

February 2, 2009

California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340
Via Email



Re: Support for Supplemental Environmental Project Adoption in Conjunction with Proposed ACL Complaint No. R9-2005-0265 for the City of Escondido

Dear Chairman Wright and Members of the Board:

On behalf of San Diego Coastkeeper, a grassroots organization dedicated to protecting and restoring the region's bays, coastal waters and watersheds, I am writing to express our strongest support for the approval of the proposed Supplemental Environmental Project (SEP) in relation to ACL Complaint No. R9-2005-0265 (Item 7 on the February 11, 2009 agenda). The Escondido Creek Conservancy's (TECC) project has the support of numerous environmental and civic groups as well as the City of Escondido, and would play a pivotal role in naturally improving, protecting, and preserving the water quality within the Escondido Creek Watershed.

The original violations that led to this ACL were quite serious and damaging to Escondido Creek and the Watershed as a whole. Just in part, in 2005 the City violated its effluent flow limitation 47 times in a period of less than three months, discharged 353,500 gallons of secondary treated effluent into Escondido Creek, and violated its turbidity, nitrate and nitrogen limitations 11 times in a two-month period. The complaint specifies that the maximum penalty for these violations would be staggering: \$17,087,490,000.

While Coastkeeper respects the efforts the City has made to correct these problems, the proposed settlement represents only a tiny fraction of the monetary penalty that could be imposed. The Board must make every effort to see that this money is put to the highest and best use, and serves the Creek's needs. Keeping a portion of the settlement to be used locally, rather than generally in Sacramento, meets this goal.

Coastkeeper has been a party to these issues since violations arose nearly five years ago. We have performed water monitoring in the Escondido Creek and around the watershed, and are intimately familiar with the challenges facing this area. While we have worked with the City, TECC, Regional Board staff, and other stakeholders for six months to craft a project that would best support the Creek, Coastkeeper will not have a role in the SEP should it be approved. We find that this division allows us to objectively respond to the issues raised by your Prosecution Team (Team) regarding the SEP. We note also that these concerns have been addressed in other forms as well; including the various letters of support, direct conversations with the Team, and a comprehensive letter from Kevin Barnard of TECC dated December 9, 2008. With the detailed responses below, we ask that the SEP be approved.

1. Appropriate documentation regarding value of the properties

The Team is concerned that the value of the properties proposed to be purchased under the SEP is not adequately documented. We understand the Team's worry and believe that this issue can easily be resolved. First, in order to properly value the properties, a specialized appraisal is required. The appraisal is necessary to protect against market fluctuations that may arise. Customarily, one would first

secure approval for funding prior to obtaining the appraisal. Once approval is granted, we understand that TECC would hire an appropriate appraisal firm to conduct the appraisal.

Although the appraisal process allows the most accurate valuation, acquisition costs can nevertheless be projected. As stated previously in the SEP, the acquisition cost of the Lish Property is estimated at \$235,000 while the cost to acquire the Barnett Property is estimated at \$320,000. Both of these costs include estimated transaction fees. Any funds not used to purchase the properties could either be returned to the Regional Board or be transferred to the San Diego Foundation and administered to TECC as needed for use in conserving and managing the properties. The combined amounts needed to purchase the Lish and Barnett properties would garner 3.46 acres and approximately 10 acres respectively.

2. Specific method for holding purchase money pending closing

We believe that the SEP proposal, dated October 24, 2008, has properly addressed the concern that the Team has with the method for holding the purchase money pending closing of the proposed Lish and Barnett property purchases. We support the position that any funding provided by the City of Escondido to purchase the properties would be held in an escrow account and managed by the Chicago Title Co. escrow office in Escondido, California or a different escrow officer approved by the Regional Board. Additionally, any monies left at the close of escrow would either be returned to the Regional Board or be transferred to the San Diego Foundation to provide additional monies for long-term management of the properties. We support either option. In addition, if for any reason the purchases fell out of escrow, the monies would be returned to the Regional Board per joint or separate escrow instructions given to the escrow agent at the commencement of escrow.

3. Mechanisms to ensure permanent protection of the Escondido Creek Watershed

San Diego Coastkeeper agrees with the Team that a specific mechanism must be in place to ensure permanent protection of the Escondido Creek Watershed. The SEP proposal states that funds will be used for perpetual management of the potential land acquisitions. To that end, we believe that a conservation easement is an acceptable mechanism to guarantee that this result is attained. Under Cal. Civ. Code § 815.1, a conservation easement is defined as "any limitation in a deed, will, or other instrument ... executed by or on behalf of the owner of the land ... binding any successive owners of such land ... the purpose of which is to retain land predominantly in its natural, scenic, historical, agricultural, forestal, or open-space condition." A conservation easement creates an interest in real property to its holder, is perpetual in duration, and is freely transferable.

