



Sent via email to susan.glendening@waterboards.ca.gov on 12/5/16

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RE: Revised Tentative Order - Waste Discharge Requirements and Water Quality Certification for the Santa Clara Valley Water District and U.S. Army Corps of Engineers to implement, Upper Berryessa Creek Flood Risk Management Project, Santa Clara County

Dear Ms. Glendening,

The Citizens Committee to Complete the Refuge (CCCR), the Santa Clara Valley Audubon Society (SCVAS), and San Francisco Baykeeper (Baykeeper) thanks you for the opportunity to provide comments on the Revised Tentative Order (Revised TO) - Waste Discharge Requirements, and Water Quality Certification for the Upper Berryessa Creek Flood Risk Project (Project) of the Santa Clara Valley Water District (SCVWD) and the U.S. Army Corps of Engineers (Corps).

We must reiterate our concerns that the Project perpetuates a dated approach towards flood control of nearly over two miles of creek, and fails to embrace the growing trend towards urban stream revitalization. Just a little over a mile upstream of the Project, in the vicinity of Berryessa Creek Park, the creek is lined with native and non-native trees, and has been incorporated as a community open space amenity and local residents can regularly be seen walking on the trail adjacent to the creek. Approximately one half mile to the west of the terminus of the Project, a restoration of "creek" habitat exists just south of where E Calaveras Boulevard crosses the railroad tracks. The area is labeled an "Environmentally Sensitive Area" with the request the public "Please help restore this protected ecological habitat by" and the sign states there shall be "no cutting, picking or destroying of plants." It is ironic the Project that is the subject of this Revised TO will, by design, result in limited development of woody vegetation along the two mile stretch of the Project and could require recurring removal of sediment and vegetation within, and immediately adjacent to the channel to maintain design criteria.

We note that the Revised TO states that Project construction "began in early October 2016 and is scheduled to be completed in early December 2017." We assume the work that has begun is all occurring outside the creek and no work will be conducted in the creek during the rainy season. In general, the California Department of Fish and Wildlife (CDFW) prohibits construction work in streams from October 31st through the end of May.

We commend the San Francisco Bay Regional Water Quality Control Board (Water Board) on the protections for beneficial uses that it has attempted to put into place in the language of the TO, WDRs and WQC, and we generally support the proposed compensatory mitigation requirements, however it is preferable that any mitigation and monitoring plan is approved by the Board *prior* to the issuance of any approvals and *prior* to the initiation of any construction.

In a letter sent September 19, 2016, we had mentioned four main concerns with the initial TO:

1. Clarification of the Mitigation and Monitoring Plan availability schedule.
2. Contingency fund to provide for Mitigation and Monitoring changes.
3. Statement specific to potential sediment impacts downstream of the Project.
4. Addition of State of California standards for pre-construction nesting surveys.

We find the Revised TO is mostly responsive to the concerns we elaborated for each of the items, and offer the following comments to the Revised TO.

Findings #7 - Coverage of this Order:

The Revised TO added language stating the channel bed and banks armored with rock riprap will be covered with 4 inches of soil that will be hydroseeded. How was a depth of 4 inches determined to be adequate to support target native plants? [Please refer to the comments regarding Findings #20 below.] Will the banks be hydroseeded well before the rainy season to ensure adequate cover and root development to ensure erosion of bank slopes will not occur? If not, how will the soil be stabilized on the banks during the rainy season?

Findings #9 – Reuse or Dispose of Exported Material:

The Revised TO states that the Corps is implementing the soil reuse and disposal tasks relevant to this finding, but is silent regarding how quickly materials to be disposed of will be removed from the site, or how long material will be stockpiled.

Findings #13 – Rain Event Action Plan:

We assume this finding pertains to construction activities located outside of the creek as the CDFW generally prohibits work within creeks during the rainy season. We suggest that during the rainy season, the creek should be protected against any mobilization of soils from any areas of active construction or stockpiled materials on a daily basis at the end of each work day, rather than “within 48 hours prior to any likely precipitation event.”

