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Sierra Club Loma Prieta Chapter

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May 8, 2013

Board of Directors
Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, CA 95118

RE: Approval of the Draft Safe, Clean Water and Natural Flood Protection 5-Year Implementation Plan (May 14, 2013; Item 5.1)

Dear Board of Directors,

Thank you for the opportunity to provide public input regarding the Safe, Clean Water (SCW) Implementation Plan. The plan is critical to ensuring that Measure B's flood protection and habitat restoration goals are met. We look forward to working with SCVWD to ensure that the plan is as effective and robust as possible.

Unfortunately, the timeframe for public input on this plan has been minimal given its size and importance and we regret that we were not able to analyze and comment on this plan until now. Nonetheless, we have some serious concerns about the plan and the program that we would like to get on the record, realizing that there may not be sufficient time for the District to address all of the issues we raise.

We are interested in working with the District now or in the future to resolve several general concerns the Sierra Club has regarding Measure B implementation.

1. Process and Public Outreach

District public outreach efforts are not as robust as advertised. We expect more public outreach for a plan of this magnitude. The plan was first available through a staff report on Friday April 19th, less than one month before board approval. The Board itself had little or no time to study the document before the April 23rd hearing. The plan was not posted on the website for public download until April 26, after we requested that District staff do so.

Furthermore, public outreach during development of the ballot measure and program was not comprehensive and ongoing as claimed. We would be happy to speak with District staff or directors if there is interest in improving how the District does outreach in the future.

2. Maps for Program Information and Analysis

We believe that more information about projects should be available to the public on an ongoing basis. Annual reports to the Board are helpful but not sufficiently timely or detailed. We suggest a GIS map be developed for the website that displays current and future SCVWD projects geographically and allows click-through for more project details. Details should include program category, funding source(s), timeline/progress, partners/grantees, share and amount of cost, etc. The map data should be updated quarterly to keep all parties informed.

3. Flood Control Focus and Interpretation of the District Act

In a previous communication, we conveyed our disappointment in the SCVWD’s narrow interpretation of the District Act (see attached letter dated April 22, 2013). It is disingenuous for SCVWD to continue to claim that it is providing crucial projects in the area of restoring fish, bird, and wildlife habitat. It would be more accurate and honest to say that, while providing crucial projects related to water supply or flood protection, consideration will be given to restoring fish, bird, and wildlife habitat.

4. Financial Balance

We do not agree that the program is financially balanced. Our analysis indicates a number of ways in which funding is not distributed equally among the priorities or program areas.

- a. Percentage of program funds allocated for each priority for the first five years should be about 33%. However, the allocations vary widely as follows:

Priority	% in 1st 5 Years
A – Ensure a safe reliable water supply	42%
B – Reduce toxins, hazards and contaminants in our waterways	28%
C – Protect our water supply from earthquakes and natural disasters	23%
D – Restore wildlife habitat and provide open space	40%
E – Provide flood protection to homes, businesses, schools, and highways	61%

The higher allocations to priorities A, D and E (especially E) may be related to projects continued from Clean, Safe Creeks but that is not clearly explained at a monetary level in the public materials distributed. If we assume this is true, most of the \$98 million in reserves carried over from Clean, Safe Creeks will be spent on flood control versus other priorities. This \$98M in reserves is about 25% of the entire 15-year program budget. We are disappointed that flood control continues to get priority over other program areas supported by the voters.

Similarly, funds are not financially balanced within each priority. For example, the percentages for Priority D program areas are as follows.

Program Area	% in 1st 5 Years
D1: Management of Revegetation Projects	27%
D2: Revitalize Stream, Upland and Wetland Habitat	26%
D3: Grants and Partnerships to Restore Wildlife Habitat and Provide Access to Trails	41%
D4: Fish Habitat and Passage Improvement	70%
D5: Ecological Data Collection and Analysis	32%
D6: Creek Restoration and Stabilization	26%
D7: Partnerships for the Conservation of Habitat Lands	23%
D8: South Bay Salt ponds Restoration Partnership	100%

The Priority D breakout shows that protecting against sea-level rise has been given priority over other environmental objectives. We are concerned this trend will continue and additional funds

will be allocated to this program area in future 5-year plans, at the expense of other Priority D program areas.

