



Sent via electronic mail

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Attn: Danielle Mullen

August 25, 2017

Re: Public Notice (PN) SPN-2012-00302S, Availability of Prospectus, Santa Clara Valley Habitat Plan ILF Program

Dear Commander Rayfield,

This responds to the Public Notice (PN) regarding the availability of a prospectus for the Santa Clara Valley Habitat Plan (Habitat Plan) In-Lieu Fee Program (ILF Program) (SPN-2012-00302S). This ILF Program would provide the opportunity to purchase compensatory mitigation credit to offset unavoidable impacts to waters of the U.S. and would be used in conjunction with the Regional General Permit (RGP) for the Habitat Plan.

The Citizens Committee to Complete the Refuge (CCCR) and San Francisco Baykeeper appreciate the opportunity to provide comments and the short time extension that has been provided for submittal of comments.

We understand the Corps has imposed timelines for PN releases. Never-the-less we are extremely frustrated with the sequence of review. The PN outlines the process for review of this ILF Program proposal as:

- 1) public review and comment on the Prospectus, 2) IRT (Interagency Review Team) coordination on the Prospectus and the In-Lieu Fee Program Enabling Instrument (PEI), 3) development of a mitigation credit production approach and credit release schedule, 4) long-term site protection and management measures, and 5) financial assurances estimation approach.

33 C.F.R. 325.3 (a)(5) states a PN should include:

A brief description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments, including a description of the type of structures, if any, to be erected on fills or pile or float-supported platforms, and a description of the type, composition, and quantity of materials to be discharged or disposed of in the ocean; [emphasis added]

Based upon the process outlined above and the information provided within the PN and the Prospectus, we assert that we have not been provided "sufficient information concerning the nature of the activity to generate meaningful comments." We elaborate why premature circulation of this public notice is of concern in our comments below.

The Corps has already approved Regional General Permit 18 (RGP 18) for the Habitat Plan. RGP 18 provides a list of 17 categories of activities that could be authorized under the RGP, within the footprint of the Habitat Plan, so long as

the terms and conditions are met. Each of those categories includes program limits and individual project limits. Regional General Permits are a form of General Permit. 33 CFR 323. 2(h) defines General Permits thusly:

The term *general permit* means a Department of the Army authorization that is issued on a nationwide or regional basis for a category or categories of activities when:

- (1) Those activities are substantially similar in nature and cause *only minimal individual and cumulative environmental impacts*; or
- (2) The general permit would result in avoiding unnecessary duplication of regulatory control exercised by another Federal, State, or local agency provided it has been determined that the environmental consequences of the action are *individually and cumulatively minimal*. (See 33 CFR 325.2(e) and 33 CFR part 330.) [emphasis added]

33 CFR 325.3(C)(2) defines Regional Permits further:

Regional permits. Regional permits are a type of general permit as defined in 33 CFR 322.2(f) and 33 CFR 323.2(n). They may be issued by a division or district engineer after compliance with the other procedures of this regulation. After a regional permit has been issued, individual activities falling within those categories that are authorized by such regional permits do not have to be further authorized by the procedures of this regulation. The issuing authority will determine and add appropriate conditions to protect the public interest. When the issuing authority determines on a case-by-case basis that the concerns for the aquatic environment so indicate, he may exercise discretionary authority to override the regional permit and require an individual application and review.

The assumption inherent in the issuance of a RGP is that the impacts are *individually and cumulatively minimal* in their impacts on the environment. While the public has an opportunity to provide comments on proposed RGPs, there is no public comment process for individual projects that meet the terms and conditions of an approved RGP. The Habitat Plan RGP Notification and Program Management Process, dated January 2016, states “The overall program is intended to streamline the submittal and review process, shortening the timeline for permit review over the current nationwide permitting process”. We assume any additional streamlining over the current nationwide permitting process stems from the fact that impacts to covered species have already been resolved through coordination with the U.S. Fish and Wildlife Service.

The identification of activities covered under RGP 18, as well as the terms and conditions that must be met to qualify for authorization under RGP 18, have already been approved by the Corps. The question remaining for the public and decision-makers is whether the use of the proposed Prospectus for an ILF Program will provide adequate compensatory mitigation for unavoidable impacts to waters of the U.S. and though not discussed within the context of the federal process, for unavoidable impacts to waters of the State.