Findings #14 – Dewatering:

The finding notes that the consultant has submitted a Dewatering Plan to the Water Board on October 21, 2016, but that the plan does not address surface water flows. The language that has been added does not provide a time frame within which the required information must be submitted to the Executive Officer for review and approval. We suggest that the information identified should be provided 30 days prior to dewatering activities involving surface water flows.

Findings #16 – Maintenance:

We support the concern expressed in the finding that the Project will result in a system that is more depositional than the existing conditions for the reasons expressed – the increase in the cross-sectional area of the creek leading to reduced shear stresses during storm flows, the fact that the Project is in an alluvial fan, and the fact that there is ample sediment supply both from upstream and from the tributaries to Berryessa Creek.

One significant and negative impact of conventionally designed and constructed flood control channels is the recurring need for sediment and vegetation removal to maintain the design criteria for flood risk reduction. This recurring disturbance establishes a costly, never-ending cycle of habitat disruption and reduction in the function and values and beneficial uses creeks provide for wildlife, etc.

It is imperative that the development of the O & M Manual is accomplished through “collaboration with the Water Board, and appropriate regional, State and federal agencies,” including CDFW, the U.S. Environmental Protection Agency (EPA) and U.S. Fish and Wildlife Service (USFWS). Specific language should be added to emphasize the need to collaborate with the wildlife resource agencies.

We concur there should be an emphasis placed on minimizing environmental impacts while meeting flood risk objectives and that it is very important that longitudinal and cross-sectional data is required to calibrate the sediment transport model results and that such information can inform what are appropriate triggers for channel “maintenance.”

However, we would also expect the Adaptive Management Plan to address how adverse impacts to the creek environment will be minimized should sediment deposition exceed that predicted by the Corps' sediment transport model.

Findings 20 – Impacts:

As was mentioned previously, we are extremely concerned that the Project is inconsistent with the growing recognition of the many benefits provided by urban stream revitalization. The fact that rock revetment will be covered by only a very thin layer of soil for nearly two miles of creek will severely reduce the ability of this Project reach of the creek to provide beneficial uses. How was a soil depth of only 4 inches determined to be adequate? The Project proponents propose planting native vegetation, yet the Revised TO states, the minimum soil root depth requirements of the native plant species incorporated in the hydroseed mixes proposed for use are 5.1 to 20.5 inches. If this is the case, what is the likelihood that native plants are capable of becoming established rather than invasive non-native species? What are the success criteria, and what contingency measures have been proposed should native species fail to establish?

We also are concerned that as the Revised TO states:

Further, the existing soft-earthen bed and banks being replaced by rock riprap will result in less habitat for the benthic and other lower-trophic organisms living in the creek, including, but not limited to, algae, worms, diatoms, micro- and macroinvertebrates, and fish larvae. The lack of lower trophic organisms will restrict the WARM and WILD beneficial uses, which will, in turn, adversely affect the REC-2 beneficial use.

Not only is the replacement of the soft-earthen bed and banks by rock riprap (with a very thin overlay of soil) have adverse impacts on the WARM, WILD, and REC-2 beneficial uses, but any habitat for benthic and lower-trophic organisms that become established as sediment is deposited, will be likely be removed through recurring maintenance activities. Thus the creek within the reach of the Project will be reset to lowered functions, values, and beneficial uses every time sediment and vegetation removal occurs.

Finding 21 – Mitigation:

The Discharger should be required not only to replace and maintain for five years, any native trees and shrubs that will be removed, the Discharger should be required to maintain the native trees and shrubs until they are capable of thriving with no supplemental maintenance, e.g. watering, etc.

We whole-heartedly support the requirement for additional mitigation to compensate for temporary and permanent losses of functions and values resulting from the Project design. The Mitigation and Monitoring Plan should have been required prior to issuance of the previous TO and prior to initiation of any construction rather than eight months after construction was initiated (i.e. June 30, 2017). The public must have the opportunity to provide comment as the MMP is crucial to any determination that the Project (and mitigation) is consistent with the California Wetlands Conservation Policy of "no net loss."