- b. The higher percentage of Priority D funds going to D3 for habitat restoration appears to be a good trend, but we are concerned much of the money will go to trails (which have the potential to be bad for habitat). Please specify a percentage of D3 funds to be directed towards habitat restoration. We would like to see 75% to 80% of the funds in this category go to restoration programs that are more in line with the intent of Priority D.
- c. The District does not appear to be tracking how the benefits of the program are distributed countywide even though the programs say the benefits will be countywide. For many reasons including environmental equity, we believe more should be done to insure the benefits of the program are geographically distributed throughout the County. The map proposed above would be very helpful in this analysis.

5. Unrealistic 5-Year Targets

The implementation plan for Priority D program areas D4 and D8 are not realistic in terms of 5-year targets and funding allocated. Neither program area anticipates funding from other parties. We believe additional funding needs to be identified or the 5-year targets should be reduced to be in line with the funding identified.

In the case of D4, it would be appropriate to allocate some of the Clean, Safe Creeks reserves towards implementing a project to remove a fish passage barrier. Such an allocation would be a more equitable way to replace Clean, Safe Creeks projects with comparable projects in SCW. Furthermore, a larger allocation would enable to District to fund some construction costs. At a minimum, the Implementation Plan should explain where the anticipated construction funds for D4 will be obtained. This is needed to insure the District is serious about completing any fish passage improvements within the timeframe of this 15-year plan.

6. Key Performance Indexes (KPIs) and Project Metrics

During development of the Measure B program, the schedule and level of outreach became compressed. By the time the KPIs were published there was no opportunity for substantive input. Therefore, we are concerned the KPIs are not sufficient and should measure more specific outcomes such as cost-benefit, countywide impact, and outreach goals.

The metrics included in the plan are disappointing. In many cases, the metrics listed are activity based (i.e. dollars awarded; number of devices installed; number of grant cycles, etc.). These are not true metrics and should be replaced with detailed, outcome based metrics that are closely linked to the KPIs. For each project, a detailed plan and schedule for making measurements needs to be established, including before and after quantification of the KPIs.

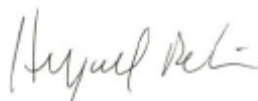
The attached comments about measuring Priority D outcomes include some specific suggestions we think would improve measurement of actual outcomes for Priority D.

We trust that SCVWD Staff and Board Members will seriously consider our input and ways to address these six issues of concern to the environmental community and the general public.

Respectfully Submitted,



Katja Irvin
Volunteer Chair, Water Committee
Sierra Club Loma Prieta Chapter



Heyward G. Robinson
Chair, Conservation Committee
Sierra Club Loma Prieta Chapter

Cc:
Norma Camacho, Watershed Chief Operating Officer
Mary Ann Ruiz, Watershed Chief Operating Officer

Attachment 1. Measuring Priority D Outcomes

Project D1: Management of Revegetation Projects

1. Need more specific interpretation of KPI for maintenance of future revegetation sites.
2. Need more specific information on KPI regulatory requirements and conditions. List current requirements and conditions of approval, endangered species requirements, Habitat Conservation Plan requirements, etc.
3. Need to know how much is currently maintained and how maintenance of additional areas will be paid for.

• Project D2: Revitalize Stream, Upland & Wetland Habitat

1. Key Performance Indicators: Clarify when more than 21 acres would be revitalized (since 21 acres is the *minimum*), specifically in case additional funds allocated to this project remain.
2. 5-Year Targets: Identify plans and potential partnerships in more detail. This is too vague.
3. Measurement #1: Develop criteria for revitalization of native habitat, such as ecological levels of service.
4. Measurement #2: Develop more meaningful criteria. Number of plans and potential partnerships does not measure effectiveness.
5. Measurement #3: Plant palettes should be reviewed and supported by independent biologists.

• Project D3: Grants and Partnerships to Restore Wildlife Habitat and Provide Access to Trails

1. We are concerned that the only specific project mentioned in this section is a bridge over Coyote Creek in the Rock Spring neighborhood (George Shirakawa's former district). Trails and bridges can be detrimental to habitat restoration and should be allocated an appropriate percentage (perhaps 20%) of funds from Project D3, to insure proper focus on habitat restoration.
2. Measurement #1: Include criteria for public input and review.
3. Measurement #2: A better and more specific measure would be the amount of money granted and the amount of that money spent directly on projects versus overhead (something to measure cost vs. benefit).