The crucial question is whether there can be a reasonable certainty that the functions and values of filled wetlands and waters will be adequately replaced through the use of the proposed ILF Program. Based upon our review of the information available, that certainty does not exist.

Impacts that could be authorized and mitigated through use of the Habitat Plan ILF must be further clarified:

RGP 18 provides a list of 17 categories of activities (impacts to waters of the U.S.) that may be authorized under the RGP, provided the terms and conditions of the RGP are met.

However, the PN states in the introduction, “If authorized, this ILF Program would receive monies from permittees receiving Corps authorization under Section 404 of the Clean Water Act....when appropriate, to provide

compensatory mitigation credit as part of Section 404 *or enforcement actions* within the proposed service area.” Further, the PN states under the heading “Mitigation Approval and Permitting Processes”:

Under the proposed ILF Program, for impacts authorized under the Regional General Permit, *or possible other project-specific Corps-authorized impacts within the Service Area*, a project proponent would pay the Habitat Agency its wetland impact fee and the Habitat Agency would ensure that the wetland fees are used to fulfill the mitigation obligations of the permit, including restoring, establishing, enhancing, and preserving aquatic resources. (emphasis added)

Additionally, the PN introduction states, “...the proposed In-Lieu Fee Program may be utilized to offset unavoidable impacts to waters of the State that are regulated by the Regional Water Quality Control Board under Section 401 of the Clean Water Act or Section 13260 of the Porter-Cologne Act.”

Based upon the information provided in the PN and Prospectus, the suite of Section 404 authorizations that may utilize the Habitat Plan ILF Program extends beyond the activities authorized under Regional Permit 18 to “other project-specific Corps-authorized impacts and enforcement actions.

- What are the criteria for these “other types of authorizations”? Does the phrase “other types of authorization” refer to the nationwide permits (another form of general permit with no requirement for public notice for individual projects) or could this encompass projects that require individual permits as well?
- If the ILF Program is used for enforcement actions does this mean fills that were placed without first obtaining Section 404 authorization would be permitted to remain in place through after-the-fact approvals or would the use of the ILF Program be used to mitigate temporal losses of wetlands and waters?
- RGP 18 includes program limits of impacts to waters of the U.S. that could be mitigated through the use of In-Lieu Fees. What limits would be imposed the use of the ILF Program for “other types of authorizations” or enforcement actions?
- Will the public have the opportunity to comment on whether such compensatory mitigation is appropriate for the “other authorized actions” or enforcement actions?
- The PN mentions the possibility of utilizing the ILF Program to also offset unavoidable impacts to waters of the State, regulated by the Regional Water Quality Control Board under Section 401 of the Clean Water Act and/or Section 13260 of the Porter-Cologne Act. Will there be a separate comment period through the Regional Water Quality Control Board for this proposal?
- It would be more appropriate to release a PN for the proposed Prospectus after a decision has been made by the Regional Water Quality Control Board. At this point in time the public has no idea of what types of impacts or the magnitude of impacts to waters of the State that might be eligible for offset through the payment of In-Lieu Fees, or whether impacts to waters of the State would be in addition to the limits imposed by RGP 18. This is concerning because there is no way to assess the overall ramifications of the proposed program of accepting payment of fees as compensation for impacts to waters of the U.S. and waters of the State.

Identification of functions and values of wetlands and waters impacts and will the ILF Program result in replacement of those lost functions and values for local communities?:

The focus of the SCVHP is on the preservation, creation, restoration, and enhancement of habitats that support covered species. While the plan purports to be a watershed and ecosystem plan, and does mention the chemical and physical functions and values of waters of the U.S., the overall focus is on the need to mitigate for impacts to covered federally listed and special status species.

An overarching observation based upon the information provided, is that it is unclear how functions and values of waters of the U.S. will be compensated through use of the proposed ILF Program. We have read through the public notice, the draft Prospectus for the ILF Program, RGP 18, and the Habitat Plan. There is language that states during

planning and execution of compensatory mitigation projects at the regional and watershed level, consideration of “maximizing ecological benefits,” “physical processes”, etc. will occur. There is discussion of mitigation to preserve, create, restore and enhance habitat values for covered species, but there is little discussion of how lost functions and values such as flood desynchronization/detention, water quality improvement, water storage, aesthetics and recreation, etc. would be replaced at the local level or the consequences of relocating them elsewhere within the watershed.

