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January 14, 2015

Vial Email to
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Certified US Mail to:
Central Valley Regional
Water Quality Control Board
Attention: Ms. Pam Creedon
Executive Director
11020 Sun Center Drive #200
Rancho Cordova, CA 95670

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Water Quality Control Board
Attention: Ms. Kati Carpenter
Engineering Geologist
1685 E Street
Fresno CA 93706

Re: Root Creek Water District, Riverstone Wastewater Treatment Facility Waste Discharge Requirements
Agenda Item 33 of the December 5/6 Agenda of the Central Valley Water Board

Dear Ms. Creedon and Ms. Carpenter:

This letter is intended to supplement the information provided to the Board on December 3, 2014, and is provided on behalf of Richard Gunner, who is a landowner that owns lands adjacent to the Root Creek Water District and in the environs of the proposed Riverstone Wastewater Treatment Facility (the "Project").

We first wish to thank the Board for delaying action on the approval of the Waste Discharge Requirements Order for that Project on the December 6, 2014. We have used this time to more thoroughly evaluate the report of Waste Discharge and its various Appendices, and wish to share our conclusions of those matters below. We also want to take this opportunity to detail the legal standards and substantial evidence that require your Board to prepare a Supplemental or Subsequent EIR as part of its CEQA evaluations before approving the requested project approvals.

1. Root Creek's Determinations as Responsible Agency. In our prior letter, we submitted substantial evidence demonstrating a number of items that reflect that the proposed Project is a significant change from the Project evaluated in the certified EIR. In response to that letter, Root Creek Water District provided correspondence from its legal counsel and engineer. Neither of those letters disputed the changes that we previously detailed. Instead, they stated that they had conducted an evaluation of those changes, as a Responsible Agency, and determined that they were not substantial and would not have a substantial impact on the environment.

Root Creek did not previously provide your Board or the public any materials concerning the date and nature of their stated evaluations and findings. We recently obtained materials from Root Creek based on a Public Records Act request, and those materials did not disclose any such evaluations.

However, even if Root Creek did such an evaluation, your Board, as a Responsible Agency, is nevertheless required to conduct its own evaluation of these matters. The

CEQA Guidelines, at Section 15096, specifically provide that "A Responsible Agency complies with CEQA by considering the EIR or Negative Declaration prepared by the Lead Agency and reaching it own conclusions on whether and how to approve the project involved". Your Board must therefore conduct its own assessment of whether the circumstances require a Subsequent EIR or a Supplemental EIR. You are not authorized to delegate that determination to, or rely solely on the unsubstantiated determinations of, another Responsible Agency.

2. Procedures for Your Board's Evaluations. CEQA does not mandate a specific procedure or format for your Board, as Responsible Agency, to determine whether a Subsequent or Supplemental EIR is required. However, the procedure must reflect a fact-based determination of the issues (se Kostka & Zishke, Practice Under the California Environmental Quality Act (CEB 2008) Section 19.1, p. 19-4.).

The prior form of the proposed Tentative Order states, in a conclusory manner, that the requirements of a Subsequent or Supplemental EIR do not exist. However, there is no reference to any evaluation of the quality of the proposed Project changes, any assessment of their potential environmental impacts, or even an acknowledgement that there has been a significant change to the Project. This may be because those matters were not previously fully disclosed by Root Creek in the materials it submitted to your staff. Now that those materials have been provided, a more thorough evaluation of the appropriate additional evaluations required for CEQA compliance is necessary.

3. Inapplicability of Addendum Process. Based on the approaches that Root Creek and Riverstone Development have thus far pursued, it is reasonable to expect that they will attempt to convince your Board to pursue a further CEQA compliance method that avoids the benefit of further public review of the necessary evaluations. For that reason, I anticipate Root Creek will recommend to the staff and the Board that a mere Addendum to the previously certified EIR be prepared.

From a pure public policy standpoint, an Addendum has the significant disadvantage that it is not circulated for public review and comment. That is because it is designed for use in circumstances where there are merely minor corrections necessary in the prior EIR, or the document is developed to demonstrate the agency's determination that a subsequent or supplemental EIR is not required. (CEQA Guidelines Section 15164). Stated another way, an Addendum is acceptable, rather than a new or Supplemental EIR, when there are only minor technical changes or additions which do not raise new issues about the significant effects on the environment. (*Ventura Foothill Neighbors v. County of Ventura* (2014), 232 Cal.App.4th 429). Substantial evidence must support that determination. For the reasons detailed below, that determination is not appropriate in this matter because the circumstances requiring a subsequent or supplemental EIR exist. Therefore, both

public policy and legal standards mandate an approach that does not rely on a mere Addendum.

