Fresno River for irrigation purposes from November 1 of each year to April 30 of the next year. The water was to be spread on lands within MID's boundaries to arrest or retard the subsidence of groundwater levels. Complete application of water to beneficial use was to be made by December 1959. MID has since requested four extensions of time to complete the project. Extensions were granted in 1959, 1964, and 1969. The last date for completion was December 1974. MID requested a five-year extension in 1975. Action on this request was delayed to allow it to be processed with a petition MID intended to file to change the point of diversion and place of use. In 1980 MID instead filed a petition to change the point of diversion and to change from direct diversion to diversion to storage at Hidden Dam. This petition and the petition for extension of time are subjects of this proceeding.

3.0 SUBSTANCE OF PETITIONS

3.1 Petition for Extension of Time to Complete Project

In June 1975 MID filed the petition under consideration herein for extension of time to complete the project. This petition requested an additional five years to complete construction and put the water to full beneficial use. This petition has not been protested.

3.2 Petition to Change the Point of Diversion to Hidden Dam and to Change from Direct Diversion to Storage

In July 1980 MID filed its petition to change the point of diversion from Franchi Weir to Hidden Dam and to change from direct diversion at

Franchi Weir to storage at Hidden Dam with subsequent release and redirection at Franchi Weir and Island Tract. Under this petition MID would store water appropriated under Permit 10472 in Hensley Lake behind Hidden Dam. This change was requested to allow more convenient use of the water authorized to be appropriated.

4.0 PROTEST

The United States Bureau of Reclamation (hereinafter "Bureau") has a permit to store water in Hensley Lake behind Hidden Dam (Permit 16584, issued on Application 18733) up to the full conservation capacity of the lake. The Bureau protested MID's petition to change the point of diversion and to change from direct diversion to storage on the basis that authorizing MID to store water in Hidden Reservoir under Permit 10472, which is senior in priority to Permit 16584, would impair the Bureau's water right under Permit 16584.

5.0 PETITION FOR EXTENSION OF TIME OR CAUSE FOR REVOCATION

When Permit 10472 was issued, construction was to have been completed on or before December 1, 1958, and complete application of the water to the proposed use was to be made on or before December 1, 1959. In December 1959 the time to complete construction and application of water was extended to December 1, 1962. In January 1964 the time was extended to December 1, 1965. In January 1969 the time was extended to December 1, 1974. The current petition was filed in 1975.

A key issue in the hearing upon which this decision is made was, "Should permittee be granted an extension of time to complete the project or should Permit 10472 be revoked?" If good cause is shown, the Board may grant an extension. Water Code §1398. If, however, the Board finds that good cause is not shown, the Board should deny the petition for extension and either revoke the permit pursuant to Water Code §1410 et seq. or determine the rights which have vested by beneficial use of water under the permit and issue a license under Water Code §1610 confirming such rights.

Good cause for an extension of time is defined in the Board's regulations at 23 Cal.Admin.Code §779. This section states that an extension will be granted:

"[O]nly upon such conditions as the Board determines to be in the public interest and upon a showing to the Board's satisfaction that due diligence has been exercised, that failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and that satisfactory progress will be made if an extension of time is granted. Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not to the enterprise will not generally be accepted as good cause for delay."

Since 1975 MID has not, in its annual permit progress reports for Permit 10472, claimed any diversion and use of water under its permit during the authorized season of diversion (November 1 through April 30). In 1975 MID claimed diversion and use under its permit of small amounts of water in November, December, February and March. (See Staff Exhibit 1.) However, it reported use under its decreed

pre-1914 appropriative right (Union Colonization Co. et al. v. Madera Canal and Irrigation Co., Madera County Superior Court No. 687 (1916)) of much less than the 200 cubic feet per second authorized for the decreed right during those months. The decreed right is senior to Permit 10472. To prevent the establishment of water rights in excess of available water and in excess of the reasonable needs of the user, diverted water is credited to the senior right to the limit of that right. See Water Code §1201; Cal.Const. Art.X, Section 2. Only diversion in excess of the senior right can be credited to the junior right. Since less than 200 cfs was being diverted, the flow must be accounted for under the decreed right during those months. Consequently, the flows claimed in 1975 for Permit 10472 should have been attributed to the more senior decreed right. Attributing the 1975 flows to the decreed right, there were eight years before the hearing in November 1982 in which MID did not use water under Permit 10472. Subtracting the drought years of 1976 and 1977, there were six years of nonuse. Under a vested right, water not used for five years may revert to the public. Water Code §1241. Here, we are asked to grant an extension of time where the water under a nonvested right has been unused for more than five years. Where water has been unused long enough to forfeit a vested right, and could have been used in the exercise of due diligence, as herein, it can be concluded that the permittee has not exercised due diligence and has not applied the water to beneficial use as contemplated in Permit 10472.

MID's case for an extension of time is dependent primarily on the Board's granting it the right to store water in Hidden Reservoir under

the permit instead of diverting it to direct application to land. If the change in point of diversion and the change from direct diversion to storage is not approved, it is unclear whether MID will make satisfactory progress toward completing its construction and use of water under Permit 10472. MID's witness testified that MID does not want to divert water to underground storage as authorized under the permit because the expense of extracting the water from underground has increased, so that surface storage is now much more economical. (See Reporter's Transcript p. 63, l. 11-26.)

The permittee has attempted to show use of water under the permit by alleging diversion at an unauthorized diversion point and by alleging use outside of the authorized season of diversion and use. These allegations do not support an extension of time, because they do not include diversion and use under the permit. Instead, they indicate unauthorized diversion without claim of right.

Evidence in the record shows that MID is receiving as much water as it can use for irrigation. If it used water under Permit 10472, it would have to refuse water from the Bureau delivered via the Madera Canal, for which it has contracted and for which it must pay regardless whether it uses the water. (See, for example, Reporter's Transcript p. 62, l. 9-15.) Since MID has not been using water available under Permit 10472, it is apparent that MID has no need for this water right.

Considering the lack of progress toward completing the project and toward applying the water to beneficial use in accordance with the

permit, the failure to use water at all for a period of five years or more, and the lack of evidence that the project will be completed as permitted if an extension is granted, we find that the permittee has failed to show due diligence in prosecuting completion of the project and in utilizing the water for beneficial purposes. We also find based on these facts that grounds exist to revoke the permit. The failure to show due diligence is not excused by MID's reasons for delay. These reasons are budgetary restrictions after the adoption of California Constitution Article 13A in 1978, increasing construction costs, and delays in construction of Hidden Dam. The first two are financial reasons and are not good cause for delaying completion of a project. 23 Cal.Admin.Code §779. In fact, the first reason tends to show that satisfactory progress will not be made even if an extension of time is granted. The third reason is unrelated to completion of the project under the current terms and conditions of the permit and is therefore also not good cause for delay.

Because the permittee has failed to show due diligence, and has failed to apply water to beneficial use as contemplated in the permit for five years or more, we will deny an extension of time to complete the project and will revoke the permit. If, after a further hearing as provided in Order paragraph 5, we decide not to revoke Permit 10472, we will cause licensing proceedings to be commenced pursuant to Water Code §1600 et seq.

6.0 PETITION TO CHANGE THE POINT OF DIVERSION AND TO CHANGE FROM DIRECT DIVERSION TO STORAGE

The change requested by MID would allow MID to store up to the equivalent of 200 cfs in Hensley Lake during the authorized diversion

season instead of directly applying the 200 cfs to land. This amount of storage would be roughly equivalent to the capacity of Hensley Lake. While discussion of this change may be unnecessary in view of our determination that Permit 10472 should be revoked, we discuss it herein as an alternative decision in the event that the revocation is not consummated or is set aside.

6.1 Board's Power to Authorize the Requested Change

MID argues that the Board can authorize this change under Water Code §1700 et seq., as a change in purpose of use. The Bureau argues that the change cannot be made under §1700 et seq.

MID argues that under Water Code §1266 storage of water is a purpose of use, and that under Water Code §1700 et seq. the Board can change the purpose of use from direct application to land (irrigation) to storage. However, §1266 cannot be construed as making storage a purpose of use. Instead, the purpose of the section is to specify the information required if a water right applicant intends to store water in a reservoir. Thus, the requested change is not a change in purpose of use.

As it is described by MID, the requested change appears to be a change in the method of diversion, from direct diversion to diversion to storage, and a change in the point of diversion. If the change is a change in method of diversion, it is not a change which can be made under Water Code §1700 et seq. However, the permitted direct diversion may be construed as a diversion to storage because of its

characteristics. Permit 10472 authorizes diversion of water for spreading on land from November 1 through April 30. Pursuant to Water Right Decision D 854, this water was to be used for groundwater recharge during the authorized diversion season, and could be extracted from the ground when needed for irrigation of crops. The Board's predecessor stated in D 854 that it expected this use to retard declines in groundwater levels. Since groundwater recharge is a form of storage (see Water Code §1242), the implication in Decision D 854 and in Permit 10472 that the water right at issue is not a storage right, may be misleading. Thus, the Board arguably could authorize the change as a change in point of diversion if it made the necessary findings. If the Board were to authorize the change, however, it should quantify the authorized annual amount of storage in acre-feet.

6.2 Injury to Legal User of Water

The Bureau argues that approval of the requested change would operate to its injury, and that consequently the change cannot be approved. The Bureau's argument is based on Water Code §1702, which requires that before the Board gives a petitioner such as MID permission to make a requested change, the Board must find that the change will not operate to the injury of any legal user of water. As the Bureau points out, Hensley Lake is not physically large enough to store both the water under the Bureau's Permit 16584 and the water under MID's Permit 10472. Since Permit 10472 is senior, it would be stored first, precluding storage under Permit 16584. Nonuse of Permit 16584 for five years could result in its revocation.

MID argues that the change will not operate to the injury of the Bureau, and that in any event §1702 does not protect a junior appropriator such as the Bureau.

6.2.1 Arguments That No Injury Will Result From the Change

MID cites two reasons why the Bureau will not be injured. First, MID argues that the proposed change would conserve water and energy to extract the water diverted under Permit 10472 from the ground. MID reasons that under Water Code §1011 (no forfeiture of appropriative right if water use is reduced because of conservation) a reduction in diversion under the Bureau's Permit 16584 to accommodate storage of water under Permit 10472 would not result in the Bureau's loss in part or in whole of Permit 16584.

This argument fails for two reasons. (1) While the proposed change arguably might reduce the energy MID consumed,¹ it would not reduce MID's use of water under Permit 10472. Instead, MID's use of water under Permit 10472 likely would increase. Water Code §1011 applies to a reduction in use of water, not energy. (2) Water Code §1011 protects a permittee who reduces water use by engaging in a conservation effort. It does not protect another permittee such as the Bureau who would be forced to reduce its diversions because it has inadequate storage space. Nor can it be construed to allow one permittee to change its diversion of water at the expense of another

¹ Since MID did not divert water under Permit 10472 for several years before the hearing, it is doubtful whether there would be an actual reduction in energy use.

permittee. Consequently, the Bureau is not protected by Water Code §1011 from loss of its appropriative water right if the requested change is approved.

Second, MID argues that the Bureau will not be injured because the Bureau has waived its right, as against MID, to store water in Hensley Lake. This argument is based on MID's contention that a contract between MID and the Bureau gives MID the sole right to store water in Hensley Lake and that MID has been storing water pursuant to the contract in Hensley Lake under Permit 10472 since Hidden Dam became operational. However, we note that the Bureau cannot by contract authorize a change in the terms and conditions of MID's water right permit. Only the Board can do this. Water Code §§1250, 1701. Thus, MID's contention that it has already stored water in Hidden Dam under Permit 10472 cannot be accepted. Any contract between the Bureau and MID purporting to allow this would have no force or effect.

