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Via E-mail

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The Department of Housing and Community Development
Division of Codes and Standards
P.O. Box 1407
Sacramento, CA 95812-1407
Attn: Dave Walls, Manager, State Housing Law Program
cpvc_ceqa_comments@hcd.ca.gov

Re: Comments of San Diego Baykeeper, Santa Monica Baykeeper, San Francisco Baykeeper, Deltakeeper, Russian Riverkeeper, and Orange County Coastkeeper Opposing Department's Proposed Approval of Use of Chlorinated Polyvinyl Chloride (CPVC) Pipe for Residential Structures Based on an Addendum to a Negative Declaration:
Addendum to Adopted Mitigated Negative Declaration; State Clearinghouse No. 2000091089.

Dear Mr. Walls,

Please accept these comments on behalf of San Diego Baykeeper, Santa Monica Baykeeper, San Francisco Baykeeper, Deltakeeper, Russian Riverkeeper, and Orange County Coastkeeper ("Keepers"). The Keepers are on-the-water citizen advocacy organizations who patrol the waters of California, responding to and addressing pollution problems around the state through their advocacy before the California Regional Water Quality Control Boards and State Water Resources Control Board, as well as other federal and local agencies and state and federal courts. Through that work, the Keepers are aware of ongoing tributyltin and toxicity pollution occurring in California's waters and the current contribution of the State's sewage plants to those pollution problems. The Department's proposal has serious implications for California's rivers, bays and estuaries by allowing, if approved, significant discharges of tributyltin and possibly other pollutants to numerous water bodies already cumulatively harmed by those pollutants.

In order to determine the wisdom of proceeding with the proposed expansion of CPVC pipe use in residential structures, the Department must first prepare a full environmental impact report (EIR). The Department's use of an addendum for this new proposed project is prohibited by CEQA. Substantial evidence, including expert analysis estimating the quantity of tributyltin one can expect to be released to the State's waters

by the proposed project and the effects of those releases, demonstrates that a fair argument exists that the project may have a significant effect on the environment requiring the preparation of an environmental impact report. The widespread use of CPVC pipes will result in new discharges of significant quantities of a number of toxic pollutants, including tributyltin, that will contribute to ongoing violations of water quality standards and undermine existing sewage plants' ability to comply with effluent limitations that are fully protective of water quality.

I. The Department's Proposed Use Of An Addendum Is Inconsistent With The Law.

In order to satisfy its CEQA obligations, the Department attempts to employ an addendum to a mitigated negative declaration prepared in 2000 for a drastically different project. Neither the addendum nor the 2000 MND address the Project currently proposed by the Department. Nor do they address new information that has come to light directly bearing on the Project's environmental impacts. Nor does the 2000 MND actually consider the potential adverse effects to water quality threatened by CPVC pipes. For these reasons and others discussed below, the Department's attempt to use an addendum is without authority under CEQA or an abuse of discretion.

A. As A Matter Of Law, The Department Has No Authority To Use An Addendum To The 2000 Mitigated Negative Declaration In Order To Comply With CEQA For The New CPVC Pipe Project.

Based on the plain language of CEQA, the Department has no authority to employ an addendum to a negative declaration. The statute's language does not mention the use of an addendum. The use of an addendum is reasonably implied by Section 21166 of CEQA in order for an agency to document a decision not to prepare a subsequent or supplemental EIR for projects for which a previous EIR had been certified. Thus, CEQA only discusses addenda in the context of projects for which previously prepared EIRs have been certified:

> When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs:
> (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
> (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.
> (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

Pub. Res. Code Section 21166. No mention is made of projects subject to negative declarations. By its plain terms, CEQA requires agencies to demonstrate that there is no substantial evidence of a fair argument that a revised project will have a potential significant effect on the environment, even when the previous version of the project already was subject to a negative declaration. The legislature, in enacting Section 21166, was focused on sparing state agencies the extensive costs and delay of duplicating an entire EIR process for minor changes in projects that, by themselves, would have no significant environmental effect. *See Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1073-74. No such cost or delay concerns were apparent where only a negative declaration was prepared by the agency. Under a negative declaration, the in-depth review of an EIR does not occur. Allowing an addendum to a negative declaration undercuts the objectives of CEQA, precluding public participation in an agencies' decision not to prepare a new negative declaration or EIR and undermining CEQA's fair argument standard for preparing an EIR even when no previous EIR had been prepared.[1]

