



California Regional Water Quality Control Board

San Francisco Bay Region



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Arnold Schwarzenegger
Governor

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CIWQS Place No. 746266

Sent by electronic mail to:

Town Council
Town of Moraga
2100 Donald Drive
Moraga, CA 94556

Subject: Final Environmental Impact Report for the Rancho Laguna 2 Project

Dear Town Council:

San Francisco Bay Regional Water Quality Control Board (Water Board) staff are writing with regard to findings made in documents associated with the Final Environmental Impact Report (Final EIR) for the proposed Rancho Laguna II Project (Project) in the Town of Moraga. This Final EIR was certified by the Planning Commission on August 17, 2009.

We understand that the Town Council is meeting on October 28, 2009, to discuss issues that have been raised in an appeal of the Planning Commission's certification of the Final EIR. For the purposes of your discussion, this letter is written to reiterate comments that the Water Board has previously made regarding the proposed fill of the stream channel along Rheem Boulevard, and verify that the Town Council is aware that our position regarding the proposed fill has not changed.

Proposed Creek Fill is a Significant Impact: The Final EIR as adopted includes in the preferred alternative the proposed fill of 1,768 linear feet (LF) of a stream channel that runs along Rheem Boulevard (790 LF of wetland swale and 978 LF of intermittent stream channel). The *Mitigation, Monitoring and Reporting Program* (MMRP)(August 17, 2009), prepared to highlight impacts and proposed mitigation measures associated with the Project, states "with implementation of Mitigation Measures 3.55 #3a and #3b, this impact will be less than significant." Mitigation Measures 3.55 #3a and #3b include the re-creation of a swale and stream channel, and creation of a seasonal wetland and seep on top of the buttress fill.

We do not agree with the determination that the permanent loss of the natural stream channel can be mitigated to a less-than-significant level with the proposed mitigation. Further, we do not support the concept of creating a water course on top of engineered fill either in general, or more particularly as mitigation for the permanent loss of a natural stream channel. The natural creek

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that would be filled by the project offers a degree of complexity and diversity with respect to micro invertebrate and benthic organisms that would not be replaced by creation of a water course on fill, or by preservation of land and creeks either on-site or at an off-site location.

In our September 26, 2006, comments on the Draft EIR, we noted that the permanent loss of a natural stream channel is considered to be a significant impact. We also noted that the proposed creation of a water course on the buttress fill would not be acceptable as mitigation for such losses, should it be determined that the proposed fill is necessary. The September 26, 2009, letter also discussed the overall significance of the functions provided by the stream channel proposed to be filled, and noted that such functions were not adequately characterized or described in the Draft EIR.

The revisions to the Draft EIR, and other documents associated with the development of the Final EIR have not provided any new substantial information to address the comments made in our September 26, 2006, letter. Further, the Final EIR does not include new information that could support a determination that the Project including the proposed fill is the least environmentally damaging practicable alternative (LEDPA).

The proposed filling of the stream channel along Rheem Boulevard is a significant impact that is subject to review under current Water Board policies noted in our September 26, 2006, letter. These policies require that proposed fill of wetlands and streams be subjected to a rigorous analysis of alternatives designed to meet the project purpose. The policy of the State of California with respect to environmental impacts to water resources is to require – in ranked order – first, avoidance, and second, where impacts are unavoidable, to minimize such impacts, and last, to mitigate impacts that cannot be avoided or fully minimized, but only as a last resort. This means that no discharge of fill shall be permitted if there is a practicable alternative to the proposed discharge that would have less adverse impacts on the aquatic ecosystem. The Project proponent has not demonstrated in the Final EIR, or in materials submitted to the Water Board as part of their CWA Section 401 water quality certification application, that the proposed project constitutes the LEDPA as specified in the Guidelines.

Proposed Mitigation for Creek Fill Inadequate: The proposed re-creation of a stream on fill to compensate for the loss of a natural stream channel suggests to us a number of problems that can not be easily addressed. Some of these problems were noted in our September 26, 2006, letter, and also in comments provided to the Project proponent in response to the submittal of a 401 water quality certification application. These problems include potential stability issues, loss of groundwater/surface water interaction, and lost transport of important micro biota and nutrients through the watershed which are basic building blocks of a healthy aquatic ecosystem. A stream placed on fill would need to be carefully constructed to remain stable over time. As such, it would be designed to prevent natural movement of its bed and banks, which normally allow creeks to develop physical complexity associated with features formed by erosion and deposition. These types of features, such as shallow riffles, deep pools, and point bars, provide variation in habitat for creek organisms, and energy dissipation. As such, an engineered creek

will not function in the same ways as the existing natural creek. Re-creation of a creek resting on fill material might have the appearance of a natural creek, but it would lack many of its essential functions.

