1st Civ. No. A157127

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

SANTA CLARA VALLEY WATER DISTRICT,

Petitioner and *Appellant*,

v.

SAN FRANCISCO BAY REGIONAL WATER QUALITY CONTROL BOARD,
Respondent.

Appeal From The Contra Costa County Superior Court
Case No. MSN171822
Honorable Edward Weil, Judge

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND [PROPOSED] *AMICUS CURIAE* BRIEF OF ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, IMPERIAL IRRIGATION DISTRICT, AND CALIFORNIA CENTRAL VALLEY FLOOD CONTROL ASSOCIATION IN SUPPORT OF PETITIONER AND APPELLANT SANTA CLARA VALLEY WATER DISTRICT

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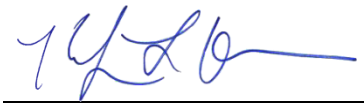
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons that must be listed under California Rules of Court, Rule 8.208.

Dated: August 10, 2020 DOWNEY BRAND LLP

By: 

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT

TO THE HONORABLE PRESIDING JUSTICE OF THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT:

Pursuant to California Rules of Court, Rule 8.200(c), *Amici Curiae* Association of California Water Agencies ("ACWA"), California State Association of Counties ("CSAC"), Imperial Irrigation District ("IID"), and California Central Valley Flood Control Association ("CCVFCA") (collectively, "*Amici Curiae*") respectfully submit this application to file the accompanying brief in support of Petitioner and Appellant Santa Clara Valley Water District (the "District"). Pursuant to California Rules of Court, Rule 8.200(c)(1), this application is timely, as it is being filed within fourteen (14) days after appellant's reply brief was and could have been filed. *Amici Curiae* have not filed any prior applications in this proceeding.

INTERESTS OF *AMICI CURIAE*

Association of California Water Agencies ("ACWA")

ACWA is a non-profit public benefit corporation organized under California law that has existed since 1910. ACWA is the largest coalition of public water providers in the United States, currently representing more than 450 water agencies. ACWA's membership is diverse, ranging from small irrigation and flood control districts to large water districts and water wholesalers. Collectively, ACWA's members are responsible for developing water supply projects of various magnitudes, as well as managing, treating, and distributing approximately 90 percent of the water delivered to rural and urban communities, farms, industries, and cities throughout California.

ACWA has a direct interest in this appeal because ACWA members regularly undertake infrastructure improvements and other projects that are subject to environmental review and permitting, and permit conditions and

environmental reviews must provide agencies with the certainty necessary to properly plan and fund critical projects. When an ACWA member finalizes its Environmental Impact Report ("EIR") under the California Environmental Quality Act ("CEQA"), the EIR helps the planning and budgeting for the project because that document encapsulates all potential project impacts and measures necessary to reduce or avoid those impacts. Likewise, the purpose of the water quality certification pursuant to Section 401 of the federal Clean Water Act ("CWA") is to allow a permittee to proceed with a project while knowing the permit conditions and other requirements with certainty. The Superior Court of the State of California, County of Contra Costa's Statement of Decision undermines this certainty by condoning the San Francisco Bay Regional Water Quality Control Board's ("SF Regional Water Board") attempts to add mitigation measures and amend permit conditions long after these processes have been completed.

As *Amicus Curiae,* ACWA submits this brief in support of the District to illuminate for this Court the critical way in which the trial court decision interferes with water agencies' ability to commence and complete infrastructure projects. This brief highlights that (1) the time for the state, as a responsible agency, to participate in CEQA's environmental review process, is before the certification of an EIR, and (2) Regional Water Quality Control Boards may not engage in wholesale revision and re-certification of water quality certification pursuant to Section 401 of the federal CWA long after issuing the initial certification. In short, the trial court's ruling should be reversed to prohibit tactics that would delay and jeopardize infrastructure projects.

<u>California State Association of Counties ("CSAC")</u>

CSAC is a non-profit corporation, and its membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program,

which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the State. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

CSAC's members are responsible for public-works projects that serve critical public-health, safety, and welfare needs. Such projects can include fire-abatement projects, storm-drain projects, facilities-upgrade projects that increase energy efficiency, road-safety and pavement-upgrade projects, undergrounding-utilities projects, sewer-treatment projects, projects related to correctional facilities, and projects related to parks and recreational areas. The environmental impacts of such projects should be raised during the CEQA process, so that such impacts and any related mitigation may be addressed and accounted for before project approval. At the very least, permits, such as the water quality certification pursuant to Section 401 of the CWA at issue in this appeal, should not remain open for an unspecified time. Addressing environmental impacts during the CEQA process, rather than in a piecemeal fashion that may extend throughout the construction and life of a project, will create the certainty necessary to assure that important public projects continue to be built.

Imperial Irrigation District ("IID")

IID was formed in 1911, and is headquartered in Imperial, California. IID is a community-owned utility, providing irrigation water and drainage 24-hours a day, seven days a week to the lower southeastern portion of California's desert. IID serves water through approximately 5,600 delivery gates for irrigation purposes; operates and maintains more than 1,400 miles of lateral canals, 230 miles of main canals and the 80-mile-long All-American Canal; maintains over 1,450 miles of drainage ditches used to collect surface runoff and subsurface drainage from over

32,000 miles of tile drains underlying nearly 500,000 acres of farmland; and has constructed 11 regulating/interceptor reservoirs, with a total capacity of more than 4,300 acre-feet of water, as part of its ongoing water conservation program.

IID's infrastructure, and projects maintaining and improving that infrastructure, are of critical importance to those who rely on IID for irrigation water and drainage. IID's ability to address the environmental impacts of projects that maintain and improve IID's infrastructure during the CEQA process, as opposed to at some point during the construction and life of a project, is critical to IID's ability to plan and budget for such projects.

California Central Valley Flood Control Association ("CCVFCA")

CCVFCA was established in 1926 to promote the common interests of rural and urban public flood management agencies sharing in the responsibilities associated with reducing the risks of flooding in the Sacramento and San Joaquin Rivers and their tributaries, including the Delta. Today, the CCVFCA is the premier flood protection advocacy organization with a consistent presence in Sacramento and is comprised of over 75 members with a wide spectrum of flood control expertise and responsibilities, including reclamation districts conducting surface drainage and routine levee maintenance; cities and counties managing stormwater and levee systems; regional agencies constructing urban flood control improvements; and associated consulting firms working for all levels of government. Reducing flood risk and protecting public safety remains the day-to-day business of CCVFCA's public agency members.

Due to the passage of Proposition 218 in 1995, almost all of CCVFCA's members rely on dedicated funding streams to implement flood protection projects; in other words, projects are funded through project-specific assessments, and the agencies typically do not have general funds.

These funding streams are developed and then approved through a vote by property owners who are voting to assess themselves in order to fund necessary improvements. The amount presented to voters is based on the agency's understanding of the likely cost of the project. The actions of the SF Regional Water Board in this case threaten to undermine CCVFCA members' ability to implement these property and life-safety projects by creating significant uncertainty about future mitigation and how that future mitigation would be funded.

In order to reduce flood risk and to protect the public, CCVFCA member agencies must have a high level of certainty regarding permit conditions at the time the permit is issued. For these reasons, CCVFCA is joining in this brief.

THE *AMICUS CURIAE* BRIEF WILL ASSIST THE COURT IN DECIDING THIS MATTER.