B. The Proposed CPVC Pipe Project Is An Entirely New Project For Which A Separate EIR Must Be Prepared.

The use of an addendum pursuant to CEQA and its guidelines also is not authorized where a proposed project is a brand new project entirely distinct from a previous project for which CEQA analysis is completed. The Court of Appeal has laid out the fundamental criteria for when a project is a modification to a previous project or, as in this case, an entirely new project. The new project must be both "within the scope" of the prior project and amount to "essentially the same project" as the prior project in order for an agency to have any discretion to consider employing an addendum to comply with CEQA. *Sierra Club v. Sonoma* (1992) 6 Cal.App.4th 1307, 1320-1321 ("project was either *the same* as or *within the scope* of the project, program or plan described in the [previous CEQA document]"). *See also Burbank-Glendale-Pasadena Airport v. Hensler* (1991) 233 Cal.App.3d 577, 594. Where a newly proposed project is broader in scope than a previous related project, the more recent proposal constitutes a new project. *Apartment Ass'n of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, 1168-69. Similarly, even where a current proposed project was discussed in a prior EIR, if the project was not "specifically addressed in the [prior] EIR . . . it cannot be considered part of the overall 'project' addressed in those documents." *Natural Resources Defense Council v. Los Angeles* (2002) 103 Cal.App.4th 268, 285. The determination of whether a proposal constitutes a project under CEQA is a matter of law for which the Courts owe no deference to the lead agency. *See Fullerton Joint Union High School Dist. v. State Bd of Educ.* (1982) 32 Cal. 3d. 779, 795. Because the Department's new proposed CPVC Project is neither within the scope nor the same as the 2000 CPVC limited use amendment, the agency may not consider using an addendum in lieu of CEQA's mandated environmental review documents.

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[1] We respectfully disagree with the First District Court of Appeal's decision in *Benton v. Bd. of Supervisors* (1991) 226 Cal.App.3d 1467, 1477-81.

The proposed Project authorizing the use of CPVC pipes in any new residential buildings anywhere in the State of California is well beyond the scope of the 2000 project providing for the limited use of CPVC pipes in the very few areas of the State with corrosive drinking water. If there was a theme to the Department's 2000 project, it was the extremely limited scope of that project, a point emphasized over and over again in that project's initial study and the mitigated negative declaration:

> Because the local CPVC approval authority that would be granted by the [2000] proposed regulations requires findings of existing or expected metallic pipe failure due to existing soil and water conditions, the potential scope of CPVC use that will result from the proposed project will be limited. Information in the record of previous HCD examinations of CPVC pipe indicates that corrosive drinking water is not a widespread problem in California. The evidence before the Lead Agency indicates that the problems with metallic pipe corrosion have been isolated and occurred significantly only in certain limited areas of the state were residential units are being served by underground water wells. Finally, no cities or counties have filed with HCD modifications or changes in California Plumbing Code provisions to approve CPVC pipe. . . . For these reasons, the Lead Agency has concluded that the CPVC installations that may result from the proposed regulatory approval will be limited in scope.

2000 Initial Study, pp. 3-4. *See* 2000 Environmental Checklist, Explanation of Checklist Judgments, p. 1 ("proposed project . . . consists of an amendment to the California Plumbing Code authorizing local building officials to approve use of CPVC pipe as an alternate building material *under limited circumstances. . . .*"; *Id.* ("the Lead Agency has determined that due to the limited scope of the project . . . environmental effects will result in 'No Impact'); *Id.* ("[t]he determinations made for this Environmental Checklist are based on the limited scope of the proposed Project. . ."); *Id.*, p. 3 ("the Lead Agency anticipates that the CPVC installations that will result from this Project approval would be limited in scope . . ."); *Id.* ("[air quality] determination is based on the limited number of anticipated residential installations of CPVC. . ."); *Id*, p. 4 (same); *Id.*, p. 5 (same); *Id.*, p. 6 (same); *Id*, p. 7 (same); *Id.* p. 10-12 (hazardous materials determination); *Id.*, p. 1315 (water quality determination); *Id*, p. 22 (no impacts on solid waste stream because "number of CPVC installations . . . will be limited"). In practice, using 2004 as an example, the 2000 amendment resulted in the installation of CPVC pipes in about 4% of residential construction in California or 33 housing units per day. Comments of Phyllis Fox, Ph.D. (April 25, 2005) ("Fox Comments"). That 4% of residential construction was concentrated in a few southern California counties, Orange, Los Angeles, San Diego, Riverside, San Bernardino.[2]