Further, the Board has received evidence that water has been stored in Hensley Lake under the Bureau's permit continuously since Hidden Dam commenced operation. Thus, MID's contention that it has been storing its own water in Hensley Lake conflicts with evidence of storage under the Bureau's permit. We find that any water stored in Hidden Lake under a water right permit has been stored under Permit 16584.

Additionally, it is doubtful that the contract means what MID claims it means. It contains no language explicitly authorizing MID to store water in Hensley Lake other than water diverted under the Bureau's permit. It would strain the limits of logic to the breaking point to

conclude, as MID requests us to, that MID's contractual right to request storage or release of water means that the water is not stored and released under the Bureau's permit.

6.2.2 Protection of Junior Appropriators Under Water Code §1702

Finally, contrary to MID's assertion, Water Code §1702 protects a junior appropriator such as the Bureau. Section 1702 provides:

"Before permission to make such a change is granted the petitioner shall establish, to the satisfaction of the board, and it shall find, that the change will not operate to the injury of any legal user of water." (Emphasis added.)

The plain language of this section is that it protects any legal user of water. Its protection is not limited to senior water right holders. Thus, if the proposed change would operate to the injury of the Bureau, a legal user of water, the Board could not give permission for the change. Based on the foregoing discussion, we find that the proposed change to divert water at Hidden Dam and store it in Hensley Lake would operate to the injury of the Bureau with regard to its diversion to storage and use of water appropriated under Permit 16584.

6.2.3 Public Interest Considerations

Even if it were found that there would be no injury to the Bureau, however, the change would not best develop, conserve and utilize water in the public interest, because it would actually reduce the water supply available to MID (see paragraph 6.3, infra, and record cited therein). Under Water Code §1253, therefore, this change should not be made.

The proposed change also is not in the public interest because it would contribute to uncertainty in the Bureau's exercise of its water rights. Such a result would be contrary to the policy expressed in In re Waters of Long Valley Stream System, 25 Cal.3d 339, 158 Cal.Rptr. 350 (1979). Therein, the court stated that: "Uncertainty concerning the rights of water users has pernicious effects." (25 Cal.3d at 355, 158 Cal.Rptr. at 360.) "Uncertainty also fosters recurrent, costly and piecemeal adjudication." (25 Cal.3d at 355, 158 Cal.Rptr. at 360.) "Finally, uncertainty impairs the state's administration of water rights." (25 Cal.3d at 356, 158 Cal.Rptr. at 360.) Concluding, the court stated: "[C]larity and certainty foster more beneficial and efficient uses of state waters as called for by the mandate of article X, section 2." Thereupon, the court made a holding which would promote certainty in the exercise of water rights.

Because of injury to the Bureau and because the proposed change would not be in the public interest, the proposed change will be denied.

6.3 Effect of Proposed Change on Water Supply

If the Board authorized MID to move the point of diversion under Permit 10472 to Hidden Dam and store water behind Hidden Dam for use in another season, the water would occupy a substantial space in Hensley Lake. Theoretically, MID could store enough water to fill Hensley Lake if water were continuously available to supply the 200 cfs authorized under Permit 10472 during the diversion season.² Any

² It is questionable whether 200 cfs is ever continuously available during the authorized diversion season. The Board's findings in D 854, pages 18-20, show that the supply of water for Permit 10472 is very irregular.

space in Hensley Lake occupied by water appropriated under Permit 10472 would not be available for water appropriated under Permit 16584, and water available for appropriation under Permit 16584 would not be stored. However, if the point of diversion for Permit 10472 is not moved to Hidden Dam, it will be possible to appropriate the full amount of water under both permits, subject to availability. (See Reporter's Transcript, p. 62, l. 4-15.)

Since MID is the recipient of the water appropriated under both permits (See Permit 16584 and Permit 10472; Reporter's Transcript, p. 46, l. 15 - p. 48, l. 1; p. 52, l. 22 - p. 53, l. 20.), the effect of the proposed change would be to reduce the water supply available to MID by the amount of water available for appropriation under Permit 10472.

6.4 Point of Diversion at Island Tract

MID has indicated that it wants to add a point of diversion at Island Tract, even if it is not granted permission to divert at Hidden Dam. We find that a change adding a point of diversion at Island Tract would not injure any legal user of water. Consequently, if Permit 10472 is not revoked, we herein grant permission for such change.

7.0 CEQA COMPLIANCE

If Permit 10472 is revoked, the provisions of the California Environmental Quality Act will be inapplicable. Public Resources Code §21080(b)(5).

This order alternatively authorizes the addition of a point of diversion at Island Tract pumping station, an existing facility. There would be a negligible expansion of use of the pumping station as a result of the addition of the point of diversion. This would be a minor change which is exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 21000 et seq.) in accordance with 14 Cal.Admin.Code §15301.

8.0 CONCLUSION

Based on the foregoing findings, the Board concludes that except for addition of a point of diversion at Island Tract the petitions of MID regarding Permit 10472 (Application 15287) should be denied, and Permit 10472 should be revoked.

ORDER

IT IS HEREBY ORDERED THAT:

1. Madera Irrigation District's petition for an extension of time to complete construction and application of water to full beneficial use under Permit 10472, is denied.
2. Madera Irrigation District's petition to change the point of diversion under Permit 10472 from Franchi Weir to Hidden Dam and to add points of rediversion at Island Tract and Franchi Weir is denied.

3. Madera Irrigation District's petition for a change from direct diversion to diversion to storage is denied.
4. Madera Irrigation District's petition to add a point of diversion at Island Tract pumping station is approved as a point of direct diversion if Permit 10472 is not finally revoked.
5. This Order shall be deemed a notice of proposed revocation under Water Code §1410. Unless a written request for a further hearing signed on behalf of the permittee is delivered or mailed to the Board within 15 days after receipt of this Order or within the period allowed for reconsideration of this Order under Water Code §1357, whichever is later, the Board may act upon the proposed revocation without a further hearing. Any request for a further hearing may be made by delivering or mailing the request to the Chief of the Division of Water Rights at 901 P Street, Sacramento, California, or P. O. Box 2000, Sacramento, California 95810.

Any request for a further hearing on the revocation must include an offer of evidence relevant to the proposed revocation. Such evidence may not be repetitive of the evidence already received by the Board in this matter. The existing record in this proceeding, including all transcripts taken and exhibits received in evidence shall be part of the evidentiary record in any further hearing in this matter and official notice of such record shall be taken in any such hearing.

If, as a result of any further hearing in this matter the Board decides not to revoke Permit 10472, the Board will instruct the Division of Water Rights to commence licensing proceedings with regard to Permit 10472.

CERTIFICATION

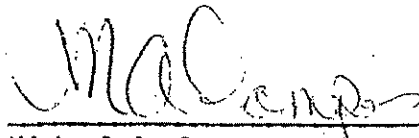
The undersigned, Executive Director of the State Water Resources Control Board, does hereby certify that the foregoing is a full, true, and correct copy of a Order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 16, 1985.

AYE: Raymond V. Stone
Kenneth W. Willis
Darlene E. Ruiz
Edwin H. "Ted" Finster

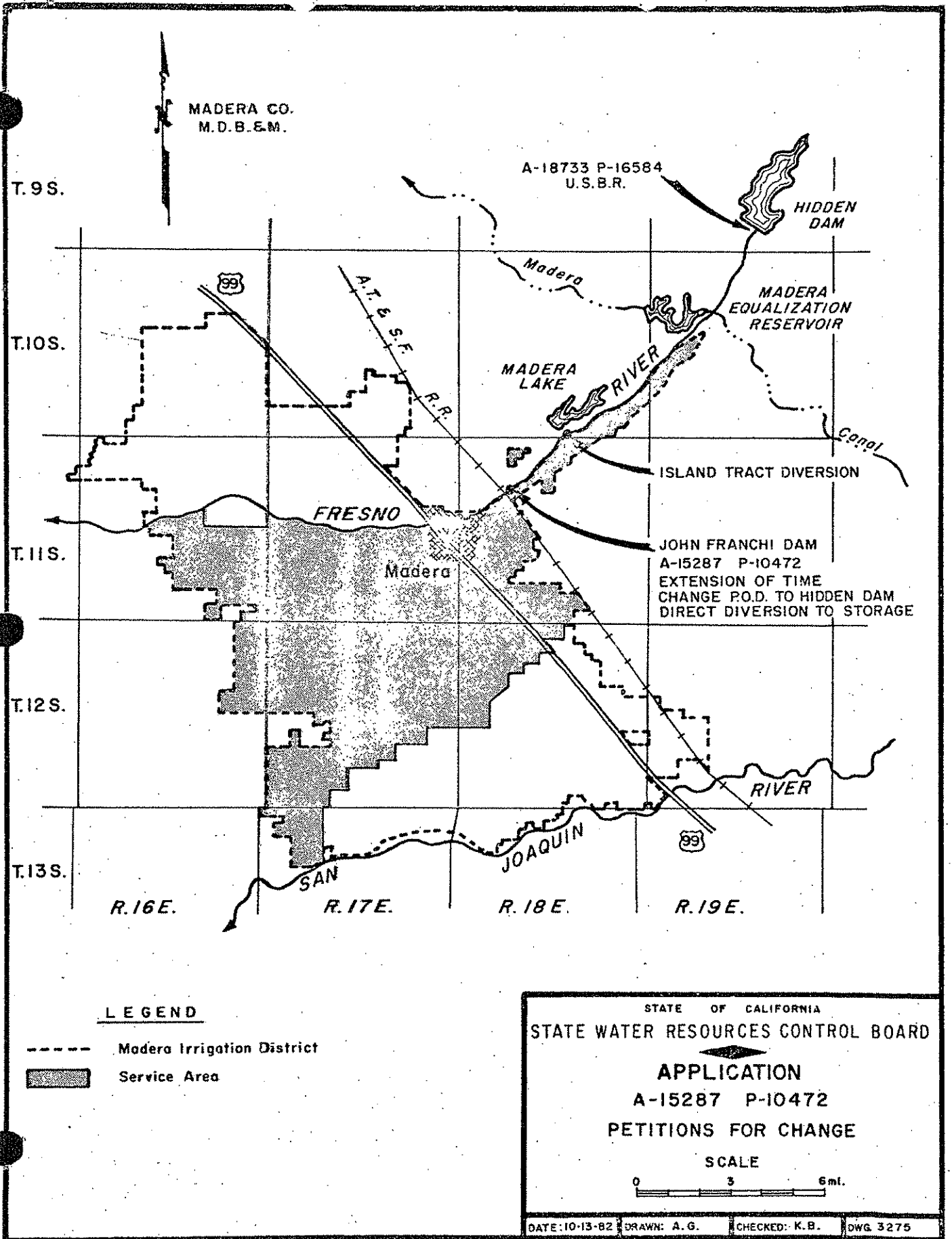
NO:

ABSENT:

ABSTAIN:



Michael A. Campos
Executive Director



LEGEND

- Madera Irrigation District
- █ Service Area

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

APPLICATION
A-15287 P-10472
PETITIONS FOR CHANGE

SCALE

0 3 6mi.

DATE: 10-13-82 DRAWN: A.G. CHECKED: K.B. DWG 3275

EXHIBIT 4

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 22316 by)
UNITED STATES BUREAU OF RECLAMATION,)
Applicant,)
DELTA WATER USERS ASSOCIATION, et al.,)
Protestants.)
Rock Slough in Contra Costa County)

Decision 1308

Amended by Order 9/5/68

DECISION APPROVING APPLICATION IN PART

Introduction

Application 22316, filed by the United States Bureau of Reclamation, is for a permit to appropriate 5,400 acre-feet annually by storage in Contra Loma Reservoir to be collected from January 1 to December 31 of each year from Rock Slough, which connects with Old River, a San Joaquin River-Delta channel. Protests were filed and a hearing was held on February 15, 1967, by the State Water Rights Board (predecessor of the State Water Resources Control Board). At the hearing, amendments to the application were offered and accepted which added recreation as a use, increased the place of use to include a small recreation area around the reservoir, and corrected

the estimated acreage of the place of use to read 120,000 acres. As amended, the application is for water to be used for irrigation, domestic, municipal, industrial, water quality control, and recreational purposes on 120,000 acres of land in Contra Costa County as delineated on a map filed with the application.