In summary, *Amici Curiae* submit this brief as representatives of local public agencies, counties, and municipalities throughout the State of California. Because *Amici Curiae* and their members often act as lead agencies under CEQA for critical water-supply and infrastructure projects, they have a strong interest in ensuring that CEQA's standards governing the duties and requirements of responsible agencies are applied in a legally consistent and practical manner in accordance with State policy. Similarly, *Amici Curiae* and their members have a significant interest in ensuring that the California State Water Resources Control Board ("State Water Board") and nine related Regional Water Quality Control Boards ("Regional Water Boards") timely issue water quality certifications pursuant to their delegated authority under the CWA without imposing uncertain conditions or terms allowing the certification to later be reopened or revisited at some unspecified time in the future, as this can create chaos for the regulated community. Finally, *Amici Curiae* can also be responsible for securing 401

certification from the State and/or Regional Water Boards, along with other permits, to implement their own large-scale public works and infrastructure projects, which rely on permitting certainty to ensure project viability, sufficient financing, and ratepayer satisfaction.

An adverse ruling in this appeal could impose significant new administrative burdens and liabilities on *Amici Curiae* members under CEQA and the CWA, and jeopardize their ability to timely fund and implement projects. *Amici Curiae* are uniquely situated to comment on the implications of the trial court's decision on this matter, as well as caution this Court against issuing a blanket ruling that could have far-reaching and negative unintended consequences.

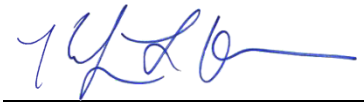
Amici Curiae respectfully request that the Court accept and consider the accompanying brief in support of the District.

CALIFORNIA RULE OF COURT 8.200(c)(3) STATEMENT

No party or counsel for a party in this appeal authored this proposed *Amicus Curiae* brief, in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity made a monetary contribution intended to fund the preparation or submission of this proposed *Amicus Curiae* brief, other than the *Amici Curiae* submitting this proposed brief, their members, or their counsel in the pending appeal.

Dated: August 10, 2020

By: DOWNEY BRAND LLP



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AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

I. INTRODUCTION

A. Interests of *Amici Curiae*

As reflected in the briefs of Appellant Santa Clara Valley Water District ("District") and Respondent San Francisco Bay Regional Water Quality Control Board ("SF Regional Water Board") (collectively, the "Parties"), this matter involves an appeal tied to an extensive flood protection project (the "Project") undertaken by the District and the United States Army Corps of Engineers ("Corps") for a stretch of the Upper Berryessa Creek in San Jose and Milpitas. The Project is intended to improve a 2.2-mile stretch of the Upper Berryessa Creek to prevent the Creek from overflowing and flooding an area including hundreds of surrounding homes and businesses, as well as a new Bay Area Rapid Transit ("BART") station. (AR 8795, 8835, 1176-77.)[1] The Project was the subject of extensive environmental review and permitting, including under the California Environmental Quality Act ("CEQA").

Amici Curiae Association of California Water Agencies ("ACWA"), California State Association of Counties ("CSAC"), Imperial Irrigation District ("IID"), and California Central Valley Flood Control Association ("CCVFCA") (collectively, "*Amici Curiae*") consist of a diverse group of local public agencies, counties, and municipalities throughout the State of California, who often serve (or whose members often serve) as lead agencies under CEQA for important water supply, flood control, and infrastructure projects. *Amici Curiae* have a strong interest in ensuring that

[1] Consistent with the Parties' briefs, the following acronyms are used throughout this brief: Appellant's Opening Brief ("AOB"), Appellant's Appendix ("AA"), Administrative Record ("AR"), Respondent's Brief ("RB"), Appellant's Reply Brief ("ARB").

CEQA's standards governing the duties and requirements of responsible agencies are applied in a legally consistent and practical manner in accordance with state law and policy. Similarly, *Amici Curiae* and their members have a significant interest in ensuring that the California State Water Resources Control Board ("State Water Board") and nine related Regional Water Quality Control Boards ("Regional Water Boards") timely issue water quality certifications pursuant to their delegated authority under the Clean Water Act ("CWA") without imposing uncertain conditions or terms allowing the certification to later be reopened or revisited at some unspecified time in the future.

As explained in greater detail below, *Amici Curiae* submit this brief in support of the District because an adverse ruling on appeal could impose significant new administrative burdens and liabilities on local agencies under CEQA and the CWA, and jeopardize the ability of agencies to timely fund and implement projects. *Amici Curiae* are uniquely situated to comment on the implications of the trial court's decision on this matter, and thus respectfully request that this Court reverse the trial court's decision and caution this Court against issuing a blanket ruling that could have far-reaching and negative unintended consequences.

B. Relevant Factual Background[2]

As typically occurs in projects involving disturbance of water features such as creeks and channels, the District's Project was the subject of extensive state and federal environmental review and permitting. The comprehensive environmental review took place pursuant to CEQA, in the form of an Environmental Impact Report ("EIR"). The District was the

[2] Rather than restate the facts and procedural history in detail, *Amici Curiae* simply provide the following relevant background information as context for the issues *Amici Curiae* would like to highlight for the Court.

lead agency for this effort. (AR 8823.) Pursuant to Section 401 of the CWA (33 U.S.C. § 1341(a)), in 2015, the Corps sought a water quality certification from the SF Regional Water Board that the Project met applicable requirements, as part of the CWA permitting process. (AR 2244-49, 1848.)

As relevant here, CWA Section 401(a) provides that if the entity charged with issuing the water certification does not act on a completed application within a reasonable time not to exceed one year, the ability to act on the certification is waived. (33 U.S.C. § 1341(a).) In March 2016, the SF Regional Water Board issued its "Water Quality Certification for the Upper Berryessa Creek Flood Risk Management Project" (the "2016 Certification"). (AR 1848-68.) Within the 2016 Certification, the SF Regional Water Board included five broad categories or items, including certain known Project impacts, which the SF Regional Water Board indicated it intended to later address when it considered and adopted Waste Discharge Requirements ("WDR") for the Project.[3] (AR 1849.)

WDRs are the state permitting mechanism to authorize the discharge of waste to waters of the State. (Cal. Wat. Code, §§ 13260, 13263.) The SF Regional Water Board is well aware that the issuance of WDRs does not

[3] The SF Regional Water Board's March 2016 water quality certification reserved the right to later impose additional conditions tied to WDRs in relation to "Future operation and maintenance; [¶] Requirements for monitoring of vegetation reestablishment and channel cross and longitudinal sections to inform future maintenance guidelines under the District's Stream Maintenance Program; [¶] A plan to compensate for the capital project's impacts; [¶] Requirements for the post-construction stormwater treatment from newly-constructed or replaced impervious surface; and [¶] Plans for future site uses." (AR 1849.) Undoubtedly, such generic reservations could entail a number of different scenarios and would create uncertainty for any project applicant regardless of project funding ability.

involve addressing environmental impacts previously identified in an EIR/CEQA document, and WDRs do not prescribe mitigation to offset such impacts. That is the purpose of the CWA Section 401 certification, which, by its own terms, is broader in scope than WDRs. (Compare 33 U.S.C. § 1341, with Cal. Wat. Code, § 13263.) Instead, Water Code sections 13260 and 13263 authorize WDRs to contain specific requirements regulating the character of a discharge to receiving waters of the State (*i.e.*, the receiving creek). (Cal. Wat. Code, §§ 13260, 13263.) With respect to regulating the character of a discharge, WDRs must "implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241."[4] (Cal. Wat. Code, § 13263(a).) The authorizing statutes do not contemplate that WDRs will address environmental impacts generally, or mitigation related thereto.