4. Necessity of a Subsequent or Supplemental EIR. When substantial changes are proposed in a project, a Subsequent or Supplemental EIR is required (Public Resources Code Section 21166(a)). CEQA Guidelines Section 15162(a)(1) further detail that further EIR preparation is required where: (1) the change in the project is substantial; (2) the change involves new or more severe significant environmental impacts; (3) the change will require major revisions to the previous EIR based on the new or more severe impacts; and, (4) the more severe impacts were not considered in the prior EIR. In this instance, the decision to develop the Interim WWTP so that it percolates undisinfected effluent into the aquifer is a significant change in the Project that will have two important and severe impacts not considered in the prior EIR. Therefore, that EIR must be modified in a manner that provides more than a mere clarification or correction. It requires a substantial new analysis that is a major revision of the prior EIR.

a. Impact of Revision on EIR's Water Supply Assessment. The EIR certified by the County of Madera for the Project relied, in part on a Water Supply Assessment (a "WSA") for the Project that was prepared initially for the Root Creek Water District. A copy of that WSA is enclosed as Exhibit "A". Section 9 of the WSA details the proposed water supply for the Project. At section 9.3, it represents to the public that reclaimed water from the WWTP will be stored in lined ponds and used to irrigate crops on the designated disposal areas. That arrangement is to provide groundwater recharge, by diminishing the demands on groundwater that the agricultural uses otherwise created. It is therefore part of the overall program of assuring water supply reliability for the Project, and addressing the then existing groundwater overdraft within the Root Creek Water District.

Section 8.3 of that WSA also discusses water conservation measures and quotes from the Gateway Village 2006 Infrastructure Master Plan. It states that "all wastewater effluent shall be conjunctively reused within RCWD either as reclaimed water or for agricultural irrigation".

The approvals pending before the Regional Board reflect a significant change in the Project. Effluent generated during use of the Interim WWTP will not be stored in lined ponds or conjunctively reused in any manner. The entire amount will be percolated into the ground. In addition, the Ultimate WWTP no longer intends to use conjunctive reuse of effluent as the sole method of discharge. A substantial portion of the effluent will now be percolated into the ground. These are significant changes in the Project and have important impacts on the water balance arrangements represented by the WSA.

The significance of this impact is illustrated by Table 1 of the WSA. That table demonstrates how Root Creek intends to achieve the requirements of the WSA, to address an overall 3,400 acre-feet of overdraft. The table details the contributions of six stated approaches. It confirms that the goal is not achieved without substantial reliance on the conjunctive reuse of the effluent (as detailed in its measures 3 and 4). The amount of effluent estimated for conjunctive reuse by the WSA also did not account for loss of water to the aquifer arising from percolation of the effluent. However, based on engineering analysis conducted by the engineer that prepared the Report of Waste Discharge, percolation of effluent will result in significant loss of such waters from the underlying aquifer.

The Report of Waste Discharge and its related addendums has information that, when parsed through, allows a reviewer to discern the significance that this Project change will contribute to the over drafted water aquifer (though there is no discussion of the impact of that significant change). That analysis requires an inventory all of the effluent to be generated during the years that the Initial Plant is operated, and how much is expected to be percolated. It also requires a consideration of the potential loss to the aquifer of portions of the effluent (beyond losses generated by evaporation. A similar analysis must be done for both phases of the Ultimate Plant since significant amounts of effluent will continue to be percolated.

The Initial Plant will provide no conjunctive use of effluent, and that circumstance will continue for up to 10 years. The Report of Waste Discharge, Section 3 (page 10) confirms that the Initial Plant is intended to operate for up to 8.6 years. The Antidegredation Study, Section 6.4.1 (page 24) states that the Initial Plant will operate for approximately 7 to 10 years.

The quantity of effluent, in acre-feet per year, is detailed in Exhibit E to the Report of Waste Discharge. The first page of that Exhibit confirms that 336 acre-feet of effluent will be generated and sent to the percolation ponds. The calculations assume that, after evaporation, 81% of the ponded effluent is percolated (see also Section 5.1 of the Report of Waste Discharge). As a result, 272 acre-feet per annum of effluent, which the WSA assumed would be applied to conjunctive use, is being percolated. That is 2,720 acre-feet over the 10-year life of the Interim Plant.

