



November 3, 2023

ATTN: Lara Quetin
California Regional Water Quality Control Board – San Diego Region
2375 Northside Drive, Suite 100
San Diego, California 92108-2700
Via email to Lara.Quetin@waterboards.ca.gov

Re: Tentative Cleanup and Abatement Order No. R9-2023-0102 for Lake San Marcos and San Marcos Creek, San Marcos, California

Mr. Board Chair and Honorable Members of the Board,

Please accept the following comments on behalf of San Diego Coastkeeper (Coastkeeper) and Coastal Environmental Rights Foundation (CERF) regarding Tentative Cleanup and Abatement Order No. R9-2023-0102 (Tentative CAO). Coastkeeper is the San Diego region's leading clean water advocacy organization, member supported since 1995. Our mission is to protect and restore coastal and inland waters in San Diego County, using advocacy, community science, and education.¹ Coastkeeper also actively seeks agency implementation of federal, state, and local laws, regulations, and permits; regularly engages in administrative review and public comment procedures of agency actions; and, where necessary, directly initiates enforcement actions on behalf of itself and its members. CERF is a nonprofit environmental organization founded by surfers in 2008 for the protection and enhancement of California's coastal resources. The purposes of CERF are to aid the enforcement of environmental laws, raise public awareness about coastal environmental issues, encourage environmental and political activism, and generally act to defend natural resources in coastal areas.

Generally, Coastkeeper and CERF support immediate and aggressive action to clean up the various wastes, pollutant sources, and other toxins which continue to pose a threat to human health and choke the life out of Lake San Marcos (Lake) and Upper San Marcos Creek (Creek). The Lake has been plagued with nutrient pollution and eutrophic conditions for decades. Similarly, the Creek has long been impaired due to uncontrolled discharges of wastes and other pollutants from sources within the Upper San Marcos Creek Watershed.

While the Tentative CAO adequately describes the multiple uses in and around the Lake, it lacks important information about the Creek. The contiguous riparian vegetation along the Creek serves as an important wildlife corridor connecting upstream and downstream viable habitat areas, as it is one of the few undeveloped, natural stretches in the otherwise heavily developed area of central

¹ More detailed information on Coastkeeper can be found at www.sdcoastkeeper.org.

San Marcos.² The Creek supports delicate riparian, marsh, and wetland habitats which include rare plant species considered sensitive by various local, state, and federal agencies such as the southern tarplant, southwestern spiny rush, and the Southern California black walnut.³ The creek also provides the lifeblood habitat for a variety of bird and other animal species, including endangered or sensitive species such as the southwestern willow flycatcher, least bell's vireo, California gnatcatcher, white-tailed kite, southwestern pond turtle, and arroyo toad.⁴

Prior actions by both the Regional Board and the Dischargers have failed to significantly improve conditions in the Lake and the Creek. For example, Lake San Marcos was first listed as impaired for ammonia as nitrogen and nutrients in 2006. The Regional Board issued Investigative Order No. R9-2011-0033 to Citizens Development Corporation (CDC) in 2011, and the several of the Dischargers finally submitted the Remedial Investigation/Feasibility Study Report (RI/FS Report) in 2016. In 2017, the Board adopted Resolution R9-2017-0038, which largely allowed Dischargers to work together voluntarily under a Participation Agreement, in lieu of enforcement orders, to implement pilot studies and Corrective Action Plans as set forth in the 2016 RI/FS Report.

Unfortunately, these prior efforts were unsuccessful in restoring the beneficial uses of the Lake and the Creek. As set forth in detail in the Tentative CAO, Lake San Marcos remains heavily polluted,⁵ potentially threatening human health through direct contact, or even via inhalation of harmful toxins produced by algal blooms.⁶ Upper San Marcos Creek remains impaired for benthic community effects, bifenthrin, Dichlorodiphenyldichloroethylene (DDE), indicator bacteria, nitrogen, phosphorus, pyrethroids, selenium, total dissolved solids, and toxicity. Constituents of concern in Creek and Lake waters and sediments include ammonia as nitrogen, arsenic, cadmium, chromium, copper, lead, nickel, zinc, nitrate, nitrogen, pesticides, phosphorus, polycyclic aromatic hydrocarbons (PAHs), selenium, and TSS.⁷

As the pollution in the Lake and Creek likely poses an ongoing threat to human health, as well as to pets, wildlife, and multiple ecosystems, in the interest of public awareness and transparency, Coastkeeper and CERF suggest the Tentative CAO include a section or appendix cataloguing the entire regulatory history surrounding Lake San Marcos and Upper San Marcos Creek. Cataloguing all prior orders, resolutions, agreements, reports, studies, public comments, administrative records, etc., which have led to the current states of affairs would help the public, including Coastkeeper and CERF, better understand which strategies, remedies, approaches, and/or BMPs have been successful or unsuccessful, and thus which approaches should be accordingly pursued moving forward.