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[2] Fax from Garry Gage, Noveon, to Bill Stack, HCD, Re: Repipes, September 15, 2004.

The Department's new project proposes unlimited use of CPVC pipe anywhere in the State without regard to the corrosivity of a local drinking water supply. Thus, the proposed Project would allow up to 100 percent of all new residential construction as well as replumbing jobs to use CPVC pipe. That amounts to the potential use of CPVC pipes in 852 housing units per day throughout the State based on the Addendum's 2004 numbers. Addendum, p. 19; Fox Comments, p. _. The increase in units using CPVC, 852 minus 33, is 819 units per day based on 2004. Hence, at the time of approval, the new proposed Project authorizes for the first time ever, about 819 housing units to be equipped with CPVC pipes. None of those 819 housing units currently can use CPVC pipe. Similarly, projecting 25 years into the future, in 2030, the proposed Project would allow CPVC pipes in approximately 1,134 new housing units per day throughout the State. Of those anticipated housing units in 2030, the current regulation would prohibit about 1,101 units from using CPVC pipe, compared to 2004 baseline (1134-33).

The statewide use of CPVC pipe was not contemplated, never mind analyzed, in the mitigated negative declaration prepared for the previous limited use amendment for CPVC pipe. Over and over again, the negative declaration cites the limited scope of that earlier project as the primary reason for its conclusion that the limited use of CPVC pipe in residences would not have a significant impact. Whether or not the statewide use of CPVC in potentially every new home in California for the indefinite future may have significant impacts was simply not addressed.

Because the Department's new proposed Project so greatly exceeds the limited use of CPVC pipe authorized by the Department's 2000 amendment and because it applies to new residential construction prohibited from using CPVC under that proposal, the new project is substantially beyond the scope of that previous project and is a new and separate project under CEQA. Likewise, the new project clearly was not part of the prior CPVC amendment project because the statewide use of CPVC pipe in residential buildings was not analyzed in the prior mitigated negative declaration. An addendum may not be used to initiate CEQA review for new projects, like the proposed statewide use of CPVC pipe.

C. The CEQA Guidelines Do Not Support The Use Of An Addendum To The 2000 Mitigated Negative Declaration For The New CPVC Pipe Project.

Assuming an addendum to a negative declaration is allowed at all, an addendum to an EIR or a negative declaration is "a way of making minor corrections. . . ." 14 Cal. Admin. Code § 15164, Discussion. Guidelines Section 15164(b) states that, "[a]n addendum to an adopted negative declaration may be prepared if only minor technical changes or additions are necessary or none of the conditions described in Section 15162 calling for the preparation of a subsequent EIR or negative declaration have occurred." Section 15162 of the Guidelines describes the following conditions requiring the preparation of a subsequent EIR:

> (a) When an EIR has been certified or a negative declaration adopted for a project, no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one or more of the following:
>
> (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;
>
> (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
>
> (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
>
> (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
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> (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
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> (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
>
> (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.

14 Cal. Admin. Code § 15612.

Focusing only on water quality impacts, the Department's proposed Project cannot meet at least two of the described conditions. First, the new Project proposed substantial changes to the project reviewed and addressed by the 2000 Mitigated Negative Declaration requiring major revision to that previous limited environmental

analysis. Second, new information of substantial importance is now available that was not available during the previous analysis showing new and increased significant impacts from the widespread use of CPVC pipe in residential buildings.

1. The Proposed Project Includes Substantial Changes In The Use Of CPVC Pipe Which Will Have New Or Increased Significant Effects On Water Quality Requiring Major Revisions To The Previous Negative Declaration.