Description of the Project

The water applied for is to be diverted and conveyed by and through the existing Contra Costa Canal System when there is unused capacity, to a point near the Contra Loma Reservoir, where it will be lifted into the reservoir by a combination of pumps with a designed capacity of 21.16 cubic feet per second. The Contra Costa Canal System, a unit of the Central Valley Project (CVP), diverts water from Rock Slough through a series of four pumping plants, each with five pumps. Total or partial shutdown of any pumping plant due to power, pump, or motor failure interrupts service which is more than 90 percent to municipal and industrial users. Water stored in Contra Loma Reservoir will be released as necessary primarily to maintain the flow in the Contra Costa Canal when the normal supply fails, thereby increasing the reliability of the system. The reservoir will have an active capacity of 1,800 acre-feet and will be filled not more than three times a year.

Availability of Unappropriated Water

Application 22316 was accepted and processed pursuant to statutory and regulatory provisions as an application for a permit to appropriate unappropriated water. The application is on the standard printed form, which states that the applicant "does hereby make application for a permit to appropriate the following described unappropriated waters from the State of California." However, in a supplement attached to and made a part of the application, the applicant states, "Direct diversions of water to be stored in the Contra Loma Reservoir will be made under Applications 9366 and 9367 held by the United States. Re-diversion of Central Valley Project water will also be made under United States Applications 5626 [etc.] to supplement the diversions for storage requested in this application." This statement together with testimony by the applicant's witness at the hearing indicates that the applicant is requesting a permit to store 5,400 acre-feet of water annually, which it proposes to divert or redivert from Rock Slough under existing permits.

While it is true that the applicant now has permits which authorize direct diversion of not to exceed 350 cubic feet per second all year from Rock Slough through the Contra Costa Canal and that water will not be diverted at a greater

rate with Contra Loma Reservoir in operation, applicant's right under these permits does not entitle it to divert more water than is beneficially used in the authorized manner, which means that these permits do not authorize diversion from Rock Slough into storage even though such diversion is within the authorized rate, quantity, and season. Any water placed in storage will necessarily be diverted from Rock Slough under another right and will have the priority of such other right. It follows that Application 22316 must be treated on the same basis as any other application and its approval depends upon a finding by the Board that unappropriated water is available in Rock Slough.

There can be no question as to the availability of 5,400 acre-feet of unappropriated water in the Delta on an annual basis, but the season of availability is limited. For several years, it has been the policy of this Board to exclude July, August, and September from the season of diversion from the Delta based on numerous water rights studies which show only small quantities of water available in some of these months, with rare frequency. In Decision D 1291, on reconsideration of Decision D 1275, which dealt with appropriations for the State Water Project, an exception to the general rule was found justified under the particular circumstances. For any application with a later priority,

the frequency and quantities of water available in the Delta during July, August, and September as shown by conventional water rights studies would be insignificant. USBR Exhibit No. 16, which presents data on inflow to the Delta in a typical wet year with and without operation of the CVP, demonstrates that after all Delta users are satisfied, the water available in the Delta during July, August, and September is water which has been released from CVP storage. Therefore, as the only water available in the Delta in these months for diversion to storage in Contra Loma Reservoir by the United States is water released from CVP storage which it is entitled to redivert under its existing permits, these months will be excluded from the season of diversion in the permit issued pursuant to this application for unappropriated water. A permit so restricted will allow the applicant to operate as planned, either diverting pursuant to this permit or rediverting pursuant to other permits (USBR Exh. 3) to storage in Contra Loma Reservoir at any time of the year.

Water Quality

The only issue raised at the hearing concerned the protection of water quality in the Delta. Protestants contended that the applicant was requesting a permit to

divert water at times when it would not divert water under its existing permits and that the quality of water in the Delta should be protected by a condition in the permit restricting diversion when the quality was below minimum standards as defined in Delta Water Quality Criteria dated November 19, 1965 (USBR Exh. 17).

The applicant contended that high quality water is required for the use to be made of water diverted from the Delta under this application so that it must necessarily maintain a satisfactory quality of water in the Delta and no restrictions are necessary.

The subject of water quality in the Delta was considered in Decision D 990; the Board found that sufficient information was not available to formulate conditions regarding water quality in the Delta and reserved jurisdiction to consider the question at a later date. As this application and the applications considered in Decision D 990 are for water to operate the same unit of the Federal Central Valley Project, the same reservation of jurisdiction will be made in the permit issued on this application.

~~Deleted~~ In Decision D 1275 as amended by Decision D 1291, which approved applications for water to operate the State Water Project, the Board also reserved jurisdiction with regard to water quality control in the Delta, but imposed

[certain restrictions in the interim until a final determination can be made on the subject. It was determined that no restrictions were necessary during December through March, that restrictions defined in Condition No. 15 should apply during April through June, and that compliance with the contract between the State Department of Water Resources and Delta water users would provide reasonable protection during the balance of the year. Nothing has occurred in the relatively short interval since Decisions D 1275 and D 1291 were issued to change this situation, so that the findings therein with regard to interim quality requirements are adopted for the purposes of this decision. Therefore a condition similar to Condition No. 15 of Decision D 1275 will be included in the permit to be issued pursuant to this application, but as the present applicant has not entered into a contract with regard to Delta water quality, there will be no requirement comparable to Condition No. 16-a of Decision D 1275. July, August, and September will be excluded from the season of diversion pursuant to this application, which leaves only October and November to be considered. In view of the relatively small quantity of water involved in this application and the evidence that the operations [of the applicant require high quality of water in the Delta

when it is diverting, the Board concludes that no other condition relative to interim water quality standards is necessary.]

Other Permit Terms

The applicant holds Permits 12725 and 12726 (Applications 9366 and 9367) issued pursuant to Decision D 990, which contain limitations on the rate at which water may be diverted equal to the maximum capacity of the Contra Costa Canal System. As diversion under this application will utilize part of the capacity of the system and will supply part of the demands on the system, the combined rate of diversion under the permit issued on this application and Permits 12725 and 12726 will be limited as in the present permits.

As Contra Loma Reservoir is an integral part of the CVP, Conditions Nos. 22, 25, 26, 27 and 28 of Decision D 990 will be included in the permit issued pursuant to this application.

Conclusion

The evidence indicates, and the Board finds, that unappropriated water exists in the Delta at times and in sufficient amounts to justify the approval of Application 22316 in part; that the uses proposed are beneficial;

that such waters may be taken and used as proposed, subject to certain conditions, without interference with the exercise of prior rights; and that the application should be approved and a permit issued pursuant thereto, subject to the usual terms and conditions and the additional terms and conditions indicated in this decision. The Board finds that as so conditioned the developments proposed in this application will best develop, conserve, and utilize in the public interest the water sought to be appropriated.

ORDER

IT IS HEREBY ORDERED that Application 22316 be, and it is, approved in part, and that a permit be issued to the applicant subject to vested rights and to the following limitations and conditions:

1. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 5,400 acre-feet per annum by storage to be collected at a maximum rate of 21.16 cubic feet per second from about October 1 of each year to about June 30 of the succeeding year.

This permit does not authorize collection of water to storage outside the specified season to offset evaporation and seepage losses or for any other purpose.

2. The maximum quantity herein stated may be reduced in the license if investigation warrants.

3. Complete application of the water to the proposed use shall be made on or before December 1, 1990.

4. Progress reports shall be filed promptly by permittee on forms which will be provided annually by the State Water Resources Control Board until license is issued.

5. All rights and privileges under this permit, including method of diversion, method of use and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water.

6. The combined rates of diversion from Rock Slough, pursuant to this permit and permits numbered 12725 and 12726 (Applications 9366 and 9367), shall not exceed 350 cubic feet per second.

7. Storage of water under this permit for use beyond the Sacramento-San Joaquin Delta* or outside the watershed of the Sacramento River Basin** shall be subject to rights initiated by applications for use within said watershed and Delta regardless of the date of filing said applications.

8. The State Water Resources Control Board reserves continuing jurisdiction over this permit for such time as may be prescribed by the Board, for the purpose of formulating terms and conditions relative to salinity control in the Sacramento-San Joaquin Delta. Permittee shall, on or before January 1, 1969, and each six months

* For the purpose of this order the Sacramento-San Joaquin Delta shall be that area defined in Water Code Section 12220.

** For the purpose of this order the Sacramento River Basin shall be that portion of the State encompassed by a line beginning at the Sacramento-San Joaquin Delta at Collinsville; thence northeasterly to the crest of the Montezuma Hills; thence northwesterly through the crest of the Vaca Mountains; thence northerly along the crest of Putah, Cache, Stony, Thomes, and Cottonwood Creek Basins and along the crest of the Trinity Mountains to Mt. Eddy; thence easterly through Mt. Shasta and along the northern boundary of the Pit River Basin to the crest of the Warner Mountains; thence southerly and westerly along the boundary of the Pit River Basin to Red Cinder Cone Peak; thence easterly along the northern boundary of the Feather River Basin to the crest of the Sierra Nevada; thence southerly along the crest of the Sierra Nevada to the southern boundary of the American River Basin; thence westerly along the southern boundary of the American River Basin to the eastern boundary of said Delta; thence northerly, westerly, and southerly along the boundary of the Delta to the point of beginning.

thereafter, submit to the Board a written report as to the progress of negotiations relative to agreement between permittee and the State of California and/or the permittee and water users in the Delta and in Northern Contra Costa County.

9. The Board reserves continuing jurisdiction over this permit for an indefinite period not to extend beyond the date of issuance of license for the purpose of coordinating terms and conditions of the permits with terms and conditions which have been or which may be included in permits issued pursuant to other applications of the United States in furtherance of the Central Valley Project and applications of the State of California in furtherance of the State Water Resources Development System.

~~Deleted~~ 10. Until further order of the Board, no water shall be diverted to storage under this permit during the period from April 1 through June 30 at any time the maximum surface zone chloride ion content of the San Joaquin River at Blind Point exceeds 250 parts per million. If Blind Point is not used as a monitoring station, permittee shall establish a correlation with some other station satisfactory to the Board to provide the necessary data on quality at Blind Point.)

¹⁰
11. Upon the request of the Board, permittee shall make such measurements and maintain and furnish to the Board such records and information as may be necessary to determine compliance with the terms and conditions of this permit, including the recognition of vested rights and for the further purpose of determining the quantities of water placed to beneficial use under the permit.

¹¹
12. This permit shall be subject to "Agreement Between the United States of America and the Department of Water Resources of the State of California for the Coordinated Operation of the Federal Central Valley Project and the State Feather River and Delta Diversion Projects" dated May 16, 1960, filed of record as Department of Water Resources Exhibit 77 at the hearing on Applications 5625, 5626, 9363, 9364, 9365, 9366, 9367, 9368 and 10588.

Adopted as the decision and order of the State
Water Resources Control Board at a meeting duly called
and held at Eureka, California.

Dated: JUL 18 1968

/s/ George B. Maul
George B. Maul, Chairman

/s/ W. A. Alexander
W. A. Alexander, Vice Chairman

/s/ Ralph J. McGill
Ralph J. McGill, Member

/s/ Norman B. Hume
Norman B. Hume, Member

/s/ E. F. Dibble
E. F. Dibble, Member

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 22316 by)
UNITED STATES BUREAU OF RECLAMATION,)
Applicant,)
DELTA WATER USERS ASSOCIATION, et al.,)
Protestants.)

