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Via E-mail and U.S. Mail

Linda Candelaria, PhD
Santa Ana Regional Water Quality Control
Board
3737 Main Street, Suite 500
Riverside, CA 92501-3348

**Re: City of Newport Beach Supplemental Comments on Proposed Basin Plan
Amendments to Incorporate Total Maximum Daily Loads (TMDLs) for Copper
(Cu) and Non-TMDL Action Plans for other Metals in Newport Bay**

Dear Dr. Candelaria:

We are writing on behalf of the City of Newport Beach (“City” or “Newport Beach”) to provide the following comments on the Santa Ana Regional Water Quality Control Board’s (“Regional Board”) Proposed Basin Plan Amendments to Incorporate Total Maximum Daily Loads (TMDLs) for Copper (Cu) and Non-TMDL Action Plans for other Metals in Newport Bay, including the Revised Substitute Environmental Document (“RSED”) for the Copper TMDLs and Action Plans for Zn, Hg, As and Cr in the Newport Bay project (“Project”).

The City appreciates the opportunity to comment on the revised Copper TMDL documents, and as stated in the separately submitted comment letter from City staff, Newport Beach is pleased to participate as a stakeholder in the Regional Board’s regulatory process. Though the City believes it was wise for the Regional Board to take time to consider comments to the last draft Copper TMDL, unfortunately, the most recent draft remains deeply flawed. If it is adopted in its current form, it will be vulnerable to numerous legal challenges, as summarized below.

In the Regional Board’s July 10, 2018, Public Notice, it asked commenters to “[p]lease limit new comments to the revised portions of the draft documents and to issues that were not raised during the initial comment period.” Accordingly, the City will not reiterate the comments it previously submitted, most of which have not been adequately addressed.

In spite of the revisions made since 2016, the Copper TMDL and its supporting documents still suffer from major legal deficiencies. First, it still unlawfully fails to heed the Legislative prohibition against local governments attempting to regulate the sale and use of registered pesticides. Second, since the City cannot lawfully control the use of registered pesticides, it

has no control over the primary pollutant loading mechanism and is therefore not properly considered a discharger. Third, the deletion of the State Lands Commission from the list of dischargers is arbitrary when the City was originally identified as a discharger for the same reasons. Fourth, the Regional Board's conclusion that the implementation schedule provides sufficient time is unsupported. Fifth, the RSED is replete with numerous and serious violations of the California Environmental Quality Act. For all these reasons, the Copper TMDL cannot be adopted in compliance with the law.

I. The Copper TMDL Still Requires Unlawful City Regulation of the Sale and/or Use of Registered Pesticides

The revised Copper TMDL documents attempt to conceal the fact that, if adopted, the Regional Board will be requiring the City to regulate the sale and/or use of registered pesticides, which is prohibited by state law. The Supplemental Staff Report states that: "The proposed Cu TMDLs do not require or recommend that the City or County ban the use of Cu antifouling paints. (The proposed Implementation Plan does recommend providing incentives to boaters to convert from Cu AFPs to nontoxic AFPs.)" (Supplemental Staff Report, p. 5). Thus, the Regional Board still intends to require the City to undertake actions that would violate state law. Food and Agriculture Code section 11501.1, subdivision (a), forbids any action by local government to "prohibit or in *any way attempt* to regulate *any matter relating to* the registration, sale, transportation, or use of pesticides . . ." (Italics added.) The Regional Board appears to believe its "incentive" approach is a way to skirt the preemption issue identified by the City. The Legislature could hardly have written its preemption language to sweep more broadly. The Regional Board's suggestion that "incentives" to influence the sale and use of registered pesticides constitute a loophole to subvert the Legislature's intent is without merit.

II. The City is Not a Discharger

The Regional Board's assumption that the City is a discharger with regard to Copper Anti-Fouling Boat Paint ("Cu AFP") is incorrect, and therefore the Cooper TMDL and its Implementation Plan are based upon incorrect assumptions. The Regional Board contends the City is a discharger in this regard because the City has been delegated authority over certain tidelands: "The City and County thereby have the ability to exert control over Cu discharges from Cu AFPs due to passive leaching from boat hulls and/or hull cleaning activities." If it were true that the City could regulate the sale and use of Cu AFP, then the Regional Board's position would arguably be consistent with State Water Resources Control Board decisions. (See, e.g., *In the Matter of Petition of San Diego Unified Port District*, State Water Resources Control Board Order No. WQ 89-12, p. 6 ["This Board has consistently taken the position that a landowner who has knowledge of the activity taking place *and has the ability to control the activity*, has "permitted" the discharge within the meaning of Section 13304."] (Italics added).)