As part of the environmental review process, the District acted as the lead agency under CEQA and prepared an EIR for the Project, certifying the final EIR (the "Final EIR") on February 9, 2016, and filing a Notice of Determination on February 16, 2016. (AR 8792, 8793.) As a responsible agency under CEQA, the SF Regional Water Board submitted detailed comments on the draft EIR (the "Draft EIR"), including comments addressing the Project's impacts and related mitigation measures, which the District responded to in the Final EIR. (See AR 9143-54.) The Final EIR found that impacts to water quality would be less-than-significant with

[4] Water Code section 13241 sets forth the types of economic, environmental and socioeconomic factors to be considered when setting water quality requirements for discharge. (Cal. Wat. Code, § 13241.)

imposition of on-site mitigation measures; no off-site compensatory mitigation was deemed necessary. (AR 9054-71.) The SF Regional Water Board did not bring a timely action challenging the Final EIR. However, when issuing the 2016 Certification, just one month after the Final EIR was certified, the SF Regional Water Board claimed that the Final EIR was suddenly deficient, for not including "necessary detail for long-term impacts and mitigation." (AR 1857.) Given the SF Regional Water Board's position in the 2016 Certification, it is clear the SF Regional Water Board had staked its position internally, chose not to challenge the Final EIR, and instead, sought to impose significant new requirements as part of the subsequent issuance of WDRs, for which no authority exists, as discussed herein.

Over a year later, the SF Regional Water Board rescinded the 2016 Certification and, on April 12, 2017, issued Order No. R2-2017-0014 (the "2017 Certification"), replacing the earlier version. (AR 1175-1212.) By its own terms, the 2017 Certification amounted to a combined water quality certification (re-issued over a year after the original) and WDRs, and now included extensive mitigation to compensate for the Project's supposed waste discharge effects, even though the Project's impacts and mitigation measures were already identified during the EIR/CEQA process and were properly subject to the 2016 Certification's terms. (AR 1175-76, 1186-88, 1193.) Specifically, the 2017 Certification imposed compensatory off-site mitigation to ensure a "long term net gain in the quantity, quality, and permanence of wetlands acreage and values" (AR 1186) including "measures that enhance about 15,000 linear feet or 15 acres of waters of the State or a combination of length and area commensurate with the Project's impacts." (AR 1187; see also AOB 24-25 [outlining the factors the SF Regional Water Board considered in determining the required amount of mitigation].) The District has conservatively estimated that this additional

off-site mitigation will cost the District $1 million per acre of mitigation (so, an additional $15 million, at a minimum). (See AR 484, 15363.)

Seemingly knowing that this action was both unconventional and unsupported by authority, the SF Regional Water Board attempted to explain why it decided to issue additional mitigation requirements in the 2017 Certification. However, the explanation fell flat, as the 2017 Certification was forced to simply refer back to the Project EIR, in effect at the time of the earlier 2016 Certification: "The Project EIR found several significant impacts that are under the purview and jurisdiction of the Water Board," and "[t]he Project EIR also found that the mitigation measures proposed therein would mitigate all of these impacts to less than significant levels." (AR 1189.) Similarly, the 2017 Certification further stated that:

> The Water Board, as a responsible agency under CEQA, has considered the EIR and finds that in combination with the requirements of this Order, impacts during the construction of the Project that are within the Water Board's purview and jurisdiction have been identified and will be mitigated to less-than-significant levels. This Order includes conditions and mitigation measures that will substantially lessen or avoid the Project's impacts on the environment. The need for compensation of impacts from the Project design is addressed in this Order [].

(AR 1190.) Again, the newly included mitigation refers back to the Project EIR and previously identified impacts. None of the explanation included in the 2017 Certification provides any independent basis to revisit the original certification, and as noted above, the WDR component of the 2017 Certification provides no additional authority by which to impose the new terms. The foregoing background information and timeline with respect to the District's Project provides important context for the larger concerns of *Amici Curiae*.

II. ARGUMENT

A. The SF Regional Water Board's Belated Imposition of New, Different Mitigation After EIR Certification Violates CEQA.

CEQA is the primary law governing analysis of, and mitigation for, the environmental impacts of any project proposed to be approved or carried out by a public agency. The purpose of the CEQA process is to ensure that all information regarding impacts, alternatives, and mitigation is disclosed to the public and decisionmakers before the decision is made to move forward with the project. A project proponent or applicant has a reasonable expectation that the CEQA document prepared for its project will disclose all significant environmental impacts associated with the project and will identify all mitigation measures required to reduce those impacts to a less-than-significant level.

To ensure this analysis and disclosure is comprehensive, CEQA creates specific roles and responsibilities for each agency with authority over some aspect of the project, requiring those agencies to participate in the CEQA process. Any responsible agency is bound by the lead agency's findings unless that agency challenges the EIR.

As a responsible agency, the SF Regional Water Board was required to identify impacts within its jurisdiction and propose mitigation to reduce those impacts to a less-than-significant level during the CEQA process. (See *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 936 ["*Banning Ranch*"].) And as the SF Regional Water Board concedes, if it determined that the EIR was not adequate for its use,

it was required to either file a lawsuit challenging the adequacy of the EIR or be deemed to have waived any objection to its adequacy.[5]

Based on the Final EIR, the District found that impacts within the jurisdiction of the SF Regional Water Board would be less-than-significant with the incorporation of on-site mitigation measures. The SF Regional Water Board did not challenge this finding during the CEQA process, as is clearly required by Guidelines[6] section 15096(e). Accordingly, the SF Regional Water Board waived the right to challenge that finding, and could not add completely new and different mitigation through its CWA section 401 water quality certification years after CEQA was complete, disregarding its duties as a responsible agency.

The trial court erroneously concluded that, "[i]f the EIR found that a given effect was not significant, that would be relevant, but not determinative, in assessing whether the Board's decision to require mitigation under the Porter-Cologne Act is supported by the weight of the evidence in the record." (AA 379.) In fact, the SF Regional Water Board is bound by the District's findings. To allow this type of belated end-run around CEQA would undermine the entire purpose of the law, allowing a responsible agency to develop critical information after the CEQA process is complete, robbing the public and decisionmakers of the ability to understand and comment on that additional analysis in a public forum, and depriving the project proponent of any ability to reliably plan for and fund its project. It is contrary to the law and should not be permitted.

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[5] Under these circumstances, Guidelines section 15096(e) also allows a responsible agency to prepare a subsequent or supplemental EIR or assume the lead agency role if permissible under the governing regulations.

[6] Cal. Code Regs, tit. 14, will be referenced as the "Guidelines."

1. CEQA Creates a Centralized Process for Analysis of All Environmental Impacts, Alternatives, and Mitigation Measures.

CEQA was designed as a comprehensive, all-inclusive process for disclosure of environmental impacts, including the determination whether mitigation is necessary and what mitigation would be effective and feasible.

