

Comments of Friends of Orinda Creeks on Proposed Settlement and Stipulated Order in the matter of Administrative Civil Liability Complaint R2-2015-1003 issued to OG Property Owner, LLC dated October 9, 2015

RE: Objection to proposed Settlement and Order without stipulation for use of available ACL funds within Upper San Pablo Creek Watershed

The Friends of Orinda Creeks (FOC) is a registered 501(c)(3) nonprofit volunteer organization founded in 1994. FOC's mission is to conserve, restore, and educate the public about the values of and threats to the creeks of Orinda. We restore, monitor and protect the creeks of Orinda, California. We involve residents and young people in restoration activities. We educate students and other residents on how healthy creeks mean a healthy water supply. We conduct public meetings and workshops for homeowners about issues involving our creeks and about caring for creeks near their homes. Members of FOC work hands-on to monitor, restore, and protect native habitat in our creeks in order to maintain clean water and a healthy watershed. To achieve these goals and increase awareness of creek issues, we invite volunteers from the community, including residents, homeowners, students from Orinda's schools, and scouting organizations to participate in this ongoing effort. More information about FOC can be found on our website at www.orindacreeks.org.

OG Property Owner, LLC's Wilder Project, where the discharge that is the subject of this proposed settlement occurred, is within Orinda and within the San Pablo Creek watershed. The headwaters and most of the San Pablo Creek watershed drainage area upstream of San Pablo Reservoir lie within Orinda. The proposed settlement agreement and stipulated order includes an agreement by OG Property Owner, LLC to pay an Administrative Civil Liability (ACL) totaling \$449,000. FOC strongly believes that to the maximum extent legally possible, that funds from this ACL should be spent on restoration and other relevant activities in the San Pablo Creek watershed upstream of San Pablo Reservoir where the damage to beneficial uses occurred. The State of California has a Policy on Supplemental Environmental Projects (SEPs) designed to accomplish just such an appropriate use of the funds resulting from the ACL.

California's SEP policy states that the State Water Board or Regional Water Board may allow a discharger to satisfy part of the monetary assessment imposed in an ACL by completing or funding one or more SEPs. It further states that as a general rule funding for SEPs should be no more than 50 percent of the assessment against the discharger. The policy also stipulates that SEPs may be performed by the discharger or by an independent third-party entity, and that: "The SEP shall directly benefit or study groundwater or surface water quality or quantity, and the beneficial uses of waters of the State. Examples include but are not limited to: a. monitoring programs; b. studies or investigations (e.g., pollutant impact characterization, pollutant source identification, etc.); c. water or soil treatment; d. habitat restoration or enhancement; e. pollution prevention or reduction; f. wetland, stream, or other waterbody protection, restoration or creation; g. conservation easements; h. stream augmentation; i. reclamation; j. watershed assessment (e.g., citizen monitoring, coordination and facilitation); k. watershed

management facilitation services; l. compliance training, compliance education, and the development of educational materials; m. enforcement projects, such as training for environmental compliance and enforcement personnel; and n. non-point source program implementation.” Note how these qualifying SEP activities closely align with FOC’s objectives and activities.

A particularly relevant section of the SEP Policy states in part that: “There must be a nexus between the violation(s) and the SEP. In other words, there must be a relationship between the nature or location of the violation and the nature or location of the proposed SEP.” It is for these reasons, consistent with and using mechanisms established under the State’s SEP Policy, that FOC believes that available funds from this ACL should be spent on restoration and other relevant activities in the San Pablo Creek watershed upstream of San Pablo Reservoir where the damage to beneficial uses occurred.

FOC was greatly disappointed that the 2010 Settlement Agreement and Stipulation for Order and Administrative Civil Liability Order, Order No. R2-2010-0085, issued by the San Francisco Bay Regional Water Quality Control Board which addressed a 2009 violation by OG Property Owner, LLC and payment of an ACL in the amount of \$530,000, did not include any requirements for funding of any restoration or related activities in the San Pablo Creek watershed where the damage from that violation also occurred. FOC, along with the City of Orinda, had submitted multi-element SEP proposals for State SEP Policy qualifying funding in that matter.

Regarding the present matter, then, given: 1) adopted California policy; and 2) the nature and location of the damage, FOC objects to the approval of the Settlement Agreement and Stipulated Order as proposed. FOC respectfully requests that the San Francisco Bay Regional Water Quality Control Board takes appropriate actions to structure a final settlement agreement and order that includes provisions requiring that available funds from the proposed ACL be applied to one or more SEPs which would, according to the State SEP Policy, “directly benefit the area where the harm occurred . . .” Doing so would be the right thing to do, and FOC would support approval of such final agreement and order.

Thank you for considering these comments. We look forward to the Regional Water Board incorporating our recommendations in its final action on this matter.

Submitted on November 5, 2015 by Brian Waters on behalf of the Members of the Board of Friends of Orinda Creeks, as authorized by the Board of Friends of Orinda Creeks at its Board Meeting on October 13, 2015.

Members of the Board of Friends of Orinda Creeks: Reginald Barrett, Adriane Bosworth, Ethan Elkind, Lisa Hales, Toris Jaeger, James Luini, Michael McGowan, Brian Waters