Based upon the information provided under the findings for "Impacts" and "Maintenance" and the fact that the Discharger has stated compensatory mitigation must occur at an off-site location, the Water Board must require much more than the proposed minimum mitigation-to-effect ratio of 2:1 for permanently-affected waters and to require more than the proposed minimum mitigation-to-effect ratio of 1.5:1 for temporarily-affected waters.

The Revised TO stated that construction began in early October 2016. Has the 12-month clock begun for the requirement that "mitigation activity is completed within 12 months of the date when the associated impact first occurs"? If so, the Revised TO should state that mitigation must be completed by October 2017 or the penalty of an additional 10 percent mitigation per year, on an areal basis, will begin to be assessed.

Finding 25 – California Environmental Quality Act

The finding states the EIR identified the following mitigation measure for nesting birds, "Conducting pre-construction nesting bird surveys and establishing appropriate buffers, reducing impacts to nesting *residential* bird species;"

[emphasis added]. However, the 2013 Berryessa Creek Element Coyote and Berryessa Creek, California Flood Control Project Santa Clara County, California, Final Report, prepared by the U.S. Army Corps of Engineers, Sacramento District, states on page 7-11:

Pre-construction surveys are required for nesting birds. Migratory birds and their habitats are protected under the Migratory Bird Treaty Act, as amended (16 U.S.C.703 et seq.). The study area is of low habitat quality to migratory birds and lacks suitable nesting areas. However, *to ensure that there would be no effect to migratory birds, preconstruction surveys by a Corps biologist would be conducted within the study area and for a radius of at least 0.25 miles around the study area if construction is to begin before August 15th of any year. If any migratory birds are found, a protective buffer would be delineated, and USFWS and CDFW would be consulted for further actions.* In addition, focused bat surveys for *Myotis* or western big-eared bats should be completed prior to construction to see if these species are using the bridges for roosting. [emphasis added]

We urge the Water Board to add this language to the Revised TO.

We reiterate comments that were submitted in response to the DEIR for this Project:

If done during nesting season, then special precautions are necessary. Birds can build a nest, lay eggs, and start raising young within two weeks, and *an entire reproductive cycle may start and end within 30 days.*

...Mr. Johnston [Environmental Scientist, CDFW] also recommends a preliminary survey 30 days ahead of time to give the project proponent an idea of what to expect once they are ready to begin work. It is important too to survey for ground-nesting birds in addition to those that nest in shrubs and trees. Surveys for ground-nesting birds should be performed 24-hours prior to vegetation removal or disturbance. If nests are found, buffers would be set and work within the buffer areas should be postponed until the nestlings have fledged. If raptors or special status species nests are found, CDFW should be called on to set appropriate buffers.

The fact that an entire nesting cycle can be start and end within 30 days highlights the fact that preconstruction surveys for nesting birds must be conducted closer to the initiation of construction. As part of a mitigation measure to protect nesting birds, San Diego Gas & Electric required the following in their East County Substation Project Nesting Bird Management, Monitoring, and Reporting Plan (2013):

5.1.0 Pre-Construction Surveys and Reporting

Pre-construction nesting bird surveys will be conducted by a CDFW-approved Avian Biologist no more than 10 days prior to planned construction in order to locate nests within and adjacent to the proposed work area. Results of nest surveys will be detailed in the Nest Survey Report (Attachment A: Nest Survey Report and Nest Notification Forms) and submitted to the CPUC and BLM no less than 72 hours prior to construction. An additional verification survey will be performed by a CDFW-approved Avian Biologist no more than 3 days prior to construction to assure discovery of any new nesting activity initiated since the original survey. If a nest is detected during the pre-construction nest survey, the Avian Biologist will include the details of each nest along with minimization and avoidance measures, and buffers implemented in the Nest Survey Report. If a nest is detected during a verification survey or during construction monitoring, the details of each nest along with minimization and avoidance measures, and buffers implemented will be included in a Nest Notification Form (Attachment A: Nest Survey Report and Nest Notification Forms). Details of each nest discovered during surveys or during monitoring will be included in the Nest Monitoring Log (NML).