The stated legislative purpose of CEQA is to ensure informed public participation and informed decisionmaking with regard to a project that may have a significant impact on the environment. "The Legislature has made clear that an EIR is 'an informational document' and that '[t]he purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.'" (*Laurel Heights Improvement Assn. v. Regents of Univ. of California* (1988) 47 Cal.3d 376, 391 [quoting Cal. Pub. Resources Code, § 21061] ["*Laurel Heights*"]; see Guidelines §§ 15002(a), 15003(b)-(e).)

One of the express purposes of CEQA is to ensure that the lead agency considers and discloses potential mitigation measures to address significant impacts. "Evaluation of project alternatives and mitigation measures is '[t]he core of an EIR.'" (*Banning Ranch, supra,* 2 Cal.5th at 937.) "An EIR shall describe feasible measures which could minimize significant adverse impacts." (Guidelines § 15126.4(a)(1), (a)(1)(D).) "For each significant effect, the EIR must identify specific mitigation measures; where several potential mitigation measures are available, each should be discussed separately, and the reasons for choosing one over the others should be stated" and, "[i]f the inclusion of a mitigation measure would itself create new significant effects, these too, must be discussed, though in

less detail than required for those caused by the project itself." (*Cleveland Nat'l Forest Found. v. San Diego Assn. of Governments* (2017) 17 Cal.App.5th 413, 432; see Guidelines § 15126.4(a)(1)(B).) Furthermore, "[t]he discussion of mitigation measures shall distinguish between the measures which are proposed by project proponents to be included in the project and other measures proposed by the lead, responsible or trustee agency or other persons which are not included but the lead agency determines could reasonably be expected to reduce adverse impacts if required as conditions of approving the project." (Guidelines § 15126.4(a)(1)(A).)

To achieve this, a lead agency's CEQA review should be integrated with the environmental review conducted by responsible agencies:

> CEQA sets out a fundamental policy requiring local agencies to "*integrate* the requirements of this division with planning and environmental review procedures otherwise required by law or by local practice so that all those procedures, to the maximum feasible extent, *run concurrently, rather than consecutively*." (§ 21003, subd. (a).) The CEQA Guidelines similarly specify that "[t]o the extent possible, the EIR process should be *combined with* the existing planning, review, and project approval process used by each public agency." (Guidelines § 15080.)
>
> . . .
>
> Toward that end, agencies are encouraged to "[c]onsult[ ] with state and local responsible agencies before and during preparation of an environmental impact report *so that the document will meet the needs of all the agencies which will use it*." (Guidelines § 15006, subd. (g).)

(*Banning Ranch, supra,* 2 Cal.5th at 936 [emphasis added].) In other words, environmental review by the lead and responsible agencies should be done concurrently, rather than consecutively.

2. A Responsible Agency Has a Duty to Meaningfully Participate in the CEQA Process Before Project Approval, and to File a Lawsuit If It Determines the Final EIR Is Not Adequate.

In order to ensure that the CEQA process is, in fact, thorough and comprehensive, CEQA requires all agencies that propose carrying out or approving a project to participate meaningfully in the CEQA process.

The duties of a responsible agency are clearly defined in the CEQA statute and Guidelines. Among other things, "[a] responsible agency should review and comment on draft EIRs and negative declarations for projects which the responsible agency would later be asked to approve," and "[c]omments should focus on any shortcomings in the EIR, the appropriateness of using a negative declaration, or on additional alternatives or mitigation measures which the EIR should include." (Guidelines § 15096(d).) In fact, "[t]he lead agency shall consult with and request comments on the draft EIR from . . . Responsible agencies," and "[t]he responsible agency's comments shall be supported by specific documentation." (Guidelines § 15086(a)(1) & (c).)

Significantly, "[p]rior to the close of the public review period, a responsible agency or trustee agency which has identified what that agency considers to be significant environmental effects shall advise the lead agency of those effects" and, "[a]s to those effects relevant to its decision, if any, on the project, the responsible or trustee agency shall either submit to the lead agency complete and detailed performance objectives for mitigation measures addressing those effects or refer the lead agency to appropriate, readily available guidelines or reference documents concerning mitigation measures" or, "[i]f the responsible or trustee agency is not aware of mitigation measures that address identified effects, the responsible or trustee agency shall so state." (Guidelines § 15086(c).)

A responsible agency is required to rely on the EIR prepared for a project, or to bring a timely action challenging that EIR. "Prior to reaching a decision on the project, the responsible agency must consider the environmental effects of the project as shown in the EIR or negative declaration." (Guidelines § 15096(f).)

After a final EIR is certified, "[i]f a responsible agency believes that the final EIR or negative declaration prepared by the lead agency is not adequate for use by the responsible agency, the responsible agency must either: [] Take the issue to court within 30 days after the lead agency files a notice of determination [or] Be deemed to have waived any objection to the adequacy of the EIR or negative declaration; [] Prepare a subsequent EIR if permissible under Section 15162; or [] Assume the lead agency role as provided in Section 15052(a)(3)." (Guidelines § 15096(e).) A subsequent EIR is only permissible under Guidelines section 15162 if substantial changes in the project are proposed or occur, or there is "new information of substantial importance" meeting specific criteria is developed after EIR certification; and, per Guidelines section 15052(a)(3), a responsible agency may take over as lead agency only if the lead agency failed to consult with the responsible agency.

In the absence of a timely action challenging the EIR, "the environmental impact report shall be conclusively presumed to comply with the provisions of this division for purposes of its use by responsible agencies, unless the provisions of Section 21166 [regarding subsequent EIRs] are applicable." (Cal. Pub. Resources Code, § 21167.2; *Cent. Delta Water Agency v. State Water Res. Control Bd.* (2004) 124 Cal.App.4th 245, 274 [stating that, "to the extent any of the appellants have permit authority over the Project they are responsible agencies under the CEQA law" and that, "[i]n that event, they must, as a general rule, use the EIR prepared by the lead agency, even if they believe it to be inadequate"]; *cf.* Cal. Pub.

Resources Code, § 21167.3 [requiring responsible agencies to assume that an EIR complies with CEQA if there is an action challenging an EIR]; *City of Redding v. Shasta Cty. Local Agency Formation Com.* (1989) 209 Cal.App.3d 1169, 1180 [finding that, "[b]ecause Redding's pending lawsuit (Shasta County No. 87481) attacked Anderson's negative declaration, section 21167.3 required LAFCO [as a responsible agency] to assume the negative declaration complied with CEQA"].) It follows, therefore, that a finding made by the lead agency in the CEQA process as to impacts and mitigation of those impacts cannot and should not be unwound by a responsible agency's delayed findings that are inconsistent with the Final EIR.

Where the EIR is conclusively presumed to comply with CEQA, the interest in finality limits a responsible agency to preparation of a subsequent EIR if allowed under Guidelines section 15162.[7] (Guidelines § 15096(e).)

3. The SF Regional Water Board Is Bound By the EIR's Findings with Regard to Impacts and Mitigation.

The SF Regional Water Board had ample opportunity to participate—and in fact did actively participate—in the CEQA process prior to the EIR's certification. The SF Regional Water Board has not taken the position that subsequent or supplemental review was required under Guidelines section 15162. Accordingly, because the SF Regional Water Board did not file a lawsuit challenging the EIR, it cannot challenge the adequacy of the EIR and is bound by the EIR's findings with regard to

[7] Generally, where the lead agency prepared an environmental document, and consulted with the responsible agency pursuant to Guidelines sections 15072 or 15082, a responsible agency can only assume the role of lead agency where "[a] subsequent EIR is required pursuant to Section 15162." (See Guidelines § 15052(a)(2)(A).)

significance of impacts, including findings that the impacts are less-than-significant with the mitigation in the Draft EIR.