A project calling for the 25-fold increase in CPVC pipes and, hence, a 25-fold increase in releases of pollutants leached or flushed from those pipes is a substantial change to the previous limited approval of residential use of CPVC pipes. *See* Fox Comments. The release of substantial quantities of organotins and other toxic pollutants from newly authorized CPVC pipe installations is a new or increased significant effect. "Significant effect on the environment" means "a substantial, or potentially substantial, adverse change in the environment." Pub. Res. Code § 21068 (emphasis added).

As described more fully below, the Project is proposing to allow a new, perpetual source of organotins, including the most toxic form – tributyltin – to be installed in every new residential structure in California. That steady supply of organotins will be discharged to sewage treatment plants throughout the State, including plants already found by the regional water quality control boards to have a reasonable potential to discharge tributyltin at levels that may exceed applicable water quality standards and treatment plants already violating effluent limitations for tributyltin. The proposed new source of tributyltin also may be released to water bodies already deemed "toxic hot spots" by the regional boards because of excessive levels of tributyltin already present in the environment or impaired by unknown toxicity. There can be no doubt that the magnitude of this potentially substantial change to the environment requires not just a major revision to the previous negative declaration but an entirely new EIR.

2. New Information Shows That The New Proposed Project Will Have One Or More Significant Effects On The Environment.

Since the Department's 2000 CPVC Pipe amendment, considerable new information has become available regarding CPVC pipe's potential impacts to water quality. Most importantly, California adopted water quality objectives for tributyltin after the 2000 MND was published. The California Ocean Plan adopted tributyltin "objectives" that apply to discharges to the ocean to protect beneficial uses, including aquatic life. Water quality objectives are the minimum levels of a pollutant necessary to be achieved in the State's ocean waters in order to fully protect all of the beneficial of those waters. *See* Water Code § 13241. The objective for tributyltin is very low, set to

protect public health from the consumption of contaminated seafood, at 0.0014 ug/L.[3] The levels of tributyltin discharged to waters of the State that will result from the proposed Project could very well exceed that low standard in many locations. *See* Fox Comments. Indeed, additional new information includes the numerous reasonable potential analyses that been performed by the various regional boards in the last five years, many of them concluding that sewage treatment plants in many parts of California have a reasonable potential of discharging tributyltin at levels that may exceed water quality standards.

The agencies' establishment and application of new water quality criteria and standards for one of the most toxic pollutants known to leach from CPVC pipes is new information of substantial importance. Given the very low levels deemed by the water quality agencies necessary to protect aquatic life, and the relatively large quantities of tributyltin that will leach from the huge new quantity of CPVC pipes that will be installed as a result of the Department's new project, that new information shows significant environmental effects to water quality warranting the preparation of a full EIR.

II. The Department Must Prepare An EIR For Its Project Proposing To Drastically Expand The Use of CPVC Pipe In Residential Structures Throughout The State If There Is Substantial Evidence Of A Fair Argument That The Project May Have A Significant Environmental Impact.

"[CEQA] requires the preparation of an EIR whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact." *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75. *See Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002; Pub. Res. Code § 21080(c)-(d). The "fair argument" standard establishes a low threshold for requiring the preparation of an EIR. *No Oil, Inc., supra*, 13 Cal.3d at 75; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 310. "Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." Pub. Res. Code § 21082.2(c); 14 CCR § 15384. Under CEQA, expert disputes are treated as *per se* evidence that a project may have significant impacts. *See City of Livermore v. Local Agency Formation Commission* (1986) 184 Cal.App.3d 531, 541-42; *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 247-49 ("The very uncertainty created by the conflicting assertions ... underscores the necessity of the EIR to substitute some degree of factual certainty"). "Significant effect on the environment" means "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic and aesthetic significance." 14 CCR § 15382. Certain potential impacts, by definition, trigger a mandatory finding of

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[3] SWRCB, *California Ocean Plan. Water Quality Control Plan. Ocean Waters of California* (adopted by SWRCB November 16, 2000; approved by the U.S. EPA December 3, 2001; effective December 3, 2001).

significance. 14 CCR § 15065. These include project's that have the potential "to substantially degrade the quality of the environment, substantially reduce the habitat of a fish or wildlife species. . ., or "have possible environmental effects which are individually limited but cumulatively considerable. . . ." *Id.*