As the City has previously demonstrated, however, it does not have the ability to control the sale, use or transportation of Cu AFP due to the Legislature's determination to occupy the

entire field of such regulation. Because the City lacks the ability to control the discharge of copper from Cu AFP, it therefore follows that the City is not a discharger by virtue of its administration of certain tidelands, the Regional Board's assumptions to the contrary are incorrect, and the Copper TMDL and its Implementation Plan are fundamentally flawed.

III. The Deletion of the State Lands Commission is Unexplained and Inconsistent with the Justification for Naming Other Dischargers

In the prior draft of the Copper TMDL, the Regional Board identified the State Lands Commission as a discharger for essentially the same reasons as the City and the County of Orange. In the latest draft, the State Lands Commission no longer appears as a discharger. The Supplemental Staff Report does not provide any explanation or justification for this change. Indeed, no strikethrough version of the Basin Plan Amendments is provided, so many stakeholders may not have even noticed this substantive change to the proposed regulatory action. This lack of transparency should be addressed and explained.

Moreover, since the Regional Board previously concluded that the State Lands Commission and the City are dischargers for nearly identical reasons, it is arbitrary for the Regional Board to delete the State Land Commission from the list of Dischargers without also deleting the City and County. Indeed, the State Lands Commission likely has greater ability to control Cu AFPs on the tidelands than the City since the preemption provisions of Food and Agriculture Code section 11501.1 are targeted at local governments, not state agencies.

IV. The Regional Board's Conclusion that the Implementation Schedule Provides Enough Time is Unsupported by Evidence or Analysis

The latest draft Copper TMDL allows just 12 years to fully implement the TMDL. The City previously commented that the implementation period (which was then longer) was too short to allow for the effect of the new lower-copper AFPs to be observed, would require potentially unnecessary actions and costs and would allow collection of better data. In the Supplemental Staff Report, the Regional Board states that the recommended compliance schedule is "adequate for this purpose." (Supplemental Staff Report, p. 3.) This conclusion is unsupported by any analysis or factual support, and the schedule should be significantly lengthened.

V. Relevant CEQA Law

The California Environmental Quality Act ("CEQA") "compels government first to identify the environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives." (*Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1233.) Public agencies, such as the Regional Board, must "refrain from approving projects with significant environmental effects if there are feasible alternatives or mitigation measures that can substantially lessen or avoid those effects." (*City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal.App.4th 1392, 1421 ["Arcadia"] (citing *Mountain Lion Foundation v. Fish & Game*

Com. (1997) 16 Cal.4th 105, 134.) “CEQA requires a governmental agency to prepare an EIR whenever it considers approval of a proposed project that ‘*may* have a *significant* effect on the environment.’” (*Arcadia, supra*, (2006) 135 Cal.App.4th 1392, 1421 (citations omitted.) “If there is no substantial evidence a project ‘may have a significant effect on the environment’ or the initial study identifies potential significant effects, but provides for mitigation revisions which make such effects insignificant, a public agency must adopt a negative declaration to such effect and, as a result, no EIR is required. [Citations.] However, the Supreme Court has recognized that CEQA requires the preparation of an EIR ‘whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact.’ [Citations.] Thus, if substantial evidence in the record supports a ‘fair argument’ significant impacts or effects may occur, an EIR is required and a negative declaration cannot be certified.” (*Ibid.*) A “significant effect on the environment” is defined as “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 or aesthetic significance. An economic or social change by itself shall not be considered a significant effect on the environment. A social or economic change related to a physical change may be considered in determining whether the physical change is significant.” (CEQA Guidelines, § 15382.)