In this instance, TECC, as the proposed owner of the Lish and Barnett properties, would grant one or more conservation easements to ensure that the properties are maintained and protected in their natural conditions. This condition in no way diminishes our faith in TECC's abilities to preserve and enhance the properties for water quality protection. TECC's Board of Directors is comprised of local volunteers with expertise in business, science, land use planning, education, recreation, and restoration of natural landscapes. Their expertise has allowed TECC to currently manage 400 acres of the Escondido Creek Watershed. The additional amount of potential property would be included in the long-term management of this vast TECC commitment.

The conservation easement merely acts as an added layer of protection. The easement could be granted to one or several potential parties, including the City of Escondido, another conservation organization, and/or the Regional Board itself. This arrangement would allow for additional oversight of the property to ensure the conservation purpose of the easements is being accomplished.

4. Existing easements and sustainability of habitat values

One of the Team's concerns centers around the need to evaluate existing easements on the property to ascertain whether they could interfere with the conservation purposes of the acquisition. Having been provided with at least one title report by TECC, Coastkeeper is satisfied that the type of easements most likely to exist on the property are quite normal for this land use, and would pose no obstacle for the preservation of the land and water quality of the Creek. For instance, an easement exists for wastewater piping, but this type of easement does not make the purchase and preservation of the land ineffective.

To safeguard against any risk, the purchase agreement between TECC and the sellers can stipulate that title must meet certain conditions prior to completion of sale. If the title insurance company discovers a defect in title then the purchase agreement shall either fall out of escrow or require that the title be cleared of such issues prior to completion of sale.

5. Barnett property water rights

The Team has provided no rationale as to why this is a relevant inquiry, nor do we believe that there is a credible relationship between water rights and the SEP proposal.

6. Lish Property's impact on water quality in Escondido Creek Watershed

We believe that the Prosecution Team's concern on this subject is unwarranted. The rationale for purchasing the Lish property pertains to the property's filtration ability, rather than its position in a flood plain. The Lish property's preservation and maintenance will assist in lessening the impact that stormwater run-off from a parcel of land above Lish has on the watershed. Keeping the Lish property in its natural state would allow for vegetation to absorb large quantities of rainfall and act as a filtration system to filter out pollutants from stormwater. Support for this position can be found in the TECC letter, dated December 9, 2008.

The need for acquisitions such as proposed in the SEP is critical. Protecting large swaths of intact open space is a top criterion in stormwater runoff protection. Consider the Santa Margarita Watershed, largely occupied in San Diego County by Camp Pendleton. The watershed contains a variety of nearly intact habitats including chaparral-covered hillsides, riparian woodlands, and coastal marshes. The majority of the Santa Margarita River main stem flows within San Diego County through unincorporated areas, the community of Fallbrook, and the Marine Corps Base Camp Pendleton. The lower river and estuary have largely escaped the development typical of other regions of coastal Southern California, and are therefore able to support a relative abundance of functional habitats and wildlife. Second only to this watershed, the Harmony Grove-Elfin Forest Core Area (where the proposed properties are located) is the largest tract of private lands west of I-15 containing unobstructed creeks and a protected watershed.

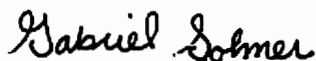
The threat to this type of habitat is very real. Already, construction has begun or is completed in several areas surrounding the Lish property. Without preservation, a significant amount of silt from the parcel above Lish will flow through the Lish property and enter the creek during rain events significantly impacting the beneficial use of preservation of biological habitats of special significance, warm freshwater, cold freshwater and wildlife habitats.

7. Third party audit information to ensure compliance

In initial discussions with Regional Board staff, we received a clear directive that any successful SEP must provide clear and demonstrable benefits to water quality. The idea of acquisition is a natural fit with these goals. The acquisition can be accomplished in a relatively short amount of time, and once completed could be conveyed to the Board through a written or testimonial report. The conservation easement and monies included for oversight provide any audit function required for the small restoration component of the SEP. Additionally, the escrow process provides a safeguard for the proper use of SEP funds. One escrow could be divided into three components: one each for the Lish and Barnett acquisition funds, and the remainder to the San Diego Foundation for annual payment to the land holder to accomplish management and restoration functions.

In summary, it is critical that a portion of the funds from the settlement remain locally where they can be used to significantly contribute to the preservation and conservation of the habitat and recreational resources supporting the Escondido Creek Watershed. Having provided the Board with the requisite information to clarify the applicability of the SEP and address the Team's concerns, and in order to ensure the continued health and preservation of the Escondido Creek Watershed, we urge that the SEP proposal be approved.

Sincerely,



Gabriel Solmer
Legal Director
San Diego Coastkeeper

Cc:

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