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THOMAS S. VIRSIK

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Via Email Only

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In Re: Notice of Preparation (NOP) of a Draft Environmental Impact  
Statement/Environmental Impact Report (EIS/EIR)

Project: Proposed Salton Sea Species Conservation Habitat (SCH) Project  
Riverside and Imperial Counties, California

Dear Ms. Cervantes and Ms. Nicol:

Our clients are agricultural landowners in the Imperial Valley who actively participated in the prior study of restoring the Salton Sea commenced in 2004. A copy of their letter to Charles Keene of April 15, 2004 is enclosed. Due to its lengthy attachments, those attachments are not included but are expressly incorporated herein by reference. Among other salient points raised in 2004 but seemingly unaddressed now, is whether the environmental review assumed is in fact necessary or advised under the law. See pages 4-5 of the April 15, 2004 letter.

The notice and scoping documents all lack a critical event since the prior review: the water transfer that is at the heart of all Sea discussion was decreed invalid after a lengthy trial in 2009. Thus, the implicit assumptions about water flow, the availability of money under legislation associated with the transfer, the responsibilities of specific parties (e.g., MWD) for liability all

remain unresolved. Yet, there is not a single word much less analysis of the effect of the invalidity of the water transfer on liability, funding, or even water flows. A copy of the final decision after trial is enclosed. While that decision is lengthy and quite detailed, as can be gleaned from its language, it is not intended to be a comprehensive statement of all issues of facts and law decided that impact the analyses herein, e.g., the Court noted that it had resolved some 150 contested matters prior to trial. The judgment of invalidity is presently on appeal. In re QSA Cases, Third District No. C064293. Given the scope of the trial court's decision, the results on appeal – affirming or reversing – may well fundamentally alter the status of the Sea, especially what parties may be liable for any cost of remediation thereof.

That trial decision was rendered after substantial argument and evidence of facts that are independently lacking in the analysis. For example, as a matter of law the landowners in the Imperial Valley are entitled to continued water service by virtue of the easements predating governmental intrusion into the waters of the Colorado River. Corp. Code § 14452 (formerly Civ. Code § 552)

Whenever any corporation, organized under the laws of this state, furnishes water to irrigate lands that the corporation has sold, the right to the flow and use of that water is and shall remain a perpetual easement to the land so sold, at any rates and terms that may be established by the corporation in pursuance of law. Whenever any person who is cultivating land on the line and within the flow of any ditch owned by the corporation, has been furnished water by it with which to irrigate his or her land, that person shall be entitled to the continued use of that water, upon the same terms as those who have purchased their land from the corporation.

The discussions of water rights in the notice and scoping documents fail to reflect such unique rights. Any discussion of the cause of the Sea's historic size – a potential factor in assessing fiscal liability – is also absent from the notice and analysis documents thus far, which facts were touched upon during the aforementioned trial. See Declaration of Patrick J. Maloney in Support of Morgan/Holtz Response to Metropolitan Water District's Phase 1A Brief and Notice of Errata to Morgan/Holtz Parties' Response to Metropolitan Water District's Phase 1A Even the fundamental facts about what the documents refer to as "water rights" (e.g., § 1.1.2 of the screening criteria) are wrong, i.e., much of the water use in the Imperial Valley is not under the SWRCB jurisdiction since such rights are of the pre-1914 variety. Arizona v. California (2006) 547 US 150, 175 (recognizing 2.6MAF of present perfected rights as of 1901).

Our clients have also filed and continue to file statements of water diversion with the SWRCB. Water Code §§ 5100 et seq. For whatever reason, the SWRCB has failed to act on the filings for several years despite repeated requests, and even the recent clarification in the law (SB 8). The most recent correspondence is enclosed. Any review of the "water rights" involved would necessarily include the public statements of water diversion filed by those who use Colorado

River water in Imperial County, in as much as the analysis expressly referenced the applications of MWD for certain New and Alamo River water.

Moreover, the focus appears to be wholly piecemeal and likely will not garner support from the public (assuming other analytical and disclosure flaws are corrected).

The Agricultural landowners of Imperial Valley are fully aware of the problems in the Ecosystem of the Salton Sea. They have developed a Consortium with the most competent people capable of solving the problem in the world. Issues relating to the Salton Sea cannot be dealt with in isolation. The Restoration of the Salton Sea Ecosystem impacts multiple publics: Imperial, Coachella, Mexico, Arizona, the Coast of California, and the San Francisco Bay Delta and the problem is urgent. It is essential that an integrated approach be taken that guarantees a rapid solution and involves the parties directly impacted. Only by doing so will a viable solution be developed and successfully implemented.

Respectfully submitted,



Patrick J. Maloney

Encl.

4/15/04 letter to Charles Keene re Salton Sea Restoration Project EIR NOP (w/o internal enclosures)

QSA Statement of Decision JCCP 4353

Declaration of Patrick J. Maloney in Support of Morgan/Holtz Response to Metropolitan Water District's Phase 1A Brief and Notice of Errata thereto

6/16/10 letter to Victoria Whitney re Statements of Water Diversion and Use