Source: Rock Slough
County: Contra Costa

ORDER AMENDING DECISION 1308 AND IN OTHER RESPECTS
DENYING PETITIONS FOR RECONSIDERATION

Petitions for reconsideration of Decision 1308 were filed by the United States Bureau of Reclamation and the Contra Costa County Water District.

The Bureau objects to the Board's finding that no unappropriated water is available for appropriation under Application 22316 during the months of July, August and September. In its petition, the Bureau states that the primary purpose of this application was to provide for the temporary offstream storage in Contra Loma Reservoir of water diverted under permits issued on Applications 9366 and 9367 and that storage in Contra Loma Reservoir will not result in an increase over the actual scope of the appropriation envisioned by Applications 9366 and 9367 but is part of the progressive development originally contemplated and consummated with due diligence. The Bureau contends the Board was in error in its findings that existing permits issued pursuant to Applica-

tions 9366 and 9367 do not authorize diversion from Rock Slough into storage and that Application 22316 must be considered as a separate application to appropriate unappropriated water.

In substance, the Bureau seems to be proposing that the Board issue a new permit which would authorize a change under the existing permits from direct diversion to direct diversion in part and diversion to storage in part. The contentions of the Bureau do not raise any issues that were not considered and discussed in Decision 1308. Existing permits cannot be amended by issuing a new permit. Each application for a permit must be judged on its own merits and in light of availability of unappropriated water at the time the application was filed. The contention of the Bureau that diversion to storage will not increase the scope of the appropriation envisioned by Applications 9366 and 9367 but is part of the progressive development originally contemplated, is incorrect. Applications 9366 and 9367, which were state filings, clearly set forth the plan and intent that the proposed appropriation was to be accomplished by direct diversion only, from which it follows that a right cannot be acquired under these applications to more water than can be beneficially used by direct diversion. Since storage of water in Contra Loma Reservoir will cause more water to be used than would be used by direct diversion, such storage must be under a new and separate water right.

The petition of the Bureau includes a request for reconsideration of Paragraph 10 of the order, pertaining to protection of water quality in the Delta. Paragraph 10 was included on the theory that the restrictions on the right acquired under this application should be consistent with the restrictions imposed on the State of California for diversions from the Delta under applications with earlier priority. Such consistency should undoubtedly be the eventual objective. However, a permit issued pursuant to this application will be interrelated with the other permits held by the Bureau for the Central Valley Project, including permits for direct diversion and rediversion of water by means of the Contra Costa Canal. It would serve no useful purpose and would be impractical to require the Bureau to observe water quality criteria when diverting water to storage which it need not observe when diverting water through the same canal for use without storage. Also, the same reservation of jurisdiction over water quality protection in the new permit as in the old permits will provide the basic protection to Delta water users. Little or no additional protection would result from interim restrictions in the new permit, particularly in view of the small quantity of water involved in comparison to the total quantity of water authorized to be diverted from the Delta under existing permits which do not include interim quality restrictions. Therefore, it is concluded that a

special condition in the permit relative to interim water quality standards is not necessary.

The petition of the Contra Costa County Water District is based on several grounds. The District contends that Decision 1308 is essentially no more than an amendment of the Bureau's permits under Applications 9366 and 9367. In substance, this is the same as the Bureau's contention already discussed and disposed of. The District contends that the decision should not limit the Bureau to the storage of 5,400 acre-feet per annum but should allow it to store whatever amount is necessary within the 350 cubic feet per second limit. The application specifies 5,400 acre-feet per annum and the Board cannot authorize diversion of more water than is requested in the application. The District also objects to permit Condition No. 7 on the basis that it is not consistent with the Watershed Protection Act. This subject was thoroughly considered and decided in Decision D 990 which imposed on the Bureau's basic permits to divert and redivert water into the Contra Costa Canal certain limitations with regard to the watershed of origin. The permit issued under this application will be inter-related with the Bureau's present permits and therefore should be subject to identical limitations concerning the watershed of origin.

ORDER

IT IS HEREBY ORDERED that Decision 1308 be amended by deleting the last four lines of page 6, all of page 7, the first three lines of page 8, and Paragraph 10 on page 12, and by renumbering Paragraphs 11 and 12 on page 13 as Paragraphs 10 and 11.

IT IS FURTHER ORDERED that in all other respects the petitions for reconsideration of Decision 1308 filed by the United States Bureau of Reclamation and the Contra Costa County Water District be, and they are, denied.

Adopted as the order of the State Water Resources Control Board at a meeting duly called and held at Sacramento, California.

Dated: September 5, 1968

/s/ George B. Maul
George B. Maul, Chairman

/s/ W. A. Alexander
W. A. Alexander, Vice Chairman

/s/ Ralph J. McGill
Ralph J. McGill, Member

/s/ Norman B. Hume
Norman B. Hume, Member

/s/ E. F. Dibble
E. F. Dibble, Member

M.C.N:ch
9-4-68STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 22316 by
 UNITED STATES BUREAU OF RECLAMATION,
 Applicant,
 DELTA WATER USERS ASSOCIATION, et al.,
 Protestants.

Source: Rock Slough
 County: Contra Costa

(a- 9/5)

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Adopted as the order of the State Water Resources Control Board at a meeting duly called and held at Sacramento, California.

Dated: September 5, 1968

/s/ George B. Maul
George B. Maul, Chairman

/s/ W. A. Alexander
W. A. Alexander, Vice Chairman

/s/ Ralph J. McGill
Ralph J. McGill, Member

/s/ Norman B. Hume
Norman B. Hume, Member

/s/ E. F. Dibble
E. F. Dibble, Member

LETTER OA-4 – HABITAT AND WATERSHED CARETAKERS

Law Offices of Stephan C. Volker

- OA-4-1 Adequacy of City Water Supplies and Commitment to Provide Water to UCSC. Comment indicates that the City should not commit to providing water for UCSC growth as the DEIR indicates that the City currently has inadequate supplies during dry years and could face a shortfall during normal years after 2025 in addition to other possible limitations to the San Lorenzo River sources. See Master Response WS-1 – Water Supply Adequacy & Potential Reductions regarding the adequacy of the City’s water supplies and potential reductions. The commenter’s opinion that the City should not commit to providing additional water to UCSC is acknowledged and so noted and referred to City decision-makers for further consideration.
- OA-4-2 WSA Comments. The comment asserts that the WSA does not identify the increase in water associated with non-UCSC development (page 26). The cited statement comes from a discussion in the WSA about off-campus residency of students as the Settlement Agreement indicates that UCSC will provide on-campus housing for 67% of the new student enrollment about 15,000. Thus, remaining students would live off-campus, and as further indicated in the portion of the referenced cited paragraph not quoted by the commenter, this off-campus population would be part of the population growth that was used to identify non-project demand. Thus, water use for off-campus students was assumed and accounted for in both the WSA growth scenarios as indicated on page 26 of the WSA.
- OA-4-3 Supply Reductions Likely to Protect Fish. See Master Response WS-1 – Water Supply Adequacy & Potential Reductions regarding the adequacy of the City’s water supplies and potential reductions.
- OA-4-4 Potential Increased Groundwater Pumping. See Master Response WS-1 – Water Supply Adequacy & Potential Reductions regarding groundwater pumping.
- OA-4-5 Alternative Water Supplies Not Sufficient to Meet Demand. The comment asserts that the WSA suggests three alternative water sources: water conservation, curtailment of demand and desalination, but that water conservation and curtailment are not additional water sources. These “alternatives” cited in the comment are actually “strategies” included in the City’s adopted Integrated Water Plan (IWP). The WSA clearly identifies and describes these adopted strategies on page 44 of the WSA, but does not incorrectly characterize them as water supply alternatives as indicated in the comment. The City’s long-term water strategy as set forth in the adopted IWP is described on page 4.1-15 of the DEIR, in which desalination is identified as a supplemental water source after years of evaluation of various alternative water sources as discussed on pages 4.1-13 and on pages 4.1-20 to

4.1-23. Water conservation and use curtailment are identified in the IWP as water demand management strategies.

The comment indicates that a seawater desalination plant could have potential “deleterious” impacts that are not addressed, and that seawater desalination is a “relatively new and untested technology”. The potential impacts of construction and operation of a desalination project are discussed on pages 4.1-36 to 4.1-39 based on the “program”-level of analysis previously conducted for the IWP EIR. The City is now in the process of developing design plans for the facility that will undergo site-specific review that will address potential significant impacts, including those referenced in the comment related to energy use and greenhouse gas emissions. See also Master Response WS-2 – Desalination Project Purpose & Impacts regarding the desalination project.

Desalination is a technology that has been widely used throughout the world for decades in the Middle East, Caribbean, and Asia. According to the scwd² website (http://scwd2desal.org/Page-About_History.php), desalination is not a new technology. In 1790, United States Secretary of State Thomas Jefferson received a request to sell the government a distillation method to convert salt water to fresh water. During World War II, it was felt that desalination should be developed to convert saline water into potable water, where fresh water supplies were limited. In 1952 Congress passed “The Saline Water Act” to provide federal support for desalination. The U.S. Department of the Interior, through the Office of Saline Water (OSW) provided funding during the 1950s and 60s for initial development of desalination technology, and for construction of demonstration plants. One of the first seawater desalination demonstration plants to be built in the United States was at Freeport, Texas in 1961.³ Thus, it is not an untested or unproven technology. Furthermore, the City conducted a pilot study for a year to further assess feasibility and potential for Santa Cruz, with successful results.

The comment further asserts that due to the uncertainty related to approval and timing of a desalination project (as acknowledged in the DEIR), the City has no certain source of additional water to carry out the project, and without an adequate supply to meet all its demands, the City should not proceed with the project. The DEIR analyses indicate that adequate supplies exist during normal years to the year 2025 or 2030 depending on the level of growth in the City’s service area, and thus, would be adequate for the proposed project. Under existing dry year conditions, water supplies are not adequate under existing or future conditions as indicated in the DEIR (see pages 4.1-7 to 4.1-8, 4.1-11 and 6-8), and the DEIR (and WSA) found

³ From Pacific Institute. June 2006. *Desalination, With a Grain of Salt, A California Perspective*. Heather Cooley, Peter H. Gleick, and Gary Wolff. Online at: http://pacinst.org/reports/desalination/desalination_report.pdf

supplies to be inadequate dry year conditions to serve the project. The commenter's opinion that the City should not commit to providing additional water to UCSC is acknowledged and so noted and referred to City decision-makers for further reference. To the extent that by referring to the *Vineyard* decision, the commenter is asserting that the *Vineyard* decision prohibits the City from proceeding with the project in the face of any uncertainty about future water supplies, this position would be an incorrect assertion under the law. As explained in Response to Comment OA-1-8, the requirements under CEQA pursuant to the *Vineyard* decision are informational; the decision does not mandate a particular result or prohibit any actions as a result of the information presented in compliance with *Vineyard's* requirements.