As best as we can determine, the notification requirements of RGP 18 do not require that an applicant identify functions and values of the wetlands or waters that would be impacted by a proposed project. This raises concerns about the degree to which functions and values would first be identified and subsequently whether an assessment will be made of whether compensation through the use of In-Lieu Fees would be appropriate.

RGP 18 has been described by the Corps as an “expedited permit process.” We could not find any indication of the number of RGP 18 notifications that are anticipated, only the following language in the Habitat Plan RGP Notification and Program Management Process, “...if there are many applications per month (e.g. over 15), the Corps may request that the applications be bundled...” As a streamline process, how much time are Corps staff expected to invest in meaningful review of RGP 18 submittals? If an activity fits into a given activity “box” – is it assumed the proposed activity has only minimal effects on the aquatic environment? The reason for asking these questions is to assess how likely it is that specific functions and values of an impacted wetland or water will be identified, and how reasonable is it to assume that it is appropriate to replace lost functions and values elsewhere within the watershed (through purchase of the proposed ILF Program) or to assume that it will not be to the detriment of the local community?

Ruhl and Salzman (2006)¹ issue the following caution with respect to the impacts of mitigation banking on society:

On-site wetland mitigation is in principal neutral with respect to ecosystem services in the sense that it keeps wetland resources in generally the same location. In contrast, wetland mitigation banking facilities move wetland resources from one location, the development project, to a potentially distant location, the bank site. Even with the generous assumption that this movement provides a net ecological advantage, it cannot be the case that the same human population benefits from the ecosystem services once associated with the damaged wetlands. If the wetlands move, their ecosystem services go with them. Some people will inevitably lose and others will gain the economic benefit of wetland ecosystem services...

They also observe there are inherent structural biases in wetland mitigation banking:

Wetland mitigation banking employs some safeguards designed to sustain the delivery of ecosystem services to a particular human population. Banking policy generally requires that the “swap” be for wetlands of similar kind and within a “service area” usually defined by watershed boundaries. Some ecosystem services thus may be provided on the same basis to the human population within the service area regardless of where a development project depletes the wetlands and a bank enhances them.

But the benefits of some wetland ecosystem services are primarily local. For example, research from Florida shows that wetlands help regulate local moisture and temperature.¹⁴ Even small wetlands in urban areas provide important pollution control services to the local population,¹⁵ and clusters of small isolated wetlands provide important functions as an ecological complex.¹⁶ Hence, moving wetland resources, even within a bank’s defined service area, is likely to alter the allocation of benefits.

¹ Ruhl, J.B. and Salzman, James. 2006. p. 8 ¹ Ruhl, J.B. and Salzman, James. 2006. *The Effects of Wetland Mitigation Banking on People*. The National Wetlands Newsletter, Volume 28, Number 2, Environmental Law Institute, Publisher.

Indeed, there is good reason to believe that wetland mitigation banking will systematically move wetland resources from urban areas to rural areas within a bank's service area. Entrepreneurial bankers are interested in profit, and thus are likely to seek the least costly land that will produce credits. Land developers are likely to seek the least costly land in the development market. It is highly unlikely, however, that bankers and developers will compete for land. Bankers need large tracts capable of sustaining wetlands, which, if they exist in a development market area, are likely to be too pricy for the banker. The whole point of wetland mitigation banking—what makes its economic incentives work—is that developers get to wipe out wetland patches in the higher-priced land markets and bankers get to establish wetland banks in the less-pricy land markets. It is not surprising, then, that development projects using wetland mitigation banking often are located in urban areas and the banks they use often are located in rural areas.¹⁷ Banking also is likely to redistribute local wetland services asymmetrically between those two areas. [emphasis added]

And Kusler² astutely observed:

Whether value as well as function is considered makes a significant difference in what gets protected and how. For example, if a regulatory agency only considers natural process, a proposed project may be approved if the project proponent agrees to provide compensatory mitigation to "replace" the lost functions anywhere in a state, region, or watershed. But if socio-economic "values" are to be reflected, then who benefits and who pays becomes relevant and lost functions may need to be compensated near or at the site of the original destruction. [emphasis added]

We recognize there is a fundamental difference between the mitigation banking circumstances described above. The goal of the proposed ILF Program is to work in concert with the Habitat Plan to ensure sufficient habitat areas are preserved, created, restored, and enhanced within the footprint of the Habitat Plan for covered species. The goal of the Habitat Plan is to maintain the ecosystem benefits provided by the identified habitats and to avoid extirpation of listed species. This is a loft goal, however when considering the range of functions and values provided by waters of the U.S., as indicated above, some lost functions that provide societal benefits, may need to be compensated near or at the site of the original destruction. The ILF Program could systematically relocate wetland and water resources from urban areas to more rural areas due to land availability and the higher costs of land in more urban areas. In addition, highly urbanized areas might not be suitable for species conservation and would be contrary to the goals of the Habitat Plan.