"The purpose of an [EIR] 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." Pub. Res. Code § 21061; *see also* § 21002.1. An EIR "serves not only to protect the environment but also to demonstrate to the public that it is being protected." 14 CCR § 15003(b). "The requirement of a detailed statement helps insure the integrity of the process of decision by precluding stubborn problems or serious criticisms from being swept under the rug." *Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal.App.3d 813, 820. "The EIR process protects not only the environment but also informed self-government." *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376, 392. "The EIR process will enable the public to determine the environmental and economic values of their elected and appointed officials thus allowing for appropriate action come election day should a majority of voters disagree." *People v. County of Kern* (1974) 39 Cal.App.3d 830, 842.

III. The Project May Have A Significant Environmental Impact Because It Calls For The Creation Of Permanent Water Pollution Sources Of Organotins In Housing Units Throughout The State, Including Housing Units Discharging to Sewage Plants And Waters Of The State Whose Discharge of Organotins Already Has Been Found To Be Violating Or Having A Reasonable Potential To Violate Water Quality Standards.

The Addendum's water quality discussion seriously misleads the public into believing that the types of pollutants expected to leach from CPVC pipes are of little or no concern to water quality once they leave the tap and are discharged to the environment. The Addendum asserts that "the CPVC pipe material and chemicals in the adhesives to install the pipe are not currently regulated or proposed to be regulated by the SWRCB for impacts on water quality." Addendum, pp. 38. That statement is blatantly incorrect.

The State Board has long recognized the serious dangers posed by TBT discharges to the waters of the State. *See* SWRCB, *Tributyltin: A California Water Quality Assessment*, Report 88-12 (1988). Organotins, and in particular tributyltin, are commonly regulated by the Regional and State Boards throughout the State. Many sewage plants have been issued NPDES permits that contain specific numeric effluent limitations for TBT. In each of those cases, the relevant regional board has made a formal determination that the sewage plant's discharges of TBT "are or may be discharged at a level which will cause, have <u>the reasonable potential to cause, or</u>

contribute to an excursion above any State water quality standard." 40 C.F.R. § 122.44(d)(1)(i) (emphasis added). The Boards' reasonable potential analyses of TBT discharges apply several relevant water quality standards. These include the State's Ocean Plan, which establishes very low numeric water quality objective of 0.0014 ug/L for TBT. The federal EPA also has issued water quality criteria for TBT of 0.46 ug/L for acute exposures (1-hour) and 0.072 ug/L for chronic exposures (4-day) in freshwater and 0.42 ug/L acute and 0.0074 ug/L chronic for saltwater. The EPA criteria are designed to be applied by California and other states when issuing TBT effluent limits in NPDES permits in the future. Likewise, all of the regional boards' basin plans include narrative water quality standards that prohibit the discharge of toxic pollutants in toxic amounts and any water quality degradation. *See, e.g.* Water Quality Control Plan (Basin Plan) for the San Francisco Bay Region, Chapter 3 (narrative toxicity standard) (http://www.waterboards.ca.gov/sanfranciscobay/basinplan/web/BP_CH3.html#TOXICITY). Other forms of organotins are also toxic to aquatic life. The California Department of Toxic Substances Control has recommended that dibutyltin, for example, be included in developing cleanup criteria. Fox Comments.

Unfortunately, sewage treatment plants are not designed to treat toxic pollutants like TBT. They are designed to treat sewage and other organic wastes. Where as here, TBT leaching from a pipe would be dissolved in water, it becomes less likely that the treatment process within a conventional sewage plant will be capable of removing sufficient quantities from its effluent to protect water quality.

Contrary to the Addendum's assumption that flushing large quantities of toxic pollutants down the drain and into the State's waters amounts to a net benefit to the environment, the State's water quality agencies already have determined that current levels of TBT found in many sewage treatment plants already threaten to violate the State's water quality standards. The additional TBT resulting from the proposed Project will exacerbate that existing threat.

A. The Project May Have Significant Environmental Effects Because It Will Contribute to Pollutant Levels Discharged From Sewage Plants That Already Are Violating Or May Violate Limitations Deemed Necessary to Protect Water Quality.