The Draft EIR included a robust analysis of impacts related to water quality. The hydrology and water quality analysis spans almost twenty pages and includes:

- Discussion of the federal, state, and local regulatory setting and, specifically, discussion of the mandates enforced by the SF Regional Water Board, such as the Basin Plan and 401 Certification;
- Identification of ten significance criteria that include "WAQ-1 Violate any water quality standard or waste-discharge requirement";
- Identification and discussion of five mitigation measures that required implementation of measures at the construction site to protect water quality (WAQ-A), preparation and implementation of a dewatering plan (WAQ-B), preparation and implementation of a rain-event action plan (WAQ-C), preparation of a spill-prevention plan (HWM-A), and treatment of VOC-contaminated groundwater (HWM-C);
- Application of all five mitigation measures to WAQ-1; and
- Extensive analysis concluding that significant impacts were identified but that, "by applying mitigation measures specified in Section 3.17.6, these impacts would be reduced to a less than significant level." (AR 9054-71, 8988-89.)

The EIR found that with imposition of these mitigation measures, impacts to water quality would be reduced to a less-than-significant level. The EIR thus considered the requirements for a 401 Certification and, specifically, the Basin Plan, and the thresholds for significant impacts to

water quality include "WAQ-1 Violate any water quality standard or waste-discharge requirement." (AR 9058-61, 9062.)

The SF Regional Water Board submitted comments on the Draft EIR on November 12, 2015. Those comments included the "Water Board staff's best professional judgment regarding sediment transport" based on two portions of the GRR/EIS prepared for the Project by the Corps and a *Final Independent Peer Review Report, Berryessa Creek* (March 6, 2013) that were attached to the comment letter. (AR 9684, 9688.) Collectively, the SF Regional Water Board submitted some 100 pages of comments that the District responded to point-by-point in the certified EIR. (AR 9682 [comment letter with attachments], 9775 [executed comment letter], 9143-54 [District's responses to SF Regional Water Board comments].)

The Final EIR, which was certified on February 9, 2016, addressed the SF Regional Water Board's comments about the Project's environmental impacts and determined that the impacts within the SF Regional Water Board's jurisdiction were either less-than-significant or would be rendered less-than-significant through on-site mitigation. (AR 9143-54; 8867-9088.) Specifically, the Final EIR responded to each of the SF Regional Water Board's comments, and included the following explanations:

- That "[t]he statement that the Water Board cannot permit or certify the Project unless it concurs with the Lead Agency's CEQA determination does not accurately describe a Responsible Agency's role," which is defined by Guidelines section 15096(e);
- That, regarding sedimentation, "overall sediment load in the creek will decrease after construction of the proposed project, and will be in equilibrium with sediment transport capacity, reducing the overall need for future sediment removal," that "the total depositional volume for the entire reach downstream of

I-680 would be less than under the existing creek conditions," and that "District will continue to follow its Stream Maintenance Program Manual including implementing applicable BMPs during future sediment removal to ensure that effects on water quality or creek habitat, if any, would be less than significant";

- That, "[a]s documented in the FEIR, the proposed project avoids and minimizes environmental impacts to the maximum practicable extent"; and
- That "USACE and the District have determined that the proposed project is the LEDPA." (AR 9143-54.)

Under the clear mandate of Guidelines section 15096, if the SF Regional Water Board did not agree with the District's conclusions with regard to the issues raised in the comment letter, it was legally required to file a lawsuit challenging the Final EIR or waive any objection to its adequacy. But the SF Regional Water Board did not file a lawsuit.

Instead, in the 2017 Certification, the SF Regional Water Board imposed additional mitigation not previously identified and that was beyond the scope of what was identified in the EIR. The 2017 Certification asserted impacts "requir[ing] additional mitigation to compensate for temporary and permanent losses of functions and values resulting from the Project design" that would consist of "offsite mitigation [that] shall enhance 15,000 linear feet or 15 acres of creek waters or the equivalent." (AR 1186, 1199.) It is important to note that the mitigation imposed in the EIR was entirely on-site; the Final EIR found that off-site compensation was not necessary to render water quality impacts less-than-significant.

Regarding CEQA, in the 2016 Certification, the SF Regional Water Board asserted that the Final EIR "does not include necessary detail for long-term impacts and mitigation." (AR 1857.) The 2017 Certification recognizes that "[t]he Project EIR found several significant impacts that are

under the purview and jurisdiction of the Water Board" and that "[t]he Project EIR also found that the mitigation measures proposed therein would mitigate all of these impacts to less than significant levels." (AR 1189.) The 2017 Certification then goes on to state that the SF Regional Water Board, "as a responsible agency under CEQA, has considered the EIR and finds that *in combination with the requirements of this Order*, impacts during the construction of the Project that are within the Water Board's purview and jurisdiction *have been identified and will be mitigated to less-than-significant levels*." (AR 1190 [emphasis added].)

Because it did not challenge the findings in the Final EIR, the SF Regional Water Board is bound by the findings in the Final EIR: as relevant here, the finding that the impacts within the SF Regional Water Board's purview would be rendered less-than-significant with the on-site mitigation identified in the Final EIR. Put simply, the Final EIR found that no additional mitigation was necessary, and by not challenging that document, the SF Regional Water Board tacitly agreed with—and waived the right to disagree with—that finding. The SF Regional Water Board is "deemed to have waived any objection to the adequacy of the EIR or negative declaration" and "must consider the environmental effects of the project as shown in the EIR or negative declaration." (See Guidelines § 15096(e) & (f).)

4. Guidelines Section 15096(g)(2) Does Not Apply Here, Because the Impacts At Issue Were Already Less-Than-Significant.

The SF Regional Water Board attempts to rely on subsection (g)(2) of section 15096 of the Guidelines for the proposition that it can, in fact, add mitigation after the EIR is certified. (RB 45-46.) That section states that "[w]hen an EIR has been prepared for a project, the Responsible Agency shall not approve the project proposed if the agency finds any

feasible alternative or feasible mitigation measures within its powers that would substantially lessen or avoid any *significant effect* the project would have on the environment. (Guidelines § 15096(g)(2) [emphasis added].) The SF Regional Water Board argues that CEQA therefore explicitly condones the addition of mitigation.

But the SF Regional Water Board ignores a critical aspect of this provision: it allows a responsible agency to add mitigation to lessen or avoid *impacts found to be significant* in the EIR. The impacts at issue here were found to be less-than-significant with the on-site mitigation imposed in the EIR. Accordingly, these were not significant effects that the SF Regional Water Board had a right to mitigate further as a responsible agency.

5. Allowing Responsible Agencies to Add Mitigation After Certification Would Undermine the Purpose of CEQA and Create Insurmountable Logistical Problems.

To allow a responsible agency who was given the opportunity to participate in the CEQA process to add entirely new mitigation after EIR certification would gut the CEQA process of its informational value and undermine the purpose of the law.