Three special conditions have been incorporated into RGP 18 that address in part retention of on-site water quality improvement and flood protection functions and values of impacted wetlands and waters, but the language is weakened by the incorporation of phrases such as "*to the maximum extent practicable*" and "*Corps may require.*"

- Special Condition 4 of RGP 18 does require that Section 401 Water Quality Certification is required for activities authorized by the RGP, and that the "Corps may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal impacts, individually or cumulatively.
- Special Condition 7 of RGP 18 requires that fills within 100-year floodplains must comply with applicable FEMA-approved state of local floodplain management requirements.
- Special Condition 14 of RGP 18 requires that "*...to the maximum extent practicable, the pre-construction course, condition, capacity, and location of open water must be maintained. The activity must be constructed to withstand expected high flows,*" and "*...the activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows.*"

^{2 2} Kusler, Jon A. "Common Questions: Definition of the Terms Wetland "Function and "Value." 2006. www.aswm.org/pdf_lib/16_functions_6_26_06.pdf Accessed 8-21-17

Finally, prior to any decision to implement the proposed ILF Program, the Corps must also address how the Corps will track cumulative impacts to ensure that relocation of functions and values through the ILF Program does not result in degradation of functions and values at the sub-watershed level (i.e. HUC-12). This has been a long-standing, substantive concern with the use of the nationwide permit, one that has never adequately been addressed by the Corps.

RGP 18 covered activities that could result in impacts to locally important functions and values that might not be adequately compensated through the use of in-lieu fees include: RGP 4 – Culvert installation, RGP 5 – outfall installation, RGP 6 - water intake installation, RGP 8 – removal of vegetation – vegetation management activities, RGP 10 – recreational facility construction, RGP 16 – utility installation, RGP 17 – discharges associated with development.

Mitigation site selection:

The public notice states that the “ILF sponsor would use the RGP or submit an application for Corps permit(s) should the proposed mitigation activities involve a discharge of dredged or fill material within waters of the U.S. or work or structures within navigable waters of the U.S.”

- The Corps should provide a map or list of navigable waters within the Service Area of the SCVHP.
- The statement above seems to indicate that ILF Program mitigation sites involving a discharge of dredged or fill material into waters of the U.S. could be approved without any opportunity for public review or comment. The Prospectus references the Calero County Park Pond and Wetland Restoration project and an upcoming stream restoration project for 2017 construction. The Prospectus also states, “The Habitat Agency intends to develop large mitigation projects as early as possible; one project will be completed in 2017, and two projects are being planned in 2017 for 2018 implementation.”
 - Is the 2017 project, the Calero County Park project?
 - How does the public obtain information regarding planned and constructed mitigation projects?
 - Were/are there impacts to waters of the U.S. for either of these projects? If yes, how were the Section 404 Clean Water Act impacts authorized? We hope that in general, construction of mitigation sites for the ILF Program will include opportunities for public review and comments. The Prospectus seems to indicate this will not be the case:

An extensive public and private stakeholder involvement process is not anticipated for the ILF Program. There will be an opportunity for public involvement during the noticing of the ILF Program and the possibly for public involvement during the IRT review of subsequent mitigation proposals. Extensive stakeholder involvement is not proposed as the Habitat Plan was crafted with a large stakeholder group of 25 members representing a wide variety of interests, including conservation organizations, business and development interests, landowners, agricultural interests, open space land-management organizations, and the general public. There were also multiple public comment opportunities during the environmental review process of the RGP and Habitat Plan development.

We urge the Corps to provide the public opportunities to review and comment on proposed mitigation projects. Involvement during the development RGP and Habitat Plan development does not equate to evaluating the suitability of proposed mitigation sites and design for replacing lost functions and values of wetlands and waters.