The regional boards already have determined that wastewater effluent released by numerous sewage plants around the State has the reasonable potential to violate water quality standards applicable to at least one of the pollutants that will leach from CPVC pipes proposed to be authorized by the Project - tributyltin. These include some of the State's largest sewage plants, servicing areas where a large proportion of new housing construction is underway and forecast for the foreseeable future. These include, for example, the Los Angeles' Hyperion Wastewater Treatment Plant (WDRs Order No. 2005-0020, p. 19; *Id.*, Table R1-1 (reasonable potential analysis)); Central Contra Costa County Sanitary District (WDRs Order No. 01-068, p.12); Olivehurst Public Utility

District WTP -Yuba County (WDRs Order No. R5-2005-0094, p. 12), Sonoma Valley County Sanitation District (WDRs, Order No. R2-2002-0046, p. 16, Table 1); South Bayside System Authority WTP, Redwood City, San Mateo County (WDRs Order No. 01-012, p. 8, 13). For a number of these plants, either the regional boards or the discharger have determined that it already is not feasible for their treatment facility to comply with the applicable water quality based effluent limitation for TBT. *See, e.g.* Central Contra Costa County Sanitary District; Sonoma Valley County Sanitation District (Fact Sheet, p. 13 [TBT]). Several cities already are violating or have violated their TBT limitations. San Jose and Santa Clara County (RWQCB Complaint No. 01-086); City of Oceanside (Order No. R9-2004-0006).

Despite these existing TBT concerns, the Project includes a mandate for developers to flush large quantities of tributyltin and other toxic pollutants to local sewage plants without regard to the sewage plants' compliance with their pollution discharge permits or adverse consequences to the rivers, lakes and ocean waters into which they ultimately discharge. *See* Addendum, pp. 38, 40; MND, pp. 13-14, 15-16. The Department's flushing "mitigation," by definition, acknowledges the potential harmful effect of the toxic solvents used to install CPVC pipe and the organotins leaching directly from CPVC pipe, reasoning that, but for the flushing mitigation, "[d]rinking water consumers would be exposed to any contaminants leaching into the drinking water carried by the pipe." *See* MND, p. 14. However, one consumers' mitigation measure is another recreational anglers' or downstream drinking water purveyors' pollution source. The flushing "mitigation" maximizes the amounts of these toxic pollutants that will be discharged to sewage plants and receiving waters as new housing and replumbing jobs come on-line. In the case of the Central Valley, many sewage plants discharge into waters that are used as drinking water further downstream. In those cases, the flushing simply transports the CPVC pollutants to downstream drinking water consumers.

The flushing "mitigation" also does not actually mitigate the long term leaching of organotins and other toxic chemicals from the CPVC pipe itself. Flushing removes some of the readily soluble material from the surface of the pipe, but not chemicals within the pipe matrix itself, which continue to leach by diffusion from the pipe interior. Fox Comments. As hundreds of thousands of new housing units are constructed in the State over the next few decades, they will be "housing" a permanent source of highly toxic organotins that will pose both compliance and water quality problems in perpetuity.

By allowing for the installation of a substantial number of new sources of organotin compounds that will discharge to sewage plants throughout the State, including plants that already have a reasonable potential to discharge TBT at levels that may violate applicable water quality standards, the Project will exacerbate those existing threats of water quality standard violations. For the plants that already are exceeding their applicable effluent limitations for TBT, the Project's approval of new releases of more TBT will exacerbate their ability to comply in the future. For those sewage plants that currently do not exhibit reasonable potential to violate water quality standards for TBT,

the approval of CPVC pipe in thousands of homes within their service areas will increase the likelihood that their future discharges of wastewater will have a reasonable potential to violate the applicable standards. Each of these scenarios involves a potential significant effect on water quality involving the release of toxic pollutants at levels that may not protect beneficial uses and which alone justifies the preparation of an EIR.