CEQA requires that public agencies fully inform the public and decisionmakers of the significant environmental impacts of proposed projects. Disclosure of relevant information is a cornerstone of CEQA. (Guidelines § 15002(a), 15003(b)-(e).) CEQA also imposes the requirement that agencies shall adopt feasible mitigation measures and alternatives to lessen the significant effects of such projects. (Cal. Pub. Resources Code, §§ 21000 (a) & (g), 21002, 21002.1; Guidelines § 15002(a)(3).)

The stated purpose of CEQA is to inform decisionmakers and the public about the potential, significant environmental effects of a project

before it is approved. (Guidelines § 15002(a)(1), (d)(1), (2).) An EIR is designed to "to inform the public and its responsible officials of the environmental consequences of their decisions before they are made." (*Laurel Heights, supra,* 6 Cal.4th at 1123.) CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring "environmentally superior " alternatives and all feasible mitigation measures. (See Guidelines §§ 15002(a)(2) & (a)(3), 15126.6(e)(2); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 ["*Goleta Valley*"].) The mitigation and alternative sections are, in fact, the "core" of a legally adequate EIR. (*Goleta Valley, supra,* 52 Cal.3d at 564.)

CEQA allows for deferral of mitigation in some circumstances. As one court stated, "when a public agency has evaluated the potentially significant impacts of a project and has identified measures that will mitigate those impacts, the agency does not have to commit to any particular mitigation measure in the EIR, as long as it commits to mitigating the significant impacts of the project." (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 621 [interpreting *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011].) "[T]he details of exactly how mitigation will be achieved under the identified measures can be deferred pending completion of a future study." (*Id.*) Where the lead agency knows mitigation is feasible, but it is not practical to specifically define the mitigation measure at the EIR stage, the agency may rely on specific performance criteria by which the effectiveness of the to-be-determined mitigation measure will be evaluated. (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 906.) Sometimes it is impractical for a responsible agency to specifically define the parameters of mitigation; for example, an EIR may include purchase of compensatory mitigation for impacts to

species habitat, but defer the amount of compensation to be required until the issue has been fully studied.

Such is not the case here. The Final EIR did not even contemplate the potential for costly compensatory mitigation, finding that the impacts were less-than-significant with incorporation of on-site measures. Allowing a responsible agency like the SF Regional Water Board to add new mitigation—mitigation that is entirely different from that considered in the EIR—would completely undermine the purpose of CEQA by depriving decisionmakers and the public of the ability to evaluate that mitigation, including the potential environmental effects of that mitigation. For example, if the SF Regional Water Board had required physical work, like bank stabilization, as part of the CWA section 401 process, the physical impacts of that work would be divorced from the CEQA process, rendering the EIR incomplete and of limited value.

It also presents significant logistical and practical challenges. If agencies are not required to even generally define mitigation requirements at the time an EIR is certified, there is potentially no end to the additional requirements—and affiliated cost—that can later be imposed on a project at the whim of another agency. Some projects involve approvals by five or more responsible agencies; if each responsible agency were allowed to impose entirely new mitigation years after project approval, the project proponent would have no way to complete engineering plans or predict cost, and the EIR would lack key details about the true physical impacts of the project. The lead agency would be forced to approve or deny a project without key information about the project's environmental impacts, which is counter to the letter and spirit of CEQA.

In summary, the SF Regional Water Board was required to provide all input and information regarding impacts and mitigation during the CEQA review. Absent significant new information triggering subsequent

or supplemental review under Guidelines section 15162, the SF Regional Water Board waived the right to assert that additional mitigation is necessary. To allow this type of "late-hit" mitigation—which is not only completely different than the mitigation imposed in the EIR, but would cost tens of millions of dollars—would wholly undermine the express purpose of CEQA and gut project EIRs of their informational value. It is contrary to the law and should not be allowed.

B. State and Regional Water Boards Do Not Have the Authority Under CWA Section 401 or State Law to Issue Certifications with Open-Ended Conditions or Reopener Provisions.

Although State and Regional Water Boards have general authority to issue CWA Section 401 water quality certifications with specific water-quality-related conditions, those conditions are tied to project impacts evaluated during the CEQA process, as the State and Regional Water Boards must rely, as responsible agencies, upon the certified CEQA document to support its permitting action. (See, e.g., Guidelines § 15096(f) ["Prior to reaching a decision on the project, the responsible agency must consider the environmental effects of the project as shown in the EIR or negative declaration."]; Cal. Pub. Resources Code, § 21167.2 [if there is no challenge to an EIR, the EIR "shall" be presumed to comply with CEQA for purposes of its use by responsible agencies].) The State and Regional Water Boards do not have the authority to issue water quality certifications with open-ended conditions or reopener provisions that allow for an unfettered "redo" after all other processes are closed. Indeed, such a process would render the detailed procedures under both CEQA and CWA Section 401 completely meaningless. It would also present project proponents with unacceptable uncertainty and potential project delays from what is supposed to be a final agency decision, which the law disfavors. (See, e.g., *Alcoa Power Generating Inc. v. FERC* (D.C. Cir. 2011) 643 F.3d

963, 972 ["[T]he purpose of the waiver provision [under 401] is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401."].)

Until very recently, the State and Regional Water Boards knew they did not possess authority to modify a finally issued CWA Section 401 certification post-CEQA, in the absence of new information or a supplemental EIR. To secure such ability, the California Legislature recently passed Assembly Bill 92 (Cal. Stats. 2020, ch. 18, § 9 (effective June 29, 2020), which will be referenced as "AB 92"), which amended Water Code section 13160 to allow only very prescribed modifications to CWA Section 401 certifications issued concurrently with CEQA-related project review, if once CEQA review is complete, additional modifications are required to conform the CWA Section 401 certification to the impacts and mitigation measures finally approved in an EIR or related CEQA document. (AB 92; Cal. Wat. Code, § 13160(b)(2).) Separately, the United States Environmental Protection Agency ("USEPA") also recently clarified existing law, stating that reopener provisions in water quality certifications are not permissible under CWA Section 401. (See Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210, 42,279-280 (July 13, 2020) (effective September 11, 2020) ("401 Certification Rule").) While these more recent developments and authorities were not before the trial court, they cannot be ignored because they support the District and *Amici Curiae's* arguments that this appeal deals with issues of statewide (and national) importance.

For the additional reasons below, this Court should reverse the trial court's decision denying the District's petition for administrative mandate. At the very least, *Amici Curiae* respectfully caution the Court against issuing any decision that has far-reaching implications for CWA Section 401 certification processes outside of the specific matter before the Court,

as other areas of practice involving CWA Section 401 certifications have differing rules based on authorizing statutes (as noted further below), and *Amici Curiae* seek to avoid unnecessary confusion or conflation.

1. The SF Regional Water Board Exceeded Its Authority When It Issued the 2017 Certification.

The federal CWA is largely implemented by the States, which through memorandum of understandings and in-lieu approved programs, are delegated the authority to ensure that the CWA's terms are implemented and enforced. (33 U.S.C. §§ 1341(a), 1342(a)-(b); Cal. Wat. Code, § 13377.) While the CWA adopted national criteria for some activities, most water quality requirements (called "water quality standards")[8] are delegated to the States to adopt, implement, and enforce. (See, e.g., 33 U.S.C. §§ 1313, 1317.) States also maintain authority and primacy to adopt more stringent provisions than federal law provides. (33 U.S.C. § 1311(b)(1)(C); *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 630.) As such, when CWA permits for discharges to waters of the United States are sought from the federal agencies (because, for example, the permitting program remains federal, such as the CWA section 404 program for "dredge and fill" activities), CWA section 401 requires the State to provide a certification that the federally-permitted project is consistent with relevant State requirements (some of which may have been adopted pursuant to the CWA or some of which may be more stringent state requirements designed to protect water quality from discharges). (33 U.S.C. § 1341.)