- OA-4-6 Cumulative Impacts to Steelhead & Coho Salmon in the San Lorenzo River Watershed. See Master Response GI – 3 Cave Gulch Erosion, and see Master Response CC – 3 Cave Gulch Erosion regarding erosion, and see Response to Comment FA-2-2 regarding North Campus potential effects on steelhead and coho. The Cave Gulch watershed is not part of the San Lorenzo River watershed.
- OA-4-7 Cave Gulch Erosion Impacts. See Master Response CC-1 – Significant Unavoidable Impacts regarding significant unavoidable impacts related to the secondary impacts of indirect growth potentially resulting from the project. See Master Response GI-3 – Cave Gulch Erosion regarding erosion in Cave Gulch.
- OA-4-8 Extension and/or Alteration to City's Water Rights Will Adversely Impact Newell Creek and San Lorenzo River. The City is in the process of applying to the State for an extension of time to go to full appropriation. The City has been granted two other such extensions of time. The City also is working with DFG and NOAA Fisheries to consider how the Felton Diversion could be used to aid the Coho Recovery Plan enhancement strategies. Thus, it would be premature to conclude the City is unlikely to retain (not regain as suggested in the comment) this water right. See Master Response WS-1 – Water Supply Adequacy & Potential Reductions regarding further discussion and description of protests to the City's applications for alteration/extension of water rights by the California Department of Fish and Game.
- OA-4-9 Impacts to Aquatic Habitat. See Master Response WS-1 – Water Supply Adequacy & Potential Reductions regarding potential reductions, consideration of aquatic species, CDFG protests to the City's water rights applications to the state, and process of dismissal of the protest.
- OA-4-10 U.S. Marine Corps Protest to City Application for Change to Add Direct Diversion. See Master Response WS-1 – Water Supply Adequacy & Potential Reductions and Appendix B_ of this document. The cited Marine Corps protest was denied by the SWRCB on December 1, 2009 per Order WR 2009-0061, which also indicated that the

City's proposed use of the change process is permissible. The reference to State Water Resources Board Decision 940 (1959) is not applicable.

- OA-4-11 Reasonable Range of Alternatives. As discussed on pages 6-29 to 6-34 of the DEIR, a range of alternatives was considered to reduce or avoid significant impacts while reasonably attaining most of the basic project objectives. (See Master Response PD-1 – Project Overview, Purpose & Objectives for further clarification of the project description and project objectives.) The City initially considered four alternatives that were subsequently eliminated from further review for the reasons identified in the DEIR (see pages 6-29 to 6-34). (See also Response to Comment LA-1-31 regarding project objectives related to alternatives.)

As noted by the commenter, the DEIR carried forward two alternatives for full analysis. See Response to Comment OA-3-8 regarding the No Project Alternative. As indicated in the DEIR, there are no known alternatives to the City provision of water and sewer services to the project area, as the City is the sole provider of urban services to the existing developed UCSC campus and surrounding areas within city limits.

The commenter asserts that the DEIR should have analyzed a No Project Alternative that does not involve “massive new development of the UC Santa Cruz campus.” However, University growth is not the subject of the Sphere of Influence amendment project or DEIR. The proposed project would not directly induce UCSC growth as no new development, housing or employment is proposed as part of the project. As indicated in Master Response PD-1 – Project Overview, Purpose & Objectives, the proposed project's provision of water and sewer services would indirectly support the planned UCSC North Campus growth as envisioned in its previously analyzed and adopted 2005 LRDP and further conditioned in the Comprehensive Settlement Agreement. The DEIR does address the secondary impacts of indirect planned growth that could be supported by the proposed project. The environmental effects of future development and growth under the 2005 LRDP were previously analyzed at a programmatic level in the University-prepared EIR for the 2005 LRDP. This area is in the exclusive control of the University of California. Thus, an alternative contemplating no growth for the University would not be a reasonable or feasible alternative to the project under CEQA, in part because neither the City, nor LAFCO, the lead agency for this EIR, has any control or authority to implement or approve such an alternative.

An EIR need not consider every conceivable alternative to a project or alternatives that are infeasible. (Guidelines, § 15126.6, subd. (a); see also *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 574; *In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1163.)

The commenter appears to misunderstand both the proposed project and the terms of the Comprehensive Settlement Agreement, with the assertion that the settlement agreement “only requires the preparation of an EIR, not the approval of more campus development.” As explained above and in the DEIR’s project description, and clarified in this FEIR, the proposed project would not directly involve or approve any new development anywhere on the UCSC campus. The LRDP EIR previously analyzed the impacts of the growth contemplated in the approved 2005 LRDP and the proposed project analyzed in this EIR does not include any additional development not authorized for the 2005 LRDP or the Comprehensive Settlement Agreement. The Settlement Agreement imposes additional terms and mitigation on the future development under the 2005 LRDP, but does not propose more campus development than previously analyzed in the LRDP EIR.

Additionally, the City respectfully disagrees with the commenter’s unsupported assertion that if there are insufficient water supplies to support campus growth, applicable law including CEQA requires disapproval of that growth. In fact, nothing under CEQA, or more specifically, the *Vineyard* decision prohibits approval of projects for which there is some uncertainty about future water supplies. Other laws affecting development, such as SB 610 (Water Code section 10910 et seq.), like CEQA, require that agencies comply with informational requirements relating to the sufficiency of water supplies for certain types and sizes of development, but they do not mandate a particular result based on the findings of that analysis.

CEQA also does not mandate that any particular number of alternatives be analyzed in an EIR, except for at least the No Project Alternative. (CEQA Guidelines, section 15126.6.) CEQA requires just that a range of “reasonable alternatives” be analyzed. It is often the case that due to the circumstances and facts surrounding a particular project, the range of potentially feasible alternatives that could avoid or lessen the significant environmental effects of the proposed project while meeting most of the basic project objectives is limited to only one other alternative or none except for the no project alternative. The DEIR’s alternatives analysis explains at length the various factors leading to the conclusion that the only potentially feasible alternatives that meet the criteria of Guidelines section 15126.6 are the No Project Alternative and the Modified Sphere of Influence Amendment Area. The commenter’s suggestion otherwise appears to be grounded on a misunderstanding of the requirements of CEQA and the Settlement Agreement.

- OA-4-12 Adequacy of Mitigation Measures. As discussed on pages 4.1-41 to 4.1-46 discusses mitigation measures, and notes that implementation of the University’s adopted LRDP EIR mitigation measures would reduce project demand (i.e., implementation of conservation measures), but the DEIR also indicated that exact timing of implementation was unknown to the City. The DEIR Mitigation Measures reflect the Settlement Agreement provisions that require UCSC to curtail its water demand at

the same levels as may be imposed throughout the City's service area in times of water shortages. See Response to Comment OA-4-11 above regarding alternatives.

The DEIR concludes that the impact to water supplies during dry years is significant and unavoidable as mitigation measures cannot be assumed to reduce the impact to a less-than-significant level due to the uncertainties associated with the timing of the desalination facility and the implementation of the UCSC conservation measures. Thus, the DEIR clearly explains that the reason for the significant and unavoidable conclusion is not based on whether the measures are enforceable, as asserted by the commenter, but rather, the uncertainty of the timing of implementation and the levels of future growth that are outside of the City's authority to control. As indicated on page 1-6 of the DEIR, the City must make findings when approving to carry out a project. In accordance with section 21081 of CEQA and sections 15091 and 15093 of the State CEQA Guidelines, "findings of overriding consideration" can be made for significant impacts that cannot be mitigated when the agency finds specific economic, legal, social, technological or other benefits outweigh the impacts. Such is a requirement of CEQA not the Comprehensive Settlement Agreement.

**Rural Bonny Doon Association
P.O. Box 551, Felton CA 95018**

18 January 2010

Mr. Ken Thomas, City of Santa Cruz Planning and Community Development Dept.
809 Center Street, Rm. 206
Santa Cruz, CA 95060

Dear Mr. Thomas,

The Rural Bonny Doon Association is a community based organization with political boundaries that coincide with the County's Bonny Doon Planning Area and thus the proposed expansion of the UCSC campus into our area is of great concern to us.

We, the Executive Board of the Rural Bonny Doon Association, want to point out some serious inadequacies in the Draft Environmental Impact Report (DEIR) for the applications to Santa Cruz Local Agency Formation Commission (LAFCO) by the City of Santa Cruz for extension of its Sphere of Influence to the Upper Campus of the University of California, Santa Cruz (UCSC) and by UCSC for water and sewer services to be provided by the City to that portion of its campus

1 1. Santa Cruz City and County General Plan Conflicts

Quoting from the DEIR, pg. 4.3-14 "In accordance with CEQA, the California Environmental Quality Act, State CEQA Guidelines (including Appendix G), [the] City of Santa Cruz plans and policies, and agency and professional standards, a project impact would be considered significant if the project would:

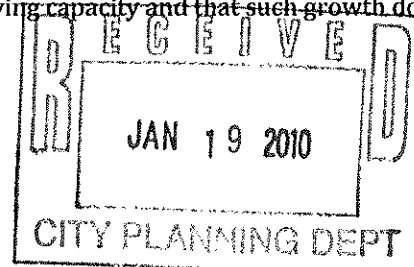
Physically divide an established community;

Conflict with any applicable land use plan, policy or regulation of an agency with jurisdiction over the project (including, but not limited to, a general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect;"

The DEIR does not regard as a significant impact that the provision of water and sewer services is in conflict with the City of Santa Cruz's General Plan. The City General Plan clearly sets boundaries for the water and wastewater service areas, and the Upper Campus is outside those boundaries. Further, the City's General Plan recognizes the Urban Services Line. Again, the new area to be served is outside that line, i.e., designated Rural. Therefore the provision of water and sewer facilities to the Upper Campus is prohibited. There is no legal basis for providing these services there and neither is it required to mitigate impacts.

2 The provision of sewer and water services also is in conflict with the County of Santa Cruz General Plan. That plan establishes the Urban/Rural boundary and again, the Upper Campus is on the Rural side of that line. This is a clear example of sprawling development that voters intended to prevent by passage of the growth management initiative, Measure J, in 1978. The RBDA, as a community based organization, believes such measures to be of the highest importance and wants to point out that the Courts have affirmed and supported the people's initiative and referendum power in cases where the voters' intent was compromised by subsequent government administrative actions. The DEIR further states, on pg. 4.3-18 "The proposed SOI amendment, provision of water and sewer services and future development of the North Campus by UCSC are consistent with the County's General Plan designation for the site --"Public Facilities"." When perusing the allowed uses in Public Facility areas, while a school or college is an allowed use, nothing is said about living quarters for students, staff or faculty. Therefore it would be a violation of the County General Plan to allow dormitories and staff or faculty housing on the Upper Campus. The DEIR should address that point and assess the significance of impacts of building housing on the Lower Campus, which has ample space and is within the Urban Services Boundary.

3 On pg. 4.3-12 the DEIR states, "There are several other City GP/LCP policies potentially relevant to the proposed Sphere of Influence amendment and provision of extraterritorial water and sewer service to the North Campus area of UCSC as outlined below:" Particularly relevant is "L 1.7: Ensure that future growth and development of Santa Cruz occurs consistent with the City's carrying capacity and that such growth does not lead to overdraft of any water source."



As noted in several places in the DEIR, including in the "Public Comments" (in particular those Gary Patton made in regard to the Water Supply Assessment, and in the Water Supply Assessment itself,) there are several inconsistencies and confusing projections that need to be cleared up before a Final EIR is submitted for certification. Since these projections come close, towards the latter part of the years covered by UCSC's 2005-2020 LRDP, particularly in drought years (already noted in the Draft EIR, page 6-1, as being a significant unavoidable impact), to putting the City in a situation where water demand could exceed supply, it is critical to obtain a more accurate picture.

In this regard, the Habitat Conservation Plan now being developed could play a critical role in whether future demand in fact will exceed supply. Without this significant piece of data, it is impossible to determine whether there is a conflict with the City's General Plan requirement that future growth and development be consistent with the City's carrying capacity and not lead to water overdrafts.

- 4 The RBDA has always been protective of our local environment and has long been concerned about the negative effects on the downstream riparian habitat resulting from the City's water diversion and withdrawal. Pressure to extract more water from these already depleted sources will increase in drought years. Given the City's acknowledged uncertainty related to the approval of and timing for the construction of the permanent desalination plant, additional commitments to serve water will increase pressure to extract more water from North Coast sources. The City's desire to do so is already demonstrated by their investment in a project to rehabilitate and restructure their North Coast pipeline system with a goal (as Water Dept. Director Bill Kocher phrased it at an RBDA meeting) "to remove hydraulic constraints" that limit the amount of water that can be conveyed to the City.