The Water Quality Control (Basin)/Section 208 Planning Program of the State and Regional Water Boards has been certified by the Secretary for Resources, which allows the Regional Board to prepare an SED instead of an Environmental Impact Report (“EIR”) or Initial Study/Negative Declaration (“IS/ND”) for the Project. “Documents prepared by certified programs are considered the ‘functional equivalent’ of documents CEQA would otherwise require.” (*Arcadia, supra*, 135 Cal.App.4th at 1422.) Though exempt from the requirement to prepare an EIR or an Initial Study/ND, “[c]ertified regulatory programs remain subject, however, to other CEQA requirements” including CEQA’s “broad policy goals and substantive standards.” (*Arcadia, supra*, 135 Cal.App.4th at 1421–22.) Moreover, the SED must include “at least the following:

1. An analysis of reasonably foreseeable environmental impacts of the methods of compliance;
2. An analysis of reasonably foreseeable feasible mitigation measures relating to those impacts; and
3. An analysis of reasonably foreseeable alternative means of compliance with the rule or regulation, which would avoid or eliminate the identified impacts.”

(CEQA, § 21159; CEQA Guidelines, § 15187(c).) In addition the “environmental analysis shall take into account a reasonable range of environmental, economic, and technical factors, population and geographic areas, and specific sites. *The agency may utilize numerical ranges and averages where specific data is not available*, but is not required to, nor should it, engage in speculation or conjecture.” (CEQA Guidelines, § 15187(d) (emphasis added).)

In reviewing the RSED, a court will “undertake an equivalent review” to the type of environmental document for which the RSED is a substitute. (*California Sportfishing Protection Alliance v. State Water Res. Control Bd.* (2008) 160 Cal.App.4th 1625, 1644.)

VI. What is the Functional Equivalent Document?

The primary difficulty with analyzing the RSED is that it is far from clear what type of CEQA document the Regional Board believes the RSED is substituting. It appears that the Regional Board intends the document to act as a programmatic EIR. However, the SED claims that the Board has no authority to impose mitigation measures and, as is discussed further below, the alternatives discussion is highly truncated based on the claim that there are no significant environmental impacts of the Project. The Regional Board should make it clear whether it intends the RSED to act as the functional equivalent of a Program EIR, or whether it intends the document to act as the functional equivalent of a program level ND. The Regional Board should clarify the type of CEQA document for which the RSED is a functional equivalent.

VII. The RSED Fails To Comply With CEQA’s Requirements.

The RSED claims that it contains “a good faith effort at full disclosure of the reasonably foreseeable environmental impacts that could accompany implementation of the reasonably foreseeable methods of compliance with the proposed Cu TMDLs and Zn, Hg, As and Cr Action Plans for Newport Bay.” However, the RSED falls well short of this standard in numerous instances. The primary issue with the RSED is that it uses the provision of CEQA Guidelines section 15187(d), which states that the Regional Board should not engage in speculation, as an excuse not to conduct necessary environmental analysis. Thus, the RSED fails to evaluate and disclose the potentially significant environmental impacts of the Project in multiple resource categories, as set forth below.

The Regional Board attempts to avoid analyzing the impacts of the Copper TMDL, among other reasons, because it claims to be “prohibited from specifying the . . . particular manner of compliance.” (RSED, p. 7.) Still, it is absolutely foreseeable that many boats will have to be converted to non-Cu AFPs if the Copper TMDL is adopted. As the Regional Board previously stated, “[t]his TMDL cannot be met unless Cu loading from boats is reduced or eliminated.” (Staff Report, p. 68, emphasis in original.) This result is not only foreseeable, it is intended by the Regional Board. Furthermore, the Regional Board is contradicting positions successfully taken by other Regional Boards on this very issue. (See *Conway v. State Water Resources Control Board* (2015) 235 Cal.App.4th 671, 679-80 [“. . . Conway’s argument has two fatal flaws: First, Water Code section 13360, subdivision (a) does not apply on its face. The TMDL is neither a ‘waste discharge requirement or other order.’ It does not require or order anything. Second, where lack of available alternatives is a constraint imposed by present technology and the law of nature, rather than the Board specifying a particular manner of compliance, there is no violation of Water Code section 13360.”].) The Regional Board cannot avoid analyzing the environmental impacts of actions it clearly intends to result from the Copper TMDL.