[8] "Water quality standards" are defined as "provisions of State or Federal law which consist of a designated use or uses for the waters of the United States [*e.g.*, aquatic, agricultural, municipal uses of water] and water quality criteria for such waters based upon such uses [*e.g.*, 5 micrograms per liter of copper is needed to protect aquatic beneficial uses]." (40 C.F.R. § 131.3(i).)

Specifically, under Section 401 of the CWA, a federal agency may not issue a permit or license to conduct any activity that may result in any discharge into waters of the United States, unless a state or authorized tribe where the discharge would originate issues a CWA Section 401 water quality certification verifying compliance with existing state water quality requirements, or waives the certification requirement. (33 U.S.C. § 1341(a)(1) & (d).) Some of the major federal licenses and permits subject to CWA Section 401 include:

- CWA Section 402 (in non-delegated States) and 404 permits (33 U.S.C. §§ 1342, 1344);
- Federal Energy Regulatory Commission ("FERC") hydropower licenses (16 U.S.C. §§ 791a-823g);[9] and
- Rivers and Harbors Act Section 9 and 10 permits (33 U.S.C. §§ 401, 403).

In this case, although the Project was not required to obtain a CWA Section 404 dredge and fill permit because the Project was approved by Congress (see 33 U.S.C. § 1344(r)), the Corps still elected to obtain a CWA Section 401 water quality certification from the SF Regional Water Board (AR 8858, 2244, 2263), which is of particular interest to *Amici Curiae*.

The State and Regional Water Boards' authority to issue water quality certifications with any conditions or reopener provisions dually rests with CWA Section 401 and the Porter-Cologne Water Quality Control Act ("Porter-Cologne Act"), as well as statutes and regulations authorized

[9] When a CWA Section 401 certification is required in a FERC hydropower licensing proceeding, there are several different rules and regulations that apply. (See generally 16 U.S.C. §§ 791a-823g; *Hoopa Valley Tribe v. Federal Energy Regulatory Commission* (D.C. Cir. 2019) 913 F.3d 1099.) These types of FERC-related proceedings are not at issue in this case, but *Amici Curiae* respectfully caution the Court against issuing any decision that could be extended to these different types of proceedings.

therein. (See 33 U.S.C. §§ 1341(a), 1342(b); Cal. Wat. Code, § 13000 *et seq.*; Cal. Code Regs., tit. 23, § 3830 *et seq.*) Significantly, neither the CWA, the Porter-Cologne Act, nor the regulations that govern water quality certifications, authorize the State or Regional Water Boards to issue water quality certifications with non-final mitigation conditions or reopener provisions that are outside the impacts identified and mitigation explored, discussed, and settled upon within the EIR, as the SF Regional Water Board did here. (See *id.*; see also AR 9143-54 [District's response to SF Regional Water Board's comments on EIR, including with respect to mitigation].) Although CWA Section 401 anticipates that "conditions" may be imposed in a water quality certification (those "necessary" to ensure that the activities will comply with any applicable water quality standard or other "appropriate" condition), there is no text that suggests such conditions can lack finality, be open-ended, and create uncertainty in relation to the underlying project conditions and certification process. (33 U.S.C. § 1341; 40 C.F.R. § 121.2(a)(4) [a certification must include a "statement of any conditions which the certifying agency deems necessary or desirable with respect to the discharge of the activity"].) For the reasons explained herein, such a reading of CWA Section 401 and the Porter-Cologne Act would lead to absurd results and consequences, especially for project proponents, which must be avoided. (See *Public Citizen v. Department of Justice* (1989) 491 U.S. 440, 454; see also *Younger v. Superior Ct.* (1978) 21 Cal.3d 102, 113.)

The Porter-Cologne Act, and regulations adopted to govern the water quality certification process, authorize the use of conditions in water quality certifications; but such conditions must be final and certain, and may only be modified under very specific and limited circumstances, especially when neither the CEQA document (EIR) nor the project has changed. (See, e.g., Cal. Code Regs., tit. 23, §§ 3859(b), 3860.) Most

notably, the State, until AB 92's recent passage, was entitled to modify or reopen a CWA Section 401 certification in only *one* instance, and that involves only one of two "standard conditions," applicable to CWA Section 401 certifications, which allows certifications to be modified or revoked where the certification is the subject of administrative or judicial review, and/or administrative enforcement, and modifications are needed in response to the tribunal's decision in those processes. (See Cal. Code Regs., tit. 23, § 3860(a) ["Every certification action is subject to modification or revocation upon administrative or judicial review, including review and amendment pursuant to Section 13330 of the Water Code and Article 6 (commencing with Section 3867) of this Chapter."].)

Nowhere in the above-referenced statutes or regulations is there any authorization, let alone suggestion, that the State or Regional Water Boards may include non-final, open-ended mitigation conditions or a reopener provision in water quality certifications, which would allow the State or Regional Water Boards to revisit or modify a water quality certification long after its issuance and the federal period for certification has expired. (Cal. Wat. Code, § 13000 *et seq.*; Cal. Code Regs., tit. 23, § 3830 *et seq.*) Further, if this type of process were allowed, this Court would be endorsing the ability of the State and Regional Water Boards to issue CWA Section 401 certifications with uncertain conditions, reserve the right to reopen the certification for any reason, and later impose additional conditions not tied to the scope of the original certification. (See, e.g., AOB 10, ARB 12-15.) Such a permitting scheme could then be used to indefinitely defer or "pile on" new or differing conditions. This action is not sanctioned, is extremely problematic, and is infeasible in light of the finite timeframes for project scoping, public approval, design, funding, other permitting, construction, and related processes *Amici Curiae* must engage in for the types of projects they develop. Such projects can include water-supply and infrastructure

projects, flood-control projects, fire-abatement projects, storm-drain projects, road-safety and pavement-upgrade projects, undergrounding-utilities projects, sewer-treatment projects, projects related to correctional facilities, and projects related to parks and recreational areas. (See, *supra*, Interests of *Amici Curiae*.)

Because neither CWA Section 401 nor the Porter-Cologne Act and related regulations that govern water quality certifications authorize the SF Regional Water Board's actions here, this Court should reverse the trial court's decision, as requested by the District.

2. Water Code Section 13160 Now Expressly Prohibits Imposing Project Mitigation Measures In Relation to a Water Quality Certification That Are Not Tied to CEQA.

Since this case involves issues of statewide (and national) importance that could severely impact the environmental review and permitting processes, *Amici Curiae* would be remiss not to highlight for the Court that the California Legislature recently passed legislation amending Water Code section 13160, which provides for the first time, express authorization for the State and Regional Water Boards to modify a previously final CWA Section 401 certification issued prior to the completion of CEQA, if post environmental review under CEQA, some modification is required to ensure the CWA Section 401 certification is consistent with the CEQA analysis. (AB 92.)