It was only after the threat of enforcement action from the State Dept. of Fish & Game that the City finally agreed, in 2007, to allow more bypass flow at their diversion sites. The City has spent hundreds of thousands of dollars on attorneys to negotiate with regulatory staff. This leads us to believe that the City would not make such expenditures unless the regulatory agencies had made it obvious that reductions in water diversions would be necessary to meet fisheries habitat requirements.

On pg 4.3-14 the DEIR states "Criteria for Determining Significance...Conflict with any applicable Habitat Conservation Plan or Natural Community Conservation Plan."

There is an applicable Habitat Conservation Plan underway that very likely will have an effect on City water supplies, and thus could well be of considerable significance. Therefore the Final EIR should not be prepared until the Habitat Conservation Plan is completed and its significance evaluated.

5 2. Climate Change Impacts

Mr. Kocher stated in his letter (Public Comments, Appendix F, memo of Nov. 16, 2009) that "climate change may well impact City water supplies that are largely dependent on surface water flows. To the extent that rain events are more intense but less frequent, [they] would likely change the baseflow in streams and rivers the City diverts from. Like the "Ongoing Planning Issues" previously discussed, the timing and quantification of impact make it too speculative to include in this analysis." The potential impacts of both climate change and the "Ongoing Planning Issues" *could be so significant* that some attempt should be made to quantify them, or at least to establish the potential range of their impacts on water supply, so that the FEIR and LAFCO commissioners can make an educated decision about their significance.

6 3. Water Supply and Economic Impacts

We already have learned from the Water Supply Assessment that sub-average rainfall years occur 60% of the time, and that the City's main reservoir, Loch Lomond, cannot fully store the rainfall available in years that are well above average. For those and other reasons it seems that rationing or even hookup moratoriums are going to occur even more frequently than might be predicted by just consideration of rainfall averages. The impacts on the 95,000 customers dependent on City Water will be exaggerated by placing an additional 100 million (or 152 million?) gallon demand on the system. In addition, the future impacts of limiting new

- 7 domestic and commercial hookups on the City's and Live Oaks's economies need to be thoroughly studied by this EIR.

8 **4. Traffic Impacts**

Regarding Traffic impacts, the EIR for the University's 2005-2020 Long Range Development Plan (LRDP) states: "A new access road designed for general, service and emergency access to the Upper Campus would connect to extensions of Heller Drive and Chinquapin Roads, and is planned to serve employee housing on the Upper Campus." It seems fairly likely, if not obvious to anyone with common sense, that this road will also be used by students, faculty, other staff and visitors. As part of this road, a bridge over Cave Gulch Creek would be required; that in itself has enormous significant environmental impacts. The Draft EIR not only fails to analyze any of the impacts from this new road on fauna, flora or riparian issues, it doesn't examine the traffic impacts on Empire Grade.

9 The above referenced LRDP EIR admits that levels of service (LOS) at Empire Grade intersections south of Cave Gulch would deteriorate to Level F from C or D and be of significant impact. The DEIR should analyze these impacts. We also believe that the LRDP EIR was wrong when it said there would be no significant impacts from the new access road's intersection with Empire Grade. Most of the new traffic would be bunched at specific times and would cause traffic to back up down the dangerous steep curves of Cave Gulch just below the new intersection, making it very dangerous, especially for trucks, cars with manual transmissions and bicyclists.

10 Incidentally, we also believe that the LRDP EIR was wrong in its assessment that most bicycle traffic would prefer to ride through the new roads on campus rather than on Empire Grade. As Bonny Dooners who use Empire Grade regularly, we have observed that a great number of the bicyclists are riding recreationally or commuting to the City of Santa Cruz.

11 The DEIR should have studied the traffic impacts on Empire Grade, both at the proposed new intersection and the existing ones in the vicinity of the campus, and examined alternatives that might be of lesser significant impact, such as Lower Campus infill and development of what are now open spaces, and building planned housing on the Lower Campus to reduce traffic to the Upper Campus.

13 **Conclusion**

We believe that because of the many problems that we and others have pointed out in the DEIR, it should be recirculated for public comment prior to the issuance of a Final EIR.

Thank you for your attention to these matters,

The Executive Board of the Rural Bonny Doon Association

[Comments prepared by Executive Board members Ted Benhari and Marty Demare]

LETTER OA-5 – RURAL BONNY DOON ASSOCIATION

- OA-5-1 Project Consistency with City General Plan – Service Area Maps. See Response to Comment OA-1-3.
- OA-5-2 Project Consistency with City General Plan – County Urban Service Line. See Response to Comment OA-1-7 regarding the County’s Urban Service Line. The County’s General Plan and Zoning Ordinance permit “colleges” in the Public Facilities designation/district. Residential uses are also permitted in the Public Facilities zone. Since dormitories and living accommodations are often part of college development, it would appear that the County land use designation covering the site would be inclusive of all uses within a college, which is an allowed use according to the County’s General Plan. Nothing suggests that the UCSC planned uses are inconsistent with this county land use designation. However, the University as a state agency is not subject to county or city plans or ordinances. See Response to Comment I-14-3 regarding consideration of relocation of North Campus development to the existing developed campus as an alternative.
- OA-5-3 Project Consistency with City General Plan Policy L.1.7 – Growth. The referenced General Plan Land Use Policy 1.7 does direct that the City ensure that future growth and development is consistent with the City’s “carrying capacity” and does not lead to “overdraft” of any water source. The General Plan glossary defines “carrying capacity” in relation to an irreversible change in the quality of air, water, land or plant or animals habitats, as well as maximum level of development allowable under current zoning. Future University development is not subject to City policies and zoning ordinance regulations. The term “overdraft” typically refers to depletion of groundwater resources. As discussed in Master Response WS-1 – Water Supply Adequacy & Potential Reductions, the limited amount of groundwater utilized by the City is not currently in an overdraft condition, and future production would not need to be increased to serve the proposed project. The comment notes other inconsistencies in DEIR, but does not make a specific reference to which a specific response can be made. With regards to reference on comments on the WSA, responses are provided in this document; See the WSA letters and responses at the end of this chapter. See Master Response WS-1 – Water Supply Adequacy & Potential Reductions regarding the adequacy of the City’s water supplies and potential reductions related to current City efforts in preparing an HCP.
- OA-5-4 Pressure to Extract More Water. The proposed project will have no effect on the legal limits of extraction/diversion of existing City water sources, and the project would not result in increased pressure to withdraw more water from north coast streams. In fact the City has interim Stream Alteration Agreements with DFG that have resulted in voluntary fish releases from Liddell Spring, Majors Creek, and Laguna

Creek. The City continues in-stream analysis of flow regimes as they relate to the life stages of the threatened and endangered species in all of those streams/spring. There is no current or foreseeable planning that calls for increases in these diversions as the City already is currently maximizing its use of those surface sources. See Master Response WS-1 – Water Supply Adequacy & Potential Reductions for further discussion regarding the HCP that is being prepared and overall timing.

- OA-5-5 Effects of Climate Change on Water Supplies. See Master Response WS-1 – Water Supply Adequacy & Potential Reductions for further discussion on climate change.
- OA-5-6 Water Rationing and Moratorium Frequency. The City does not find itself in use restrictions in every below average rainfall year. The City has modeled 60+ years of hydrology and compared it against future demands and the City will find itself needing to curtail use by some amount every 6 years or so. Severe restrictions would occur much less frequently, and unless the desalination project is built (or some other drought protection), the most severe curtailments will be in the range of 45-50%. See Response to Comment LA-2-1 regarding curtailment and effects of the proposed project.
- OA-5-7 Economic Effects Due to Potential Future Connection Limitations. The comment requests further study of economic effects of future limitations on water connections on the City's and Live Oak's economies. Future water connection moratoriums are speculative, but, even if this situation arises in the future, evaluation of economic impacts are not required under CEQA.
- OA-5-8 Impacts of Planned Cave Gulch Road/Bridge. The 2005 LRDP EIR assessed potential biotic and hydrologic effects of future development, including development of the new North Campus road and Cave Gulch bridge, on a program level as no site-specific development has been proposed. Potential riparian impacts are discussed on page 5-39 of the DEIR. As indicated, no bridge footings would be constructed within any stream channel. See Response to Comment LA-1-26 regarding impacts of a new intersection on Empire Grade.
- OA-5-9 Empire Grade Intersections. Based on the LRDP EIR, the Empire Grade/Heller Drive and Empire Grade/Western Drive intersections could be improved to acceptable levels of service with signalization of B-D and B, respectively (University of California Santa Cruz, 2005 LRDP EIR, Volume II). The comment indicates that the Association does not believe that the LRDP EIR correctly analyzed the impacts of a new road connection with Empire Grade, and is so noted, but the proposed project would not involve the construction of the road connection. The LRDP EIR has been upheld in court as discussed on page 5-12 of the DEIR, and it is outside the scope of the City or LAFCO's authority to require revisions to that analysis. See also Response to Comment LA-1-26.

OA-5-10 Empire Grade Bicycle Use. Comment disagrees with the 2005 LRDP EIR that indicates most bicyclists would prefer to ride the new campus roads than on Empire Grade, and the commenter's opinion is so noted. The City does not find any substantial evidence supporting the commenter's position and therefore declines to revise the EIR's conclusions on that basis.

OA-5-11 Empire Grade Intersections & Traffic. See Response to Comment OA-5-9.

OA-5-12 UCSC Alternatives. See Response to Comment I-14-3 regarding the suggestion that UCSC development on the Lower Campus be examined as an alternative.

OA-5-13 Request for Recirculation. See Master Response CC-2 – Draft EIR Recirculation.

From: Matthew Strusis-Timmer [mailto:mstrusistimmer@gmail.com]

Sent: Tuesday, January 12, 2010 9:41 AM

To: Ken Thomas

Subject: Comments on the City of Santa Cruz Sphere of Influence Amendment Draft EIR
November 2009

Dear Mr. Thomas,

1 The Santa Cruz Bird Club has been facilitating appreciation and conservation of birds for over 50 years in Santa Cruz County through field trips, informative meetings, and citizen science projects. The University of California, Santa Cruz is blessed with a beautiful campus full of native wildlife, some rare and threatened. We understand the need for growth and development of the campus but hope that a balanced approach will be taken that considers the impact on birds and other wildlife. The Santa Cruz Bird Club is in support of the attached petition that calls for a campus Habitat Conservation Plan that will guide future development and expansion decisions.

Sincerely,

Matthew Strusis-Timmer
Conservation Officer
Santa Cruz Bird Club

December 1, 2009

Attention:

Ken Thomas, City of Santa Cruz Planning
809 Center Street, Rm. 206
Santa Cruz, CA 95060
KThomas@ci.santa-cruz.ca.us

Chancellor George Blumenthal
UC Santa Cruz, Chancellors Office
1156 High Street
Santa Cruz, CA 95064
chancellor@ucsc.edu

Patrick McCormick, Executive Director
Santa Cruz LAFCO
701 Ocean St. #318D
Santa Cruz, CA 95060
info@santacruzlafco.org

Re: Comments on the City of Santa Cruz Sphere of Influence Amendment Draft EIR
November 2009

Protect Biological Diversity At UCSC

We, the undersigned, are deeply concerned about protecting rare and endangered species and their habitats on and around the University of California Santa Cruz campus. We are joined by the US Fish and Wildlife Service (USFWS) in believing that the piecemeal approach UCSC has taken over time with regard to planning individual development projects has not adequately accounted for or protected against the cumulative environmental impacts of those projects. We further believe that without an adequate comprehensive conservation plan certified by the USFWS and the California Department of Fish and Game (CDFG), future development will put at increasing risk the rare and sensitive species on UCSC land. Accordingly, we strongly urge UCSC to adopt a campus-wide Habitat Conservation Plan (HCP) as recommended by the USFWS in conjunction with a Natural Community Conservation Plan (NCCP) developed in coordination with the CDFG before any major new development of the North Campus takes place.