Thereafter, during the initial operation of the Ultimate Plant, as shown on page 2 of Exhibit E, 403 acre feet per annum of effluent is delivered to the ponds for percolation. After accounting for the reports assumed evaporation, the calculations demonstrate that 326 acre-feet per annum of effluent, which the WSA assumed, would be applied to conjunctive use, is being percolated. That is 3,264 additional acre-feet over the remaining 10 years of the WSA's analyzed 20-year framework.

When the Ultimate Plant expands from 0.9 MGD to 1.8 MGD, as shown on page 3 of Exhibit E, 829 acre-feet per annum of effluent is delivered to the ponds for percolation. After accounting for the reports assumed evaporation, the calculations demonstrate that 671 acre-feet per annum of effluent, which the WSA assumed would be applied to conjunctive use, is being percolated.

Enclosed as Exhibit "B" (and enclosed with our prior correspondence) is a memorandum of Provost and Pritchard, which analyzed, among other arrangements, the benefit to the local aquifer of percolated effluent intended for another project in the immediate environs of the Root Creek Water District. It states that it is not reasonable to assume that percolated effluent in these environs is a 100% contribution to the underlying aquifer (even after deducting for evaporation). Instead, Provost and Pritchard recommend a 50% reduction in the benefit to the aquifer from percolated effluent (see note (1) to Provost and Pritchard Water Demand and Balance Calculations for Gunner Ranch West Development). There is no evidence in this record to conclude that percolation efficiencies for the Root Creek Project is any different than those assumed for the project evaluated in their Exhibit B analysis.

Applying Provost and Pritchard's above described percolation efficiency assumptions to its above-described water balance calculations, the new design of the Interim Plant will result in a loss to the aquifer of 136 acre-feet of water, per annum. For the initial capacity of the Ultimate Plant, the Project change will result in a loss to the aquifer of 163 acre-feet per annum. At full projected build-out of the Ultimate Plant, the Project change will result in a loss to the aquifer of 336 acre-feet per annum. These calculations are all supported by the analysis of the above-described materials, conducted by the engineering firm of AECOM, which is included for your reference as Exhibit "C".

b. Offsetting Surface Supply. During the prior Board hearing, Provost and Pritchard suggested that no further CEQA evaluations of any kind should be required despite the above described significant change to the Project. That argument relied on the fact that there are contracts for surface water supplies that Root Creek has entered into, which are described in the WSA.

That assertion somewhat reflected in Section 7.3 of the Antidegradation study, which states that the County's adopted Specific Plan for the Project requires that the Project import 3,400 acre- feet of surface water supply. A review of the relevant documents shows that the assertions are not accurate.

The element of the Specific Plan that references water balance commitments is the Infrastructure Master Plan (the "IMP"). The IMP is enclosed for your reference as Exhibit "D". At page 17, the IMP states that a groundwater recharge program is being instituted to replace the 3,400 acre-feet of overdraft, on a five year rolling

average basis. The recharge program is described as a combination of direct recharge via land application and in-lieu recharge. It does not state that surface water is being used to address the entire 3,400 acre-feet of existing overdraft. Indeed, a substantial portion of the intended 3,400 acre-feet of recharge is intended to come from direct recharge, which was to result from the conjunctive reuse of the effluent. This is further emphasized at page 22, where the County approved IMP notes, ***"[A]ll wastewater effluent shall be conjunctively reused within RCWD either as reclaimed water or for agricultural irrigation"***.

Page 29 of the IMP discusses the extent of commitment to surface water imports in more detail. It states that proposed in-lieu system will deliver approximately 3,304 acre-feet of irrigation water annually. It further states, ***"The commitment of the Project through combined groundwater overdraft reduction programs is to perform 3,400 AF/year of recharge as measured on a rolling five-year-average basis, an amount adequate to eliminate the current groundwater deficit within RCWD."***

In limitation of that commitment, it further states ***"There is no intent to fully-utilize these in-lieu facilities every single year, and there is no commitment to increase the 3,4000 AF/year contribution from the combined groundwater overdraft reduction programs toward district-wide overdraft even if subsequent study shows the estimated overdraft to have increased"***.

The IMP make clear that the primary surface water supply to be used to augment the conjunctive use of effluent is contracts for Section 215 flood flows and Class 2 water supplies. The Specific Plan IMP does not primarily rely upon, nor commit Root Creek to provide as a Project requirement, the "up to" 7,000 ace-feet of water available under Westside Water Company contract that was subsequently assumed by Paramount Land Company. Regarding the commitments to the use of that Paramount water to benefit the aquifer, the IMP states "***It is again noted that the back-up water supply is intended as a fail-safe, and under ideal or average conditions will not have to be used to maintain the required rolling-average water balance. It has been put in place only to assure stakeholders that the project's water supply is not at risk in even a series of dry and very-dry years.***"

Based on the actual language of the Specific Plan's commitments, there is no commitment to supply 3,400 acre-feet of surface water annually. Nor is there a commitment to supply any of the water made available under the contract with Paramount.