A. Air Quality

The RSED correctly notes that the conversion of boats from the current copper paints has the potential to increase the emissions of air contaminants, including volatile organic compounds (“VOCs”). However, there is no attempt made to provide a “numeric range” of the potential for VOC emissions, or even to provide an “average” of the per-boat VOC emissions expected by the conversions as required by CEQA Guidelines section 15187(d). Clearly, it would neither be speculation nor conjecture for the Regional Board to provide an estimate of the amount of VOC emissions from a single boat conversion, which could then be extrapolated into a range of potential impacts from VOCs based on the estimated range of the number of boats to be converted. Studies summarized in the City Staff’s separate comments indicate that some non-Cu AFPs are less durable than Cu AFPs, and/or frequent re-painting is necessary to maintain effectiveness, which suggests the Regional Board should analyze the impacts of more frequent painting.¹ This would provide the public and the decision makers with at least some information regarding whether the impact would be significant and whether available measures in the SCAQMD Air Quality Management Plan would sufficiently mitigate these impacts to a less than significant level. As it stands, the RSED now states, in essence, there may be an impact, we do not know how big of an impact, but trust us, it will be reduced to a less than significant level. Such an analysis does not comport with CEQA.

The same concerns apply to the RSED’s discussion of impacts from increased emissions from vehicular/vessel traffic for monitoring and investigations and increased emissions from generator use during hull cleaning. No average for emissions from these vehicles/vessels is provided; no average emissions from generator use is provided; and no estimate of a range for the increased traffic or for the hours of generator operation is provided. The RSED could, and should, for example, provide average emissions from a typical generator used in hull cleaning, the hours of operations, on average, needed to clean a hull, and a range of the numbers of increased hull cleanings that will be necessary because of the Project. As established in comments and evidence submitted by City staff, many non-Cu AFPs are not as effective as Cu AFPs, which will require more frequent maintenance. From this information, a determination of the significance of the potential impacts can be made. Absent this information, the RSED lacks a good faith effort at full disclosure of the potential environmental impacts of the Project.

Moreover, there is no analysis whatsoever regarding whether changing the types of AFPs used would change the fuel efficiency of existing boats. Do either the proposed nontoxic AFPs or existing alternative toxic AFPs decrease the fuel efficiency of boats by themselves? By how much? Even if the Regional Board incorrectly believes alternative AFPs are

¹ For example, some paints, such as those containing zinc-oxide (for which hydrogen peroxide is the antifouling mechanism), require painting every year; some hard coating antifouling paints require cleaning every two weeks. How much would emissions increase if boaters are forced to change their paints more frequently?

effective, the question the Regional Board must analyze is whether they are *as effective as* Cu AFPs. What are the air quality impacts of any decrease in fuel efficiency on an average basis? Are the nontoxic AFPs as good at preventing fouling as the currently used AFPs? The Biological Resources section of the RSED (p. 41) indicates that the nontoxic AFPs could result in an increased growth of fouling organisms. If this is correct, would the increase in fouling decrease fuel efficiency? By how much? What are the estimated air quality impacts of any such decrease in fuel efficiency? The RSED must answer these questions in order to provide a true picture of the potential environmental impacts of the Project.

In short, the RSED lacks substantial evidence to support its conclusion that the Project will result in less than significant impacts to Air Quality.

B. Biological Resources

The Biological Resources section of the RSED indicates that the use of nontoxic AFPs could result in the increased growth of nonnative fouling organisms. This appears to be a potentially significant impact for which mitigation is required.² However, the RSED provides no threshold of significance from which the public or decision makers can make this determination. Moreover, the RSED notes that the Regional Board cannot impose mitigation for this, or any other issue.

The appropriate response in a CEQA document is not to “sweep the problem under the rug,” by simply making a finding of a less than significant impact. Rather, the RSED should first establish a threshold of significance for a potential impact. What increase in nonnative fouling organisms would be considered significant? Once this threshold is established, the RFD should determine whether the expected increase in nonnative fouling organisms is potentially significant. If the Project would result in a potentially significant impact, the RSED should determine whether there are any potential mitigation measures that the Regional Board can implement to reduce the impact to a less than significant level. If there are no such mitigation measures, or if those potential mitigation measures are outside of the Regional Board’s jurisdiction, the RSED should conclude that the impact is significant and unavoidable. The Regional Board can then choose whether to adopt a statement of overriding considerations for the Project. The Regional Board cannot, however, fail to set a threshold of significance, disclose a potentially significant impact but not evaluate its significance, fail to require any mitigation for the impact, and then declare that the impact is less than significant. This would be a wholesale abdication of the Regional Board’s responsibilities under CEQA.