The Project's potential substantial impacts have been documented by Dr. Phyllis Fox. Dr. Fox analyzes effluent data and effluent limitations for TBT included in a number of sewage plant permits around the State. Fox Comments. In those service areas where a sewage plant already is violating its water quality-based TBT limits and extensive housing developments are planned, the Project's approval of CPVC pipe in those new developments will contribute to and exacerbate those violations. *Id.* Even where a sewage treatment plant currently is in compliance with a TBT limitation, projections of future development within a plants' service area show that the project will increase significantly the amount of TBT entering those plants, greatly taxing their ability to comply with the permit's TBT limitations and protect water quality in the future. *Id.* Many of the sewage treatment plants that already have reasonable potential to violate standards applicable to TBT are located in areas expected to experience the greatest housing increases and, thus, the greatest future loadings of TBT to their plants from new CPVC pipes. These include, for example, the Los Angeles' Hyperion Plant and the Oceanside WTP. Dr. Fox's calculations demonstrate the magnitude of future TBT loadings that will result from the Project, providing substantial evidence of a fair argument that the Project will have a significant adverse impact on water quality.

B. The Project May Have Significant Environmental Effects Because It Will Result In Discharges of Pollutants That Contribute to Existing Violations of Water Quality Standards.

The Project must prepare an EIR because it will result in greater amounts of organotins to be discharged to waters of the State already degraded by organotins and toxicity. Those cumulative toxic impacts must be addressed by an EIR.

When a project results in pollution discharges that cause or contribute to violations of water quality standards, that is a potential significant environmental effect warranting the preparation of an EIR. *See* CEQA Checklist. In addition, where a water body already is degraded by the existing cumulative levels of organotins or other pollutants, irrespective of their source, increased discharges of organotins result in additional cumulative effects to that already degraded waterbody. *See* 14 Cal. Admin. Code § 15065(a)(3).

Under Section 1313(d) of the federal Clean Water Act, the Regional Boards, the State Board and the federal EPA have identified those waters of the State that they have determined are not meeting applicable water quality standards. 33 U.S.C. § 1313(d). Many of the State's waters are impaired by unknown toxicity, toxicity, sediment toxicity

and other pollutants. *See* 2002 CWA Section 303(d) List of Water Quality Limited Segments. Additional loadings of organotins and other toxic chemicals to those impaired waters will contribute to those existing violations.

The Department ignores the applicability of any water quality standards to pollutants associated with CPVC pipes. The Department also fails to acknowledge the deteriorated condition of large numbers of California water bodies. Dr. Fox summarizes the potential loadings of tributyltin through sewage plants to waters of the State, including waters already impaired by various pollutants. For example, the Regional Boards have identified numerous water ways in the Central Valley and other parts of the State that are impaired by unknown toxicity. Discharges of tributyltin and other organotin compounds at the levels predicted by Dr. Fox will contribute to those existing impairments.

In addition, the federal antidegradation policy applies to all waters of the State. The Policy states in part that, "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 C.F.R. § 131.12(a)(1). When a water body is impaired, the Policy prohibits additional discharges that will further impair that water body. Because the Project will result in discharges of new loadings of tributyltin that will contribute to existing impairments of waters of the State, the Project also will contribute to violations of the federal antidegradation policy. Because the Project results in discharges of tributyltin that will contribute to existing violations of water quality standards, the project may have a significant adverse environmental impact.

C. Because The Project Will Result In Substantial New Discharges of TBT, The Project May Have An Adverse Impact On Fish and Wildlife, Including Candidate, Sensitive And Special Status Species.

The substantial releases of organotins that will result from the Project may have significant impacts on fish and wildlife including wildlife listed by state and federal wildlife agencies as endangered and threatened. The possibility of impacts to fish and wildlife triggers the mandatory preparation of an EIR. 14 CCR § 15065. The Department fails to engage at all on this potential impact, relying instead on the 2000 MND's assertion that biological resources issues are "not applicable to the proposed [2000] Project." The Addendum's reliance on that failure to analyze whatsoever the potential impacts of CPVC pipe use on aquatic habitats and fish and wildlife throughout the State means that potential significant adverse effects of the current Project have been ignored.