More fundamentally, there is no description of how the impact of changing from conjunctive use of all effluent, to percolation of effluent, will change the previously evaluated water balance calculations. We know that Provost and Pritchard

believes that percolated effluent will be a significantly diminished benefit to the underlying aquifer, versus the original Project's intended application to crops. We also know that the Specific Plan confirms that there is no intent to adopt additional measures to address changes in the previously assumed groundwater overdraft. How the change to percolation of effluent, versus conjunctive use, will be addressed in these water balance commitments is unknown. It is a new significant impact, arising from significant changes in the Project, which were not previously analyzed in the prior EIR. Major revisions to the EIR must be made to address this new impact. Those revisions should be subjected to public review and comment, as either a Subsequent EIR or Supplemental EIR.

c. Change in Intended Disinfection of Effluent. In its statement of CEQA Compliance, the Report of Waste Discharge inaccurately states that the original intended design for the Phase A Project was to include an undisinfected design. This statement is contradicted by that Report's own immediately following paragraph, which quotes from the EIR certified for the Project. That paragraph quoted from the EIR states that "***The Phase A WWTP would be designed to treat wastewater to disinfected secondary standards suitable for irrigation on agricultural lands, such as citrus trees in the Effluent Disposal Area.***" (Emphasis added) Therefore, in describing its intended CEQA Compliance, the Report of Waste Discharge fails to acknowledge (and perhaps innocently misrepresents) the fact of the change from disinfected to undisinfected design.

The negative consequences of percolating undisinfected effluent into the groundwater table is addressed in the AECOM study that was provided with our prior correspondence. AECOM has now had the opportunity to evaluate the complete Antidegradation Study for the Project. As reflected in the attached report, AECOM reconfirms its prior conclusions about the environmental impacts of this change to the Project.

d. Broader Consequences of Change to Percolation Design. The Regional Board's requirement of an Antidegradation Study, as a condition of allowing the Project to use of percolation ponds to discharge treated effluent, is, in itself, substantial evidence that there has been a significant change in the Project. The Project's Certified EIR did not incorporate any of the analysis detailed in the Antidegradation Study because the Project described in the EIR relied disposal of the effluent through application to agricultural crops (and lined ponds for interim storage).

The Antidegradation Study submitted by Root Creek may provide much of the analysis that a Subsequent or Supplemental EIR would require to evaluate the impact on the groundwater of effluent constituents from the new percolation strategy.

However, the fact that this Project element requires substantial additional environmental evaluation demonstrates that this change in the Project is significant.

As noted above, there are errors in the Antidegradation Study's discussion of the commitments for water balance made in the adopted Specific Plan. This letter is able to discuss those errors only because we were able to obtain that study as a result of a Public Records Act request. Other errors may be identified if the document was made available for broader public evaluation, consistent with the policies of CEQA. Therefore, the significant new evaluations of the Project's impact that result from effluent percolation, as detailed in the Antidegradation Study, should be circulated for public review and comment, as part of a Subsequent or Supplemental EIR.

Section 8 of the Antidegradation Study incorporates an analysis of the costs and benefits of percolation versus other strategies, including the strategy of storing and applying the effluent for agricultural irrigation (the strategy assumed and evaluated in the Certified EIR). This further reflects that the environmental impacts resulting from the proposed change in the Project can only be justified by a weighing of the benefits and the costs of the originally proposed effluent disposal strategy. That level of Project evaluation of a significant Project change can only be done through an appropriate Subsequent or Supplemental EIR.

5. Conclusion. For the reasons stated above, your Board is urged to require the completion of a Subsequent or Supplemental EIR before it authorizes the Project to change to percolate the effluent in the groundwater. Substantial evidence supporting such a requirement is detailed above. Please ensure that this letter and all referenced enclosures are included in the Record of Proceedings regarding the above referenced matter.

Sincerely,

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

Jeffrey M. Reid

Enc. Exhibit A – WSA for Gateway Village Project
Exhibit B – Memorandum of Provost & Pritchard
Exhibit C - Report of AECOM
Exhibit D – IMP for Gateway Village Project Specific Plan