At-risk species in need of protection include Golden Eagle, Western Burrowing Owl, Townsend's big-eared bat, Western red bat, long-eared myotis bat, Loggerhead Shrike, Grasshopper Sparrow, California red-legged frog, San Francisco dusky-footed wood rat, Dolloff's cave spider, Santa Cruz telemid spider, Empire Cave pseudoscorpion, MacKenzie's cave amphipod, Ohlone tiger beetle, and a number of plant species including Santa Cruz manzanita and San Francisco popcorn flower.

The new UCSC growth plan includes extending City of Santa Cruz services to the currently undeveloped North Campus, adding over 3 million square feet of new development and logging 120 acres of forest. These actions could result in irreparable harm to sensitive species and their habitat unless a comprehensive protection plan is adopted. Furthermore, the requirements for fire protection will necessitate a large-scale plan for chaparral and Douglas Fir habitats that must be taken into account as those habitats house many sensitive species in addition to presenting considerable risks of wildfire to potential North Campus structures.

We quote from the December 2, 2008 USFWS letter to the City of Santa Cruz regarding the City's role in conducting an EIR on behalf of North Campus development: "The piecemeal approach that UCSC has taken in terms of implementing individual development projects over time makes it difficult for the Service to adequately assess cumulative impacts... We believe that UCSC, involved agencies, and the Service would benefit from the development of a campus-wide HCP by providing needed protection for listed species. Therefore, we recommend that the City support the development of a campus-wide HCP."

The USFWS also detailed concerns in a January 11, 2006 letter to UCSC about the 2005 Long Range Development Plan DEIR. The cited deficiencies included the following: "1) underestimating the effects of various development projects on federally listed species, 2) [inadequate] UCSC land use designations regarding conservation of federally listed species, and 3) the lack of a comprehensive management plan for listed species at UCSC."

A model management plan for protecting rare species and biological diversity at the UCSC campus is readily at hand in the form of what CDFG calls a Natural Community Conservation Plan (NCCP). The CDFG website describes the plan as "an unprecedented effort by the State of California, and numerous private and public partners that takes a broad-based ecosystem approach to planning for the protection and perpetuation of biological diversity. An NCCP identifies and provides for the regional or areawide protection of plants, animals, and their habitats, while allowing compatible and appropriate economic activity."

Habitat loss is the primary threat to most imperiled species. Without a broad-based ecosystem approach to protection, cumulative habitat loss through piecemeal development can be significant and harmful. An example of the sort of thinking that permits harmful development can be found in the UCSC 2005 LRDP EIR, which concluded that the elimination of 98 acres of habitat for Golden Eagles and Western Burrowing Owls is less-than-significant because other suitable habitat exists. UCSC reached similar conclusions about habit loss for other sensitive species, including that the logging of 120 acres of campus forest was not significant. Justifying a finding of a less-than-significant impact because there is suitable habitat elsewhere is spurious and evasive because it avoids the question of the impacts of the proposed development on a species where it occurs and is contrary to provisions of the California Environmental Quality Act

(CEQA) Guidelines (15065), (15380) and (15382). This is precisely why a campus-wide conservation plan is needed.

CEQA Guideline (15065) calls for “Mandatory Findings of Significance when: (1)... The project has the potential to substantially reduce the habitat of a fish or wildlife species; ... (3) The project has possible environmental effects that are individually limited but cumulatively considerable. "Cumulatively considerable" means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.” CEQA Guideline (15380) refers to “rare” species that may become endangered if its environment worsens and (15382) says that “significant effect on the environment” means an adverse change in the physical conditions including flora and fauna.

Not only is UCSC in danger of undermining the intent of federal and state statutes, the lack of either a campus-wide HCP or an NCCP appears to ignore fundamental values UCSC supposedly shares with the City of Santa Cruz, for its proposed actions are inconsistent with the campus’s espoused goals of working towards understanding and improving the natural environment and promoting sustainability in the world. UCSC should take full advantage of its unique biological circumstances and faculty expertise to further the study and protection of rare and special-status species and their habitats, rather than harming them through large-scale development without a comprehensive protection plan with enforceable provisions.

Unfortunately, we note that the City of Santa Cruz’s November 2009 draft EIR for a Sphere Of Influence Amendment, which was jointly funded by UCSC and serving a dual purpose as the UCSC EIR for North Campus development, did not support the development of a campus-wide HCP as recommended by the USFWS December 2008 scoping letter or respond to the USFWS concerns in any meaningful way.

Therefore, we strongly urge the City of Santa Cruz in its role as a project proponent for UCSC development in the North Campus to take a protective approach, heed the recommendation of the USFWS, and support the development of a combined campus-wide HCP/NCCP at UCSC in its final EIR. Furthermore, we would point out that the Local Agency Formation Commission (LAFCO) has the responsibility to review environmental impacts and jurisdiction over whether to approve development of the North Campus. We hope that LAFCO will see a duty under state law, including CEQA, and require UCSC to develop an HCP/NCCP before approving the proposed development project. Absent a comprehensive HCP/NCCP, the environmental impacts of the proposed development cannot be fully understood, nor can rare and special-status species be protected.

Thank you for your attention.

Sincerely,

Jennifer Anderson, UCSC Retired Lecturer and Assistant to the Chair, Environmental Studies

Jeffrey Arnett, UCSC Lecturer in Writing, editor of *An Unnatural History of UCSC*

Martha Brown, Co-Editor of the *Natural History of UCSC*, Senior Editor, Center for Agroecology & Sustainable Food Systems.

Ray Collett, UCSC Faculty Member beginning in 1965; Professor Emeritus Division of Natural Sciences; Founding Director, Director Emeritus, UCSC Arboretum

Shelly Errington, UCSC Professor of Anthropology

Margaret Fusari, former Director of the UCSC Natural Reserves

Jodi Frediani, Director, Central Coast Forest Watch

Aldo Giacchino, Chair, on behalf of the Santa Cruz Chapter of the Sierra Club

James Gill, UCSC Professor of Earth and Planetary Science

Steve Gliessman, Ruth and Alfred Heller Professor of Agroecology, Environmental Studies

Tonya Haff, Co-Editor of the *Natural History of UCSC* and former Curator of the UCSC Museum of Natural History, PhD candidate Evolution, Ecology and Genetics

Brett Hall, President, on behalf of the Santa Cruz Chapter of the California Native Plant Society

Grey Hayes, PhD Environmental Studies, past UCSC Campus Reserve Steward, Endangered Species Act petitioner for the Ohlone tiger beetle

A. Marm Kilpatrick, UCSC Assistant Professor, Dept. Ecology & Evolutionary Biology

Jeff Miller, Conservation Advocate, on behalf of the Center for Biological Diversity

Nell Newman, President of Newman's Own Organics, past volunteer and supporter of the UCSC Predatory Bird Research Group

Wallace J. Nichols, PhD, Research Associate California Academy of Sciences, Founder/Co-Director OceanRevolution.org

Paul Niebanck, UCSC Professor Emeritus, Environmental Planning

John Pearse, UCSC Professor Emeritus, Department of Ecology and Evolutionary Biology

Carol Shennan, UCSC Professor of Environmental Studies

Matthew Struss-Timmer, Conservation Chair, on behalf of the Santa Cruz Bird Club

Robert Stephens, Owner Elkhorn Native Plant Nursery

Don Stevens, Chair, on behalf of Habitat and Watershed Caretakers

David Suddjian, Ecologist, Historian for the Santa Cruz Bird Club

John Wilkes, UCSC Senior Lecturer Emeritus in Science Writing and founding director of the Science Communication Program

LETTER OA-6 – SANTA CRUZ BIRD CLUB

OA-6-1 Support UCSC Campus HCP/NCCP. The comment expresses support of the U.S. Fish and Wildlife Service request for a preparation of a campus-wide Habitat Conservation Plan (HCP) in conjunction with a Natural Community Conservation Plan (NCCP). See Master Response GI-1 – Request for HCP regarding the process for preparing such plans and responses to particular points raised in the petition.



SANTA CRUZ COUNTY GROUP
 Of The Ventana Chapter
 P.O. Box 604, Santa Cruz, CA 95061 ▪ phone (831) 460-1538
 www.ventana.sierraclub.org ▪ e-mail: scscrg@cruzio.com

January 18, 2010

Ken Thomas
 Planning Department
 City of Santa Cruz
 809 Center Street
 Santa Cruz, CA 95060

Re: Draft EIR – Sphere of Influence Amendment and Provision Of
 Extraterritorial Water & Sewer Service to the UCSC North Campus

Dear Mr. Thomas:

The following are our questions, comments, and concerns regarding the Draft EIR referenced above.

- 1 1. One of the major issues identified in the DEIR is the lack of adequate water supply to meet the demand in drought years. We are concerned about the lack of clarity of how the projected water supply was calculated.

Table 4 (Historical Water Supply Production) in the Water Supply Assessment document shows water supply for each year from 1985 through 2004, with a supply range that has a low point of 3,389 mgy in 1990 and a high point of 4,475 mgy in 2000. The Median supply (not shown in Table 4) calculates to 3,932 mgy.

The projected water demand in 2015, i.e. in the immediate future, ranges between a low of 3,980 mgy and a high of 4,104 mgy (Table 6). Both figures indicate that the demand exceeds the historical (1985-2004) supply averages. Therefore, there seems to be no foundation to the contention that the City has sufficient water to meet the demand in a normal hydrological year.

PLEASE EXPLAIN THESE APPARENT DISCREPANCIES.

- 2 Table 4 in the WSA also shows the "Average" water supply from 2000 to 2004 to be 4,206 mgy, without explaining why these particular 5 years were selected. In fact, a calculation of the actual arithmetic average (or Mean) supply for the entire 20 year period shown in Table 4 (1985-2004) gives a result of only 4,038 mgy.

There is no explanation why the figures for Water Supply Production in Table 4 of the WSA stop at 2004. The information for the more recent years since 2004 needs to be brought forth. It is important to examine whether the annual supply figures have declined after 2004. That would contribute to lowering the projected average supply figures, exacerbating the negative disparity between supply and demand.

PLEASE PROVIDE THE UP TO DATE INFORMATION BEYOND 2004.

- 3 2. There are unresolved Ongoing Planning Issues identified in the City's 2005 Urban Water Management Plan and in the City's 2009 WSA that threaten the City's current water supplies. These include:

The lack of a Habitat Conservation Plan for the City's watersheds;

Unresolved water rights conformance issues;

Potential for seawater intrusion in the City's Live Oak Wells.

Potential impact of climate change

In responding to these issues, the Director of the City's Water Department has stated:

"The uncertainty of timing, quantification of impact, and even the uncertainty of any impact makes it unreasonable to wait for resolution in the face of State Water Code that stipulates the WSA must be completed within 90 days of the request from the land use agency."

While the 90 days response requirement for the WSA is a convenient way of evading the issue, there is no such time pressure in the preparation of the EIR. We recognize that a definitive resolution of these issues is not immediately possible, nevertheless it is incumbent on the preparation of an EIR to evaluate the "what if" consequences of these unresolved issues.

The hydrological needs of the environment as a whole need to be addressed, not just the human consumption needs. This seems to be a clear CEQA requirement. Without a Habitat Conservation Plan (HCP), the DEIR is not sufficiently informative on these critical issues.

IN LIEU OF AN HCP, PLEASE PROVIDE AN EVALUATION OF THE IMPACT OF A 5%, 10%, 25% REDUCTION IN THE WATER SUPPLY AVAILABLE FOR HUMAN CONSUMPTION THAT MAY BE REQUIRED AS A RESULT OF REGULATORY DETERMINATIONS OF THESE ISSUES.