² This problem is extensively documented in numerous studies. See, e.g., Global Invasive Species Programme (GISP) 2008, *Marine Biofouling and Invasive Species: Guidelines for Prevention and Management* available at: <
http://www.issg.org/pdf/publications/GISP/Guidelines_Toolkits_BestPractice/Jackson_2008.pdf>.

Similar concerns pertain to the use of alternative biocide AFPs. The RSED concludes that the use of such paints “is likely to be approved only if it is demonstrated that there would be no significant adverse environmental effect” associated with the use of such AFPs. However, the Regional Board has not prohibited the use of these alternative, biocide AFPs through any mitigation measure. Therefore, it is reasonably foreseeable that conversion to toxic AFPs could be a result of the Project and a potentially significant impact. The RSED should evaluate what other biocide AFPs may be used if boats are converted from copper AFPs, establish a threshold of significance for any such impacts, and determine the potential significance of impacts to biological resources should these alternative, biocide AFPs be used. If that analysis concludes there may be potentially significant impacts, the RSED should include mitigation measures to mitigate the impacts. If no such mitigation measures are available, or are not within the jurisdiction of the Regional Board, the RSED should conclude that the impacts are significant and unavoidable and, if the Regional Board decides to approve the Project, it would need to adopt a statement of overriding considerations.

C. Greenhouse Gas Emissions

Like the Air Quality analysis, this section of the RSED makes no effort to disclose average emissions from monitoring, generator use for hull cleaning, or from potential decreases in fuel efficiency. As set forth above, for monitoring, the RSED should provide estimated average emissions on a per trip basis and a range of the emissions based on the estimated number of trips required by the Project and compare these to a threshold of significance. Likewise, the RSED should provide average emissions from generators on a per boat basis and a range of emissions based on the estimated number of increased boat cleanings as a result of the Project. The RSED should also estimate any emissions increases from decreased fuel efficiency and provide a range of emissions based on the number of boats affected. Once these averages and ranges are disclosed, the RSED can compare the impacts to a threshold of significance, determine the potential significance of the impacts, and adopt any feasible mitigation measures.

D. Hazards and Hazardous Materials

There are at least two issues with the RSED’s analysis of hazards and hazardous materials. First, as noted above, the use of alternative biocide AFPs is a reasonably foreseeable consequence of the Project. The RSED should evaluate the potential hazards and hazardous waste impacts from the use of these AFPs against a threshold of significance and determine whether such impacts are potentially significant.

The RSED also discloses that hull cleaning through the container/filter method will result in the increase in hazardous wastes “that will be deposited in appropriate landfills.” However, the RSED does not disclose whether there are any such landfills in the vicinity of the Project, or whether those facilities have the capacity to accept such materials. The RSED should be revised to include this information.

E. Hydrology and Water Quality

With regards to Water Quality, the RSED states, in full “None of the reasonably foreseeable methods of compliance are expected to violate water quality standards or waste discharge requirements (WDRs). In addition, the methods of compliance are intended and expected to reduce Cu discharges and improve water quality.” There is no disclosure of any potential impacts here, and no analysis of those impacts. The RSED should be revised to include analysis of the potential impacts from the use of alternative biocide and non-biocide AFPs and determine whether such impacts are significant against a threshold of significance.

Recent evaluations of alternative non-Cu AFPs convinced the Washington Department of Ecology to recommend that the State Legislature delay any ban of Cu AFPs because the currently available alternatives may cause greater environmental harm.³ It is concerning that the State of Washington acknowledged the potential adverse impacts to the environment, but the Regional Board’s RSED does not.