More specifically, Water Code section 13160(b)(2) now provides, in relevant part:

> The state board may issue the [water quality] certificate or statement . . . before completion of the environmental review required under Division 13 (commencing with Section 21000) of the Public Resources Code [*i.e.*, CEQA] if the state board determines that waiting until completion of that environmental review to issue the certificate or statement poses a substantial risk of waiver of the state board's

> certification authority under the Federal Water Pollution Control Act or any other federal water quality control law. *To the extent authorized by federal law, the state board shall reserve authority to reopen and*, after public notice, an opportunity for comment, and, when appropriate, an opportunity for a hearing, *revise the certificate . . . as appropriate to incorporate feasible measures to avoid or reduce significant environmental impacts or to make any necessary findings* ***based on*** *the information provided in the environmental document prepared for the project*.

(Cal. Wat. Code, § 13160(b)(2) [emphasis added].) By its unambiguous terms, Water Code section 13160 now allows the State or Regional Water Boards to issue a water quality certification before the CEQA process is completed, if not doing so poses a substantial risk of waiver of the State Water Board's authority under the CWA; however, the ability to reopen or revisit that certification is limited to incorporating feasible mitigation measures to avoid or reduce environmental impacts, which must be also based on information provided in the environmental document prepared for the project—*e.g.*, the EIR. (See *id.*)

Here, the SF Regional Water Board failed to fulfill its duty as a responsible agency by participating in the CEQA process to fully address and mitigate the environmental impacts tied to the District's Project. Instead, the SF Regional Water Board attempted to circumvent, via the creative use of a subsequently issued joint certification and WDRs, the very environmental review process that CEQA mandates and that Water Code section 13160 now explicitly prohibits from being addressed outside of CEQA. (Cal. Wat. Code, § 13160(b)(2); see also *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501, 508 ["[A]gency action must 'be within the scope of authority conferred' by the Legislature, and cannot be inconsistent with its authorizing statutes." (Citations omitted.)]; *Burke v. Cal. Coastal Comm'n* (2008) 168 Cal.App.4th 1098, 1106 ["[C]ourts do not defer to an agency's determination when deciding whether the agency's

action lies within the scope of authority delegated to it by the Legislature." (Citation omitted.)].) The fact that the California Legislature recently amended Water Code section 13160 to provide the State and Regional Water Boards with narrow authority to reopen a water quality certification (only if authorized by federal law, which currently, it is not) speaks volumes and is indicative that the SF Regional Water Board did not have the authority to do so when re-issuing the 2017 Certification.

Accordingly, *Amici Curiae* urge the Court to reverse the trial court's decision, as requested by the District.

3. USEPA Agrees That CWA Section 401 Does Not Authorize Issuance of Water Quality Certifications with Blanket Reopener Provisions.

On July 13, 2020, USEPA issued a final rule intended to increase the predictability and timeliness of CWA Section 401 certification actions by clarifying the timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures. (See 401 Certification Rule, 85 Fed. Reg. at 42,210.) Notably, USEPA explained in great detail that "reopener" provisions in water quality certifications are not consistent or authorized under CWA Section 401. (See *id.* at 42,279-280.) More specifically, in response to public comments on the issue, USEPA explained:

- "[S]ection 401 provides express statutory language (*e.g.*, specifying the time period in which a certifying authority must act on a certification request or waive its right to act; requiring certification conditions to be incorporated into a separate federal permit) that displaces the general principle, and thus Congress has precluded the certifying authority from reconsidering or modifying a certification. For the reasons explained above, unilateral modifications, including certification conditions that

would reopen the certification in the future, are not authorized in section 401." (*Id.* at 42,280.)

- The 401 Certification Rule "does not authorize certifications to be modified after they have been issued. Section 401 does not grant States the authority either to unilaterally modify a certification after it is issued or to include 'reopener' clauses in a certification." (*Id.* at 42,279.)
- USEPA has "determined that section 401 does not provide authority for a certifying authority to unilaterally modify a certification, either through certification conditions that purport to authorize the certifying authority reopen the certification in the future or through any other mechanism. The Agency also notes that the ability to unilaterally modify a certification after issuance is unnecessary, because circumstances that may necessitate modifications often will be linked to other actions that have established procedures. For example . . . if a court vacates or remands a certification or condition thereof, the certifying authority may need to modify the certification, depending on the specifics of the court's decision, and the federal agency may need to modify the license or permit accordingly." (*Id.* at 42,279; see also Cal. Code Regs., tit. 23, §§ 3859(b), 3860(a) [allowing certifications to be modified or revoked where the certification is the subject of administrative or judicial review, and/or administrative enforcement].)
- USEPA "concludes that reopener clauses are inconsistent with section 401 . . . . As described in section III.F above, the reasonable period of time to act on a certification request begins when a certifying authority receives the request, and ends when the certifying authority takes action to grant, grant with

conditions, deny, or waive. The reasonable period of time does not continue to run after a certification decision is issued. A reopener condition, if allowed under this final rule, would effectively extend the established reasonable period of time into the future, potentially indefinitely." (85 Fed. Reg. at 42,280.)

- "Allowing certifications to be modified after issuance c[an] create significant confusion and regulatory uncertainty within those federal license and permit programs." (*Id.* at 42,279.)

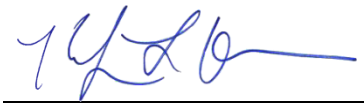
USEPA's 401 Certification Rule further solidifies the District and *Amici Curiae's* position that the 2017 Certification was inconsistent with authorizing statutes, as the reopener provision was not consistent with CWA Section 401. Accordingly, this Court should reverse the trial court's decision.

III. CONCLUSION

For the reasons stated above, *Amici Curiae* are uniquely situated to comment on the implications of the trial court's decision on this matter, and thus respectfully request that this Court reverse the trial court's decision and caution this Court against issuing a blanket ruling that could have far-reaching and negative unintended consequences.

Dated: August 10, 2020

DOWNEY BRAND LLP

By: 

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CERTIFICATION OF WORD COUNT

Counsel of record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the brief of *Amici Curiae* Association of California Water Agencies, California State Association of Counties, Imperial Irrigation District, and California Central Valley Flood Control Association was produced using 13-point Roman type, including footnotes, and contains approximately 8,908 words, according to the word count of the computer program used to prepare the brief.

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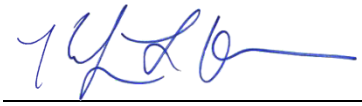
By: 

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PROOF OF SERVICE

Santa Clara Valley Water District v. San Francisco Bay Regional Water Quality Control Board
A157127

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 621 Capitol Mall, 18th Floor, Sacramento, CA 95814.

On August 10, 2020, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] AMICUS CURIAE BRIEF OF ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, IMPERIAL IRRIGATION DISTRICT, AND CALIFORNIA CENTRAL VALLEY FLOOD CONTROL ASSOCIATION IN SUPPORT OF PETITIONER AND APPELLANT SANTA CLARA VALLEY WATER DISTRICT**

on the interested parties in this action as follows:

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Downey Brand LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Sacramento, California.

Office of The Clerk
Honorable Edward Weil
Contra Costa County Superior Court
Wakefield Taylor Courthouse
725 Court Street
Martinez, CA 94553-1233

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered users will be served by the TrueFiling system. Participants in the case who are not registered users will be served by mail or by other means permitted by the court rules.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 10, 2020, at Sacramento, California.

Becky Lutman

Becky Lutman