"TBT is a serious and widespread contaminant of marine and fresh water habitats in California." SWRCB, *Tributyltin: A California Water Quality Assessment*, Report 88-12, December 1988. As evidenced by the very low water quality criteria and standards applied by the State Board and the federal EPA, extremely low levels of TBT cause

deformities in oysters and a wide range of adverse reproductive and developmental effects in fish. *See* Fox Comments. In addition to their inherent toxicity, TBT and the other organotins bioconcentrate in the aquatic environment. Because they bioconcentrate, the impact of persistent sources of organotins will be magnified over time and may thus affect anglers who catch and eat contaminated fish. The perpetual release of organotins from California sewage plants called for by the Project is just such a perpetual source. The bioconcentration factor of TBT in fish livers, including possibly listed species and species commonly consumed by anglers, can be as high as 52,000. Fox Comments. Not surprisingly, TBT has been implicated in adverse impacts to sea otters, a species listed as a threatened species under the federal Endangered Species Act and which feeds near the top of the food chains in the coastal waters off of Central California.

By allowing for the potential release of large amounts of organotins to California's rivers, lakes, estuaries, and coastal waters, the Project has the potential to degrade the quality of the environment and may have significant effects on mollusks, fish, and marine mammals such as otters. For those fish popular with California anglers, potential impacts also may result to people eating fish caught in California, including potential significant levels of organotins bioconcentrated in fish tissue.

D. The Department Failed To Gather Information Necessary to Eliminate The Possibility Of The Project's Adverse Impacts Resulting From The Discharge Of Significant Quantities Of Toxic Pollutants To Waters of The State.

Agencies are obligated to gather the information and conduct the analyses necessary to evaluate and determine the potential environmental impacts of their proposed projects. "CEQA places the burden of environmental investigation on government rather than the public. If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences." *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311. In this instance, the Department has failed to comply with its duty to gather in information on the potential water quality impacts of allowing the use of CPVC pipe in residential structures.

The Department acknowledges that CPVC piping and the solvents used to install the pipe release very toxic compounds into the drinking water flowing through the pipes. 2000 MND, pp. 14-16. Apparently acknowledging the potential health impacts to individuals drinking water containing those chemicals, the Department calls for the contaminants to be flushed downstream. *Id.*

The Department completely ignores the downstream implications of its flushing "mitigation." *See* Addendum, pp. 38-39; 2000 MND, pp. 13-14.The Department makes no effort to quantify the amount of solvents or organotins that flushing will discharge to

downstream sewage treatment plants and the waters of the State. *Id. See* Fox Comments. The Department fails to cite to any existing evidence gathered by itself or others quantifying the amounts of these contaminants released from CPVC pipes under various conditions and for various periods of time. *Id.* As noted above, the Department erroneously assumes there are no water quality regulations applicable to the organotins and other pollutants expected to be released from the CPVC pipe authorized by the project. *See supra*. Accordingly, the Department made no effort to compare the levels of organotins and other pollutants that will be released by the project to applicable water quality standards.

Nor does the Department attempt to address the long term releases of organotins from CPVC pipe installed as a result of the Project. Organotins will continue to leach from CPVC long after the 20 minutes of flushing during the first week after installation have been completed. As Dr. Fox explains, significant amounts of organotin will leach from CPVC pipe. Fox Comments. Available data indicates that organotins continue to leach from CPVC pipes after the initial flush. *Id.* The Department neither estimates the quantity of organotins expected to leach from the CPVC pipes proposed by the project or their impact on downstream receiving waters. Hence, no effort to analyze the effects of the perpetual releases of organotins authorized by the project on downstream treatment plants and waters is attempted by the Department.

The Department claims no significant impacts to water quality from its CPVC piping proposal only because it has refused to look for such impacts. In essence, the Department assures us that no news is good news. That is not how CEQA works. The Department, in order to avoid preparing an EIR, is obligated to gather in and analyze substantial evidence that there is no likelihood its Project would have any significant effect on the environment. By instead failing to study the potential water quality impacts of CPVC pipe, the Department's deficient record underscores the readily apparent fair argument that allowing significant quantities of organotins and an unknown quantity of other toxic compounds to be released to the State's sewage plants and receiving waters may have a significant environmental effect on water quality and the aquatic environment.

For all of the above reasons, we request that the Department withdraw the Project as currently proposed and the accompanying Addendum.

Sincerely,

Michael R. Lozeau

On behalf of San Diego Baykeeper, Santa Monica Baykeeper, San Francisco Baykeeper, Deltakeeper, Russian Riverkeeper, and Orange County Coastkeeper