• Project D4: Fish Habitat and Passage Improvement

1. Key Performance Indicators #2: We urge SCVWD to fund some new and crucial fish passage projects to fulfill the requirements of this KPI, and not to use the funds for projects already underway such as the Lake Almaden / Alamos Creek separation project.
2. Measurement #4: Include criteria for public input and review.
3. Measurement #5: Include criteria for success of each site in increasing spawning of indicator fish species over a specific monitoring period (ten-years).
4. Include removal of the Bonde Weir on San Francisquito Creek in the project list.

• Project D5: Ecological Data Collection and Analysis

1. Show how maximizing the impact of restoration dollars with more reliable data on countywide stream conditions will help to measure the success of other projects in category D.
2. Document the 15-year goal for this project. For example, "these actions are the first two of six steps to complete five Stream Corridor Priority Plans."

3. 5-Year Targets: We need more detail on ecological levels of service to assess the effectiveness of this target. This implementation plan should provide more detail about current level of service measures and proposals for upgrading these measures and include criteria for public input and review.
 4. Measurement #1: Include criteria for public input and review.
 5. Measurement #2: Include criteria for public input and review.
- **Project D6: Creek Restoration and Stabilization**
 1. 5-Year Targets: Include criteria for prioritizing potential projects such as ecosystem impact, distributed location, cost of maintenance, etc.
 2. Measurement #1: Is this measure meaningful if no projects will actually be constructed during this 5-year implementation plan? Include criteria for public input and review.
 - **Project D7: Partnerships for the Conservation of Habitat Lands**
 1. 5-Year Targets: Explain where the other .6 million will be spent. Include criteria for prioritizing potential projects such as ecosystem impact, distributed location, cost of maintenance, etc.
 2. Measurement: Include additional performance based measures such as potential for land to support recovery of special status species, and connectivity to other conservation lands.
 3. Completion Category: This should be a performance-based project.
 - **Project D8: South Bay Salt Ponds Restoration Partnership**
 1. 5-Year Funding off \$4.7 million is over the total allocated for this item. This doesn't add up and is clearly not fair given the less-than-proportionate amount of funding allocated to other projects under Priority D.



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April 22, 2013

Board of Directors
Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, CA 95118

RE: Review of the Preliminary Draft Safe, Clean Water and Natural Flood Protection 5-Year Implementation Plan (April 23, 2013; Item 5.1)

Dear Board of Directors,

Thank you for accepting this letter outlining the concerns of the Sierra Club Loma Prieta Chapter regarding Measure B implementation. The Sierra Club is very interested in Measure B implementation as it relates to District staff's interpretation of the District Act. We encourage you to consider the comments in the attached letter about this topic, sent to the District's Environmental Advisory Committee on April 11, 2013.

Last fall, voters overwhelmingly approved Measure B, the Safe Clean Water Program, so the Santa Clara Valley Water District (SCVWD) can continue providing for needed projects in the areas of water supply reliability, water quality, restoration of wildlife habitat, and natural flood protection. The voters clearly stated they want flood control, stronger environmentally-friendly dams, and cleaner waterways, as well as habitat restoration for threatened species such as Steelhead Trout, Chinook salmon, and the Western Pond Turtle.

District Counsel's interpretation significantly limits how the Safe Clean Water Program can do habitat restoration. Under this narrow interpretation no stream restoration projects, such as removal of fish migration barriers, will be funded by SCVWD if not in conjunction with flood control or water supply. There is no other local agency or organization capable of significant stream restoration. It is up to the District Board to ask questions and not rubber-stamp the District Staff interpretation. Otherwise, restoration will only be conducted where most convenient and beneficial for District operations, as part of other capital projects, with little or no consideration of priorities for wildlife.

This is a giant step backwards. We expect you as the Board of this environmentally-smart agency to engage in environmental leadership on habitat restoration. The time has come for the District to work with cities and identify feasible habitat restoration projects that do not interfere with rational growth near streams. We need solutions not jurisdictional power disputes.

The Sierra Club urges the District to deliver on the promises in Measure B and undertake projects to restore wildlife habitat. The District should accept the responsibility to enhance environmental beneficial uses independent of other legal responsibilities, as clearly stated in the District Act.

Respectfully Submitted,

Katja Irvin
Volunteer Chair, Water Committee
Sierra Club Loma Prieta Chapter

Melissa Hippard
Chair, Executive Committee
Sierra Club Loma Prieta Chapter

Heyward G. Robinson
Chair, Conservation Committee
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April 11, 2013

Santa Clara Valley Water District
Environmental Advisory Committee
Bob Levy, Chair

RE: Santa Clara Valley Water District, Measure B and District Act Interpretation

Dear Mr. Levy,

Thank you for accepting this letter outlining the concerns of the Sierra Club Loma Prieta Chapter regarding Measure B implementation. As a grassroots organization, our environment advocacy is driven by our membership and volunteers, including thousands in Santa Clara County.