F. Cumulative Impact Analysis

The RSED’s cumulative analysis is almost non-existent. The RSED simply declares, without analysis, that the Project’s impacts are of “limited duration and spatial extent, and would not contribute to the effects of other projects, past, current or future.” First, the statement is obviously incorrect as the Implementation Schedule is 12 years, and then presumably implementation will continue indefinitely. Second, as noted above, the RSED’s impacts analysis in several resource categories is lacking, so this statement is not supported by substantial evidence. Third, there is no effort made by the RSED to disclose the cumulative condition either on a “plan” level or on a “project” level. The RSED must disclose the cumulative condition before any analysis of how the Project’s impacts may contribute to that cumulative condition. The RSED should be revised to include the cumulative condition either on a project basis or on a plan level basis. Finally, the RSED’s cumulative impacts analysis ignores current and ongoing efforts to implement copper TMDLs in other Basin Plans. What are the cumulative impacts of these several efforts, especially with regards to the uses of non-Cu AFPs? Is there, or would there be an increase in the use of alternative biocide AFPs and what are the cumulative impacts of such use? If non-toxic AFPs are used, what is the increase in the occurrence of invasive organisms transported by boats using such paints? Does the fact that boats may commonly travel between harbors where copper AFPs are no longer in use increase this risk? In other words, would the fact that boats using non-toxic AFPs and would travel between relatively close geographic locations such as Newport Bay and San Diego likely increase the potential for the

³ Washington State Department of Ecology, Report to the Legislature on Non-copper Antifouling Paints for Recreational Vessels in Washington. Publication 17-04-039 (Dec. 2017), enclosed herewith and available at:
<<https://fortress.wa.gov/ecy/publications/SummaryPages/1704039.html>>.

transport of invasive organisms? These and other questions regarding the cumulative impacts of the Project must be answered in a revised RSED.

G. Alternatives Analysis

The RSED's alternatives analysis has not changed substantially from the SED and the problems with that analysis remain. The RSED is invalid for failing to analyze a reasonable range of alternatives, as it is required to do under CEQA's provisions for Regulatory Programs. Apart from the No Project alternative, the RSED analyzes only one "action" alternative – a purported "Adopt modified Cu TMDLs and Zn, Hg, As and Cr Action Plans" alternative. The RSED's discussion of this alternative is completely without value, however, as it does not actually describe an alternative to the proposed project. Rather, the discussion of that alternative simply states that "[s]ince the recommended action would not have a significant adverse effect on the environment, the consideration of an additional alternative(s) that would reduce significant/potentially significant environmental impacts is not required."

Since the RSED does not actually describe any "action" alternative to the proposed Project, it also fails to disclose the potential environmental impacts and benefits of such an alternative. The failure of the RSED to identify or analyze any actual "action" alternative to the proposed Project fatally undercuts the requirement that the document adequately inform decision makers and the public of a reasonable range of alternatives to the Project.

In particular, the RSED should describe and analyze an alternative under which reduction in copper loading would be achieved on a statewide basis, by the state of California, pursuant to the exclusive authority of the California Department of Pesticide Regulation (DPR) to regulate pesticides, including Cu AFPs. The RSED additionally should describe and analyze an alternative under which implementation methods would be targeted at the limited areas of Newport Bay that even arguably exceed California Toxics Rule requirements for copper, rather than regulating the entire Bay. Such focused implementation must be discussed as an alternative, as it is likely to result in fewer environmental impacts than the project as proposed. Similarly, an extended implementation period should also be considered as an alternative.

VIII. Summary of CEQA Violations

While CEQA does not require perfection, it does require a good faith effort at full disclosure of environmental impacts of the Project. The current RSED falls far short. The Regional Board cannot escape its duties to provide, at the least, averages and numerical ranges of potential impacts, nor to determine the significance of those impacts based on disclosed thresholds of significance by simply claiming that such an analysis would be speculative. The City looks forward to reviewing a further revised RSED that fully analyzes the potential impact of this Project.

Linda Candelaria, PhD
Santa Ana Regional Water Quality Control Board
August 24, 2018
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IX. Conclusion

Because of the numerous legal defects in the most recent Copper TMDL and Implementation plan, it cannot be adopted in its current form.

Sincerely,



Gregory J. Newmark
Attorney at Law

cc: Dave Kiff
Aaron C. Harp, Esq.
Michael Torres, Esq.

Encl.

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