- 4 3. The DEIR does not present sufficient analysis of how the solid waste/refuse generated by the 3.4 million sq.ft. expansion on the North Campus will be collected and disposed. It is not clear whether the solid waste generated by the North campus, currently outside the City limits, will go to the City's disposal site and what is the impact of the added volume on this facility. A further consideration is whether the expansion of the area served by the City's refuse collection and disposal services requires a specific LAFCO application as the expansion of water and sewer services.

PLEASE PROVIDE AN EVALUATION OF THE SERVICE CAPACITY ISSUE AND AN EVALUATION OF WHETHER THIS IS AN ISSUE THAT WILL REQUIRE SPECIFIC LAFCO APPROVAL OF A SERVICE AREA EXPANSION BY THE CITY'S REFUSE COLLECTION SERVICE.

- 5 4. Among the Indirect Secondary Impacts Of Growth identified by this DEIR as "significant and unavoidable" are the increased erosion and water quality degradation that will be engendered by the North Campus development (HYD-3). So much erosion has already been caused by the Main Campus development that adding further erosion in the North Campus is just unacceptable.

PLEASE PROVIDE AN EXPLANATION OF WHY WELL ESTABLISHED EROSION PREVENTION MEASURES (INCLUDING RETENTION PONDS, PERMEABLE CONCRETE, AND OTHER ENGINEERED DEVICES) CANNOT BE INCLUDED IN THIS PROJECT TO AVOID ADDITIONAL EROSION. WE REQUEST THAT AN EFFECTIVE EROSION CONTROL PLAN THAT REMOVES EROSION AS A SIGNIFICANT IMPACT BE DEVELOPED PRIOR TO THE COMPLETION OF THE FINAL EIR.

- 6 5. We are also extremely concerned about the lack of recognition in the DEIR that the extensive logging and the elimination of habitat for the many rare and endangered species in the North Campus area constitute significant impacts. For this reason we have joined many other environmental organizations and expert ecologists in drafting, signing and endorsing a document already submitted to you, titled: PROTECT BIOLOGICAL DIVERSITY AT UCSC, dated December 1, 2009.

We join the many other signers of the document in calling for the development of a combined campus wide Habitat Conservation Plan and Natural Community Conservation Plan at UCSC prior to the completion of the final EIR. PLEASE RESPOND TO THE MANY CONCERNS NOTED IN THIS DOCUMENT AND TO THE REQUEST FOR A COMBINED HCP/NCCP FOR THE ENTIRE CAMPUS.

Thank you for your consideration of these comments and requests.

Sincerely,

Aldo Giacchino, Chair
Sierra Club – Santa Cruz County Group

Cc: Local Agency Formation Agency

LETTER OA-7 – SIERRA CLUB

OA-7-1 WSA Water Supply. The comment references Table 4 (Historical Water Supply Production) that is included in the Water Supply Assessment (WSA), and indicates that the “median supply” not shown in Table 4 is 3,932 MGY, which would be exceeded with projected water demand in the year 2015. However, the gross water production values as presented on Table 4 of the WSA are not equivalent to water supply availability. Total annual water production refers to the total amount of raw water diverted at the source, which varies based on a variety of factors including customer demand, hydrologic conditions, and operations and maintenance (City of Santa Cruz 2005 Urban Water Management Plan (“2005 UWMP”), page 3-5).

Water supply estimates for normal, single dry, and multiple dry years are presented in Section 7.2 and Table 3 of the WSA. As stated in the WSA, these estimates are based upon information presented in the 2005 UWMP. The estimates are based on a hydrologic record spanning an 84-year period from 1921 to 2005 (page 5-2 of the 2005 UWMP), and cannot be calculated based upon water production information for the 20-year period as presented in Table 4 of the WSA. See Section 5 of the 2005 UWMP, for a discussion of methods used to project water supply in normal, single dry, and multiple dry years.

OA-7-2 WSA Table 4. The comment states that Table 4 in the WSA shows the “Average” water supply from 2000 to 2004 to be 4,206 MGY, without explaining why these particular 5 years were selected, as the actual average for the entire 20 year period (1985-2004) is 4,038 MGY. The comment also requests information for years after 2004. As discussed in the response to Comment OA 7-1, gross water production values as presented on Table 4 of the WSA are not equivalent to water supply availability and cannot be used to evaluate the sufficiency of water supplies to meet demands. Table 4 of the WSA is based on Table 3-2 of the 2005 UWMP and was included in the WSA to provide “ a description of the quantities of water received in prior years by the public water system, or the city or county” pursuant to Water Code Section 10910 (d) (1). The 5-year average presented in this table is used to provide information regarding the percentage of total water supply derived from each supply source for this 5-year period based on the UWMP, which only went to the year 2004 (see page 3-7 of the 2005 UWMP). Water production by water supply for the years 2005 through 2009 is presented below.

Annual Water Production by Source of Supply, 2005-2009

Year	Source:					TOTAL
	North Coast Streams	San Lorenzo River	Tait Wells	Loch Lomond Reservoir	Beltz Wells	
2005	1,487.2	1,575.3	--	583.8	84.9	3,731.2
2006	1,603.8	1,610.2	--	467.3	118.5	3,799.8
2007	848.6	2,261.6	--	487.8	178.9	3,776.9
2008	880.2	2,064.9	--	530.4	164.4	3,639.9
2009	814.5	2,037.8	--	195.3	172.4	3,220.0

Tait well production included with San Lorenzo River beginning 2000
 2009 data are provisional, subject to change

OA-7-3 Water Supply Issues. See Master Response See Master Response WS-1 – Water Supply Adequacy & Potential Reductions regarding the adequacy of the City’s water supplies and potential reductions related to current City efforts in preparing a HCP, water rights applications, groundwater issues and potential effects of climate change.

OA-7-4 Solid Waste Generation and Disposal. The secondary effects of UCSC campus development on solid waste collection and disposal is addressed on page 5-29 of the DEIR. Solid waste collection is currently provided by the University via a contract with a private collector with disposal at the City’s landfill, which has adequate capacity. The City could allow the University to dispose of its waste from the unincorporated area of campus, likely with an additional charge.

OA-7-5 North Campus Erosion Impacts. See Master Responses GI-3 – Cave Gulch Erosion and e CCS- – Significant Unavoidable Impacts regarding potential indirect secondary erosion impacts due to future North Campus development.

OA-7-6 Support UCSC Campus HCP/NCCP. The comment expresses support of the U.S. Fish and Wildlife Service request for preparation of a campus-wide Habitat Conservation Plan (HCP) in conjunction with a Natural Community Conservation Plan (NCCP), and such support is so noted. See Master Response GI-1 – Request for HCP/NCCP for UCSC.

UNIVERSITY OF CALIFORNIA, SANTA CRUZ

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SANTA CRUZ, CALIFORNIA 95064

13 January 2010

Ken Thomas, City of Santa Cruz Planning
 809 Center Street, Rm. 206
 Santa Cruz, CA 95060

Dear Mr. Thomas,

We write as faculty at the University of California, Santa Cruz with considerable experience in conservation and land management to comment on the Draft EIR of the City of Santa Cruz and the University of California, Santa Cruz to extend urban services into the northern part of the Santa Cruz campus. In short, we strongly endorse the December 2, 2008 letter from the U.S. Fish and Wildlife Service asking the UCSC campus to develop a campus-wide Habitat Conservation Plan to assure the long-term protection of the federally endangered Ohlone tiger beetle (*Cicindela ohlone*) and the threatened California red-legged frog (*Rana aurora draytonii*), as well as a host of other plant and animal species of concern. Collectively, we have conducted extensive research on the habitat needs and management of a range of plants and animals along the Central California coast. We have also served in advisory capacities for several government and non-profit agencies in the region, including the UCSC Long Range Development Plan, the UCSC Natural Reserves, the UCSC Site Stewardship Program, California State Parks, the Land Trust of Santa Cruz County, and others. Therefore, we are particularly well qualified to comment on this issue.

We feel that a campus-wide Habitat Conservation Plan is necessary for several reasons. First, from a biological standpoint, it is clear that successful conservation planning for both animals and plants must be done at a large scale. These species are dependent on both physical (e.g. water quality, hydrology) and biological (e.g. movement across different habitat types) processes at scales much larger than those of individual building development projects. For instance, we feel that upper campus likely serves as an important wildlife corridor connecting Henry Cowell Redwoods State Park to the rest of the central coast. A properly conceived development plan could maintain this connectivity and thus the long term persistence of the wildlife species that currently inhabit this biologically important and historic state park. The conservation literature is replete with data supporting the need to do this large-scale conservation planning to effectively conserve species. This scientific information is reflected in the general trend towards conducting larger-scale HCPs and the state's Natural Communities Conservation Planning process.

Second, while the UCSC campus has always worked to comply with federal, state, and local requirements for mitigating impacts of development, specifically under the California Environmental Quality Act and the Endangered Species Act, the campus history of thoroughly considering and

mitigating for cumulative impacts is weak. The campus has generally developed EIRs for individual development projects and developed a separate HCP for just the Ranch View Terrace housing development project. This approach has resulted in a piecemeal effort to conserve the extensive campus land resources and extensive unmitigated cumulative impacts.

Third, in the long-run developing a single HCP for the campus would not only be more effective from a conservation perspective, it also would likely be more cost effective. Every time the campus undertakes a development project they generally hire a consulting firm to comply with the environmental requirements of that specific project. In many cases, different consulting firms are hired, and we, as faculty who have particular expertise with the campus lands, are repeatedly asked to re-educate these consulting firms about specific conservation issues. By conducting a single HCP it would streamline the planning process and ultimately be more cost effective.

Fourth, a coordinated planning process is needed to provide the ongoing funding to implement the management necessary to conserve sensitive species. Currently much of the natural lands management on the UCSC campus falls to either UCSC Campus Natural Reserve or the UCSC Site Stewardship Program. Both of these groups have suffered drastic budget cuts in the past few years and rely largely on volunteer student labor for managing lands. In the past year the funding for the one part-time UCSC Campus Natural Reserve (CNR) steward has been cut entirely so effectively the lands in the CNR are not being managed. One of us (Holl) has been involved extensively in advising on the implementation on the Ranch View Terrace HCP. Some management funds were incorporated in the cost of this development project, but the amount provides for a few, very part-time people to do specific tasks required by this HCP. If the management funding from the Ranch View Terrace HCP were combined with similar costs associated with other individual projects, then the money could hire permanent employees who could provide the temporal and spatial continuity needed to do effective land management.

Finally, although not directly related to the HCP, a comprehensive planning process is needed to conserve the lands that many of faculty and students use as a living laboratory. Many classes and some research projects use the campus labs as laboratories, which are equally important as the indoor laboratories that scientists use. As examples, Dr. Greg Gilbert has a long-term NSF-funded forest monitoring project on UCSC Campus Natural Reserve lands in upper campus, and Dr. Karen Holl has over a decade of data from a USDA-funded grassland restoration study on Campus Grounds Services lands. Piecemeal development without considering cumulative impacts threatens the value of the remaining open space areas for teaching and research.

We close by noting that we are not writing to oppose growth of the UCSC campus into the northern lands. We realize that University of California has a commitment to educate the top high school graduates in the state. We are writing to ask that the City of Santa Cruz and the University of California, Santa Cruz engage in large-scale natural resource planning on campus lands, and specifically develop a campus-wide HCP as part of this expansion. Comprehensive natural resource planning is necessary to balance the need for growth with legal conservation requirements, as well as fulfill the commitment to sustainable development that was espoused in the UCSC LRDP.

Sincerely,



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Laurel Fox
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LETTER OA-8 – UCSC FACULTY

- OA-8-1 Support UCSC Campus-wide HCP. The comment expresses support for preparation of a campus-wide Habitat Conservation Plan (HCP). See Master Response GI- – Request for HCP regarding the process for preparing such plans.