An important aspect of Measure B implementation is the interpretation of the District Act. We believe a broad interpretation of the District Act is important because the Santa Clara Valley Water District (SCVWD) has a key role in ensuring the health of our riparian corridors and watersheds. As a funded agency reliant on the support of local residents, SCVWD should be a leader in best practices for addressing the sustainability of ecosystem services for the public good.

We are concerned that SCVWD will continue to interpret the Act in a conservative manner, restricting the fair distribution of funds for environmental restoration. Attached is a legal opinion prepared by Loma Prieta Chapter Legal Committee Chair, Steven Ferla. Ferla concludes:

The plain language of §34 of the Act provides that the Act be liberally construed to carry out its intent and purposes. Interpreting the Act according to the rules of statutory construction provides for a more expansive interpretation of the powers in §4(c)(7) and the other relevant sections discussed herein.

As a result, the Act should be interpreted in such a manner as to give the District the legal authority to conduct stream restoration activities as long as they are connected to the purpose of comprehensive water management for all beneficial uses, including environmental beneficial uses.

We hope you will consider this opinion in your deliberations.

Respectfully Submitted,

Katja Irvin
Volunteer Chair, Water Committee
Sierra Club Loma Prieta Chapter

Melissa Hippard
Chair, Executive Committee
Sierra Club Loma Prieta Chapter

Heyward G. Robinson
Chair, Conservation Committee
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Cc: Clerk of the Board, Santa Clara Valley Water District



**STEVEN W. FERLA
ATTORNEY AT LAW**

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To: SCVWD Environmental Advisory Committee (EAC)
From: Steven W. Ferla
Date: April 7, 2013
Re: Review of SCVWD District Counsel Memorandum on District Act Authority,
Nov 30, 2012

I. Introduction

The purpose of this memorandum is to opine on the scope of authority in the Santa Clara Valley District Act (the “Act”) as it relates to its power pursuant to §4(a) and §4(c)(7) to enhance, protect, and restore streams, riparian corridors, and natural resources.

The specific issue is whether the Santa Clara Valley Water District (the “District”) has the authority to stream restoration activities for environmental purposes.

I have reviewed the November 30, 2012 memorandum titled “District Act Authority: Watershed Stewardship Activities” (“EAC memorandum”), the memorandum by Richard McMurtry of the Sierra Club and Santa Clara Valley Water District Environmental Advisory Committee (“McMurtry memorandum”), and the Act.

Applying the relevant rules of statutory construction as well as explicit instruction in §34 of the Act leads to the conclusion that:

the District has the legal authority to conduct stream restoration activities connected to the purpose of comprehensive water management for all beneficial uses, including flood control and water supply functions, and to achieve environmental beneficial uses.

II. Interpretation of the District Act

A. The Provisions At Issue.

The provisions of the Act at issue are §4(a) and §4(c)(7) which state as follows:

§4(a): “The purposes of this act are to authorize the district to provide comprehensive water management for all beneficial uses and protection from flooding within Santa Clara County.”

§4(c): “The district may take action to do all of the following:
(7) Enhance, protect, and restore streams, riparian corridors, and natural resources in connection with carrying out the purposes set forth in this section.”



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B. Rules of Statutory Construction.

“The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.] In order to determine this intent, we begin by examining the language of the statute. (*McLaughlin v. State Bd. of Educ.*, (1999) 75 Cal. App. 4th 196, 210-211, 89 Cal.Rptr.2d 295). “The statute’s plain meaning controls the court’s interpretation unless its words are ambiguous.” (*White v. Ultramar, Inc.*, (1999) 21 Cal.4th 563, 572). The “[c]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage”. (*Big Creek Lumber Co. v. County of Santa Cruz*, (2006) 38 Cal.4th 1139, 1155, 45 Cal.Rptr.3d 21). A rule of statutory construction is that “each sentence must be read not in isolation but in the light of the statutory scheme [citation]; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation].” (*Lungren v. Deukmejian*, (1988) 45 Cal.3d 727, 735, 248 Cal.Rptr. 115).