Information provided in the documents to support the Final EIR have not provided any basis for a change in our determination that proposed creation of a water course on the buttness will not provide satisfactory mitigation.

CEQA Requirements: CEQA requires that mitigation measures be presented in sufficient detail for readers of the CEQA document to evaluate the likelihood that the proposed remedy will actually reduce impacts to a less than significant level. In an adequate CEQA document, mitigation measures must be feasible and fully enforceable through permit conditions, agreements, or other legally binding instruments (CEQA Guidelines Section 15126.4).

In the case of the proposed Project, the proposed mitigation measures for stream and wetland fill are not adequate. Therefore, it is not appropriate to make a finding that impacts to biological and water quality functions will be mitigated to a less than significant level. Note also that it is not acceptable to include mitigation measures to be identified at some future time. It has been determined by court ruling that such mitigation measures would be improperly exempted from the process of public and governmental scrutiny which is required under the CEQA.

Several locations within the Final EIR documents suggest that off-site mitigation may be included in the eventual mitigation package, and/or that mitigation measures will be implemented as agreed upon during permitting with the various resource agencies. Considering that the Final EIR documents do not include adequate mitigation, it appears that the Project proponent may be relying upon yet-to-be identified mitigation for biological and water quality impacts. This conflicts with the above noted CEQA requirement that mitigation measures be identified during the CEQA process.

Creek vs. Drainage: We note that the Final EIR documents refer to the stream channel along Rheem Boulevard as a “drainage”, or a “swale” in the case of the stream located on existing fill at the upper end of the Project site. We do not agree with the use of this terminology, as it suggests to the reader that the functions and values of such a features are not important. Intermittent stream channels constitute an important part of the overall stream system in Contra Costa County. They provide habitat functions that are unique and different from those provided by a perennial stream. The fact that it is intermittent rather than perennial does not reduce its importance with respect to the Water Board’s determination as to whether impacts are significant. Further, the Water Board protects both existing and potential beneficial uses of all waters of the State. The fact that any portion of the stream channel along Rheem Boulevard may be “degraded” is not important when it comes to making determinations about proposed fill.

Other Issues: Other issues of concern that we have noted in reviewing the Final EIR documents include the following: (1) the potential conflict between the landscape plan as proposed to address visual impacts and the proposed biological and water quality functions of the created

water course; (2) the lack of a well defined stormwater treatment and flow control system; and, (3) the proposed creation of mitigation wetlands and a seep on the buttress fill area.

There appears to be a potential for conflict between the mitigation measures proposed to address visual impacts and the biological needs of the water course proposed for creation as mitigation for stream fill impacts. Landscape plans appear to have been modified to limit tree plantings in certain areas. It is not clear that the proposed biological functions of the created water course could be met if such limitations are in place, or that there is adequate space to plant the designated number of mitigation willows.

Current Water Board practice requires the use of landscape based treatment (such as bioretention features, rain gardens, planter boxes, etc) to the extent feasible within a development to provide for stormwater treatment and control of the increased flows from urban development. It is not clear that adequate land area within the development has been set aside to address this need. Note also that to prevent hydromodification impacts, the range of storms between 0.1 of the 2 year storm to the 10-year storm flows are typically considered to be of greatest concern. The Final EIR only refers to control of the 2-, 10-, and 100-year storm flows. Although this may be appropriate for flooding and peak flows, it will not necessarily address hydromodification concerns. Also, note that the newly constructed/paved Rheem Boulevard would need stormwater treatment features included in the design.

To mitigate for impacts to seasonal wetlands and a seep on the Project site, the Project proponent proposes to create similar features on the buttress fill. We do not support the creation of mitigation wetlands on fill. Mitigation wetlands shall be created in natural watershed areas where impacts to the existing hydrology will not occur. Also, seep re-creation has not generally been found to be successful. As such, out of kind seasonal wetland creation may be necessary, and the mitigation to impact ratio may be higher. Also, we note that the Final EIR generally refers to a 1:1 mitigation ratio (mitigation:impact). Due to uncertainties associated with mitigation wetlands, temporal losses, and the difficulties associated with creation of a wetland where it does not naturally exist, we generally require a higher ratio of mitigation are to impacted area.

If you have any questions, please contact Katie Hart at (510) 622-2356 or via e-mail at khart@waterboards.ca.gov.

Sincerely,

Shin-Roei Lee
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