Credit Amounts:

The Prospectus proposes advance mitigation credits. One of the credits proposed is for riparian wetlands habitat in the amount of 2 acres. Riparian wetlands can take much longer to mature than freshwater emergent marsh or seasonal wetlands.

- What is the status of the riparian wetlands mitigation? Is this preserved or restored/enhanced habitat? If restored or enhanced, what is the status of the 2 acres of riparian mitigation?

Credit Releases:

We have concerns regarding the manner in which created credits will be released. According to the proposed schedule credits would be released in the following manner:

- Demonstrate conservation easement recorded – 20%
- Deliver as-built construction drawings – 40%
- Achieve hydrologic standards – 30%
- Achieve vegetation standards – 10%

As we read this, it seems 60% of the available credits for a mitigation project would be released as soon as physical manipulation of the site has occurred? This is unacceptable. Physical manipulation of the ground (e.g. grading, berms, water control structures, etc.) does not ensure mitigation success. We strongly object to the release of so many of the available credits before it has even been demonstrated the target hydrological regime has been achieved. By the time vegetation standards have been achieved only 10% of available credits would remain. If hydrological and vegetative standards are not achieved in a timely fashion (is this based on 3 growing seasons??), this schedule will further exacerbate temporal losses of functions and values of waters of the U.S.

The language of this section is too simplistic and does not take into consideration that different types of wetlands and waters may take longer to reach final success criteria (e.g. riparian wetlands vs. seasonal wetlands). One example of such an approach is that of the King County In-Lieu Fee Program Instrument³. Of note, while an example of a release schedule is provided, the language specifically states “Actual credit release schedules for each project may differ...depending on site conditions and project variable”:

The credit release schedule will be negotiated for each Mitigation Plan, though generally these credit release schedules will conform to discrete project milestones identified in the monitoring plans and ecological performance standards established for each project and approved by the IRT. Table 13 provides an example credit release schedule. Actual credit release schedules for each project may differ from the example below depending on site conditions and project variables.

Table 13. Example Credit Release Schedule

Project Milestone	Portion of Credit Released	Cumulative Portion of Fulfillment
Installation	1/6	1/6
Year 1 performance standards achieved	1/6	1/3
Year 3 performance standards achieved	1/6	1/2
Year 7 performance standards achieved	1/6	2/3
Year 10 performance standards achieved and transition to long-term stewardship (IRT sign-off on achievement of performance standards)	1/3	Credit fulfilled

³ “King County Department of Natural Resources and Parks. October 13, 2011.” Prepared by Michael Murphy and Darren Greve, King County Department of Natural Resources and Parks.

Credit releases for in-lieu fee projects must be approved by the Corps and Ecology. In order for credits to be released, the Sponsor will submit documentation to the Corps and Ecology demonstrating that the appropriate milestones for credit release have been achieved and requesting the release. The Corps and Ecology will provide copies of this documentation to the IRT members for review. IRT members will provide comments on this document. (see 33 CFR 332.8 (o)(9))

The Corps and/or Ecology may determine that a site visit is necessary prior to the release of credits. Such a visit will be compliant with 33 CFR 332.8 (o)(9).

If the in-lieu fee project does not achieve the performance-based milestones, the Corps and Ecology, after consultation with the IRT, may modify the credit release schedule, including reducing the number of credits. (see 33 CFR 332.8(o)(8)(iii)).

If at any step in the credit release schedule, it is determined through monitoring that performance standards are not being met, the IRT and the Sponsor shall identify appropriate adaptive management and contingency measures (Appendix O) and devise a plan for implementation.

The language above includes potential site visits prior to release of credits, and modification of the credit release schedule or number of available credits if performance-based milestones are not met.

Conclusion:

We acknowledge that the Habitat Plan has the potential to preserve, restore, create and enhance habitat for covered federally listed and special status species in Santa Clara Valley, and may result in positive benefits for waters of the U.S. We also recognize that the Mitigation Rule has incorporated timelines for issuance of a public notice after a draft Prospectus has been received however; insufficient information exists to determine that the use of an ILF Program will ensure that that unavoidable impacts authorized under RGP 18 will be adequately mitigated. We urge the Corps to provide future opportunities for the public to provide comments on the proposed ILF Program once additional details are provided, including clarifications requested above. We request that the Corps keep us informed of any such opportunities for public comment, a copy of responses to comments, and any decision made regarding the proposed ILF.

Sincerely,



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