In light of the above, §34 of the District Act explicitly and unambiguously provides as follows:

”This act, and every part thereof, shall be liberally construed to promote the objects thereof, and to carry out its intents and purposes.”

Thus, §34 plainly requires liberality when interpreting the Act to carry out its intent.

C. Interpretation Of The Act.

The EAC memorandum does make a reasonable argument supporting its analysis of the authority granted in the Act. However, the EAC memorandum interprets the Act’s provisions narrowly.

For example, in analyzing the scope of authority granted in §4(c)(7), the EAC memorandum correctly states that:

“Before the District undertakes Watershed Stewardship activities, it must first establish a connection between those activities and its activities related to comprehensive water management for all beneficial uses or flood protection.”

However, the EAC memorandum concludes by stating that:

“The District may *only* enhance, protect, and restore streams, riparian corridors, and natural resources when it is done in the course of carrying out its water management and flood protection activities.”

Thus, the EAC memorandum limits and narrowly construes §4(c)(7) to *only* water management and flood activities, and disregards the mandate of §4(a) which, in plain language, allows for “comprehensive water management for *all* beneficial uses *and* protection from flooding ...” The latter contemplates a more expansive set of uses than just water management



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and flood protection.

Additionally, the EAC memorandum seems to rely on §5.5 to define the scope of “beneficial uses” enumerated in that section. This narrow view of the Act’s powers ignores the opening provision in §5 which states, in plain language, that the powers in §5.5 are “*in addition to other powers granted by this act...*”, which again contemplates a more expansive set of powers.

The EAC memorandum concludes that ““beneficial uses” in the District Act is used in the context of describing those activities...to ensure the availability of sufficient quality water for all beneficial uses...” Again, this narrow construction disregards the plain language of §4(a), which provides for “comprehensive water management for all beneficial uses.”

In contrast, the McMurtry memorandum analyzes the terms “comprehensive” to mean “all or nearly all water management activities necessary to achieve all those beneficial uses referred to in the District Act.” This is more in line with the plain language and liberal construction.

The McMurtry memorandum also analyzes the terms “all beneficial uses” to plainly mean “*all* beneficial uses”, which according to McMurtry, includes both water supply and environmental uses, the word “all” being the operative adjective which expands rather than narrows the meaning of §4(a).

Here, the Act does provide for “conservation and management” of water (§4(c)(3)), conserving in any manner any of the waters (§4(c)(4), preserving open space (§4(c)(8), and enhancing, protecting, and restoring streams, riparian corridors, and natural resources (§4(c)(7), all of which clearly and plainly include environmental uses and are consistent with analyzing the provisions of the Act in light of the statutory scheme. Thus, it is reasonable to interpret “all beneficial uses” as including environmental uses.

Finally, the McMurtry memorandum includes, as part of the statutory intent of the Act, an analysis of Measure B, which is wholly missing in the EAC memorandum. According to McMurtry,

“Measure B passed by the voters in November 2000 required a broadening of the scope of the powers in the District Act in order to implement Outcome 3 of the Measure. Measure B included a table identifying Outcome 3 as: “Healthy Creek and Bay Ecosystems are Protected, Enhanced and Restored”. The table and the text of Measure B made reference to the “Clean Safe Creeks and Natural Flood Protection, a fifteen year plan to Preserve and Protect Our Quality of Life.” That plan described Outcome 3 as: “Outcome 3 provides for the crucial environmental work necessary to protect and restore habitats and encourage the return of endangered species.” Outcome 3 highlighted: “100 acres of tidal habitat created or restored, removal of fish migration barriers or installation of fish ladders, revegetation of native plants, removal of non-native plants””



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Thus, inclusion of an analysis of Measure B is critical to ascertaining the legislative intent of the Act. When construed in light of Measure B, it is clear that the intent was to broaden the scope of powers in the Act to conduct stream restoration activities for environmental beneficial uses.

III. Conclusion

The plain language of §34 of the Act provides that the Act be liberally construed to carry out its intent and purposes. Interpreting the Act according to the rules of statutory construction provides for a more expansive interpretation of the powers in §4(c)(7) and the other relevant sections discussed herein.

As a result, the Act should be interpreted in such a manner as to give the District the legal authority to conduct stream restoration activities as long as they are connected to the purpose of comprehensive water management for all beneficial uses, including environmental beneficial uses.

Very truly yours,

/s/ Steven W. Ferla

STEVEN W. FERLA
Attorney At Law