Coastkeeper and CERF generally support the approach of the Tentative CAO as set forth in the Directives, but request better guardrails and closer Regional Board oversight. First, the Tentative

² San Marcos Creek Specific Plan, § 4.2, <https://www.dropbox.com/s/5jyj5jmsy9tjki5/San%20Marcos%20Creek%20Specific%20Plan.pdf?dl=0>.

³ *Id.*

⁴ *Id.*

⁵ Tentative CAO, Tables 1-3.

⁶ Tentative CAO § I.E-F.

⁷ *Id.* § I.B.2.

CAO sets forth an extremely long, multi-step process, each step of which provides the Dischargers with too much discretion with regard to each plan, report, feasibility analysis, action plan, etc. We understand the Dischargers require some level of flexibility to develop their investigations and remedial actions. We also understand that, due to the significant existing data gaps, additional information and analyses are required to make informed decisions about appropriate remedial measures, thus necessitating a multistep process. However, Dischargers in the instant matter have a poor track record of adequately assessing the location, nature, and extent of waste and pollution sources, and for many years have failed to restore and maintain the Lake's and Creek's beneficial uses, particularly when given broad discretion.

As such, Coastkeeper and CERF request the Regional Board require an additional level of objectivity in the reporting and assessment. From Coastkeeper and CERF's extensive experience, reports and studies conducted by consultants, hired and paid for by dischargers, tend to lack complete objectivity, underestimate the magnitude of waste and pollutants, and correspondingly underestimate the size, scale, and cost of the required remedial measures. Models, even when using generally accepted methodologies, can be easily tweaked to significantly change the size, scale, scope, and cost of remedial measure or BMPs.

The significant yet unquantified potential human health impacts at stake require a robust, objective analysis. Thus, Coastkeeper and CERF request the Regional Board directly hire a third-party or third-parties to conduct the various investigations, studies, and analyses set forth in the Directives, and utilize a cost recovery mechanism through which the Dischargers would reimburse the Regional Board. Alternatively, the Regional Board and Dischargers could mutually agree upon a third party or third-parties, which could conduct the investigations, studies, and analyses with Board oversight.⁸

Coastkeeper and CERF support the initial 60-day timelines for Plans required Pursuant to Directives II.A.1 and II.A.3 are pretty tight. However, we are troubled by the lack of a backstop deadline between Directives A.3 and A.4. This is problematic given the Dischargers' prior track record, and the ongoing threat to human health. Coastkeeper and CERF suggest the Risk Assessment Report shall be completed as soon as possible, but no later than 180 days after the approval of the Work Plan in A.3.

Coastkeeper and CERF question why the Exceedance Characterization Work Plan is only triggered by wet weather exceedances. As the Dischargers are potentially exceeding water quality objectives during dry weather, we request that a dry weather trigger be added to Directive II.F.

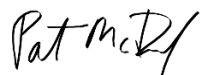
Finally, Coastkeeper and CERF request greater Regional Board oversight during the initial phases of the Directives. While Directive II.E requires semi-annual progress reports, as written, this provisions seems applicable only after remedial measures are implemented. Given the

⁸ A similar approach was conceptualized in R9-2017-0038. "Compliance with the Participation Agreement includes prompt payment of invoices issued by the State Water Resources Control Board to reimburse the State for reasonable costs incurred by San Diego Water Board staff to oversee the project." See Paragraph 6.

numerous steps, plans, reports, and analyses required by the Tentative CAO, and the potential for significant gaps in time between the completion of each step, the Tentative CAO must require pre-remediation progress reports from the Dischargers. Hence, Coastkeeper and CERF request the Tentative CAO require publicly available quarterly reports to update the Regional Board, and the public, regarding the status and expected timelines for all Directive requirements in Section II of the Tentative CAO for the first two years following its adoption, with semiannual reporting required thereafter.

Coastkeeper appreciates the opportunity to provide comments regarding the Tentative CAO. Please contact me via email at patrick@sdcoastkeeper.org, or phone, 760-525-6838 if you have any questions or need more information regarding our comments.

Respectfully,



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