We urge the Water Board to incorporate similar language into the Revised TO to ensure compliance with the Migratory Bird Act.

Finding 26 – Water Quality Control Plans:

The finding discusses naming conventions of the National Wetlands Inventory for mapping wetlands. The discussion mentions that significant portions of Upper Berryessa Creek are riverine wetlands, and lists features such as inset TO/WDR/WQC Upper

floodplain within the current channel. The photos below, looking upstream and downstream from the creek crossing at Los Coches, December 4, 2016, show evidence of cattail growth in the creek, development of inset floodplains, and use of the creek by waterfowl.



Upper Berryessa Creek looking downstream from the creek crossing at Los Coches



Upper Berryessa Creek looking upstream from creek crossing at Los Coches

B. Provisions:

Provision 5:

The Revised TO states, “The Discharger shall maintain trees and shrubs for five years as stated in the Application.”

It appears this provision should be revised to be consistent with the requirement in Attachment B – Vegetation Performance and Success Criteria (c) that requires “The Discharger shall continue to water all plantings during all projected dry water years (defined as 75 percent of average annual rainfall) that occur during the first 10 years after construction.”

Provision 11 – Rain Event Action Plan:

Please refer to the comment above regarding suggested change.

Dewatering Plan:

The language that has been struck included a requirement that “not later than 30 days prior to the commencement of dewatering activities, the Discharger shall submit a Dewatering Plan, acceptable to the Executive Officer.” We recommend that this sentence be reinstated as the Discharger has not addressed how surface water flows will be handled.

Mitigation Requirements – Provision 18 – Mitigation and Monitoring Plan:

c. The Provision should clarify that monitoring of vegetation shall continue until the plantings are thriving, have not received supplemental maintenance (e.g. watering) for at least two years, and the success criteria in the MMP are achieved.

d. We suggest “d” be reworded for purposes of clarification to read – “The Discharger shall ~~maintain~~ ensure invasive plant species in the Project site ~~at a maximum does not exceed~~ cover of ~~no more than~~ 10 percent based on the percent cover of...

Provision 19 – EIR Mitigation Measures:

“Replacing any native trees and shrubs of certain size the Project will remove during construction.” Please clarify what this sentence is intended to mean.

We urge the Water Board to incorporate the suggested protections for nesting birds discussed under Findings 25 above, to bullet # 4 of this provision.

Provision 25 – Mitigation Monitoring Reports:

“The reports shall summarize each year’s monitoring results, including the need for any remedial actions (e.g., re-planting or bank stabilization).” We suggest that supplemental watering also be considered a remedial action. If a planting achieves targets for percent cover, etc. but only with supplemental watering, this should not be considered successfully achievement of mitigation goals.

We suggest the following modification for purposes of clarification – “Success of the mitigation program shall be determined by the Executive Officer after all the ~~minimum~~ interim and final success criteria in the MMP are achieved.”

Provision 28 – Notice of Mitigation Completion:

We urge the Water Board to require a final site inspection prior to the Executive Officer’s acceptance of notice of mitigation completion in writing.

Attachment B – Vegetative Performance and Success Criteria:

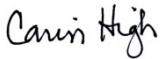
As part of the final success criteria for all plantings, it should be explicitly stated, unless supplemental watering is going to be part of a long-term management plan that all plantings must have gone at least two years with no supplemental watering. Achieving the success criteria is meaningless if the plantings only achieved the targeted percent cover or are determined to be vigorous because they are receiving supplemental watering.

In Table 1, we suggest that language pertaining to invasive plant species criteria be reworded as suggested above.

Conclusions:

With the exceptions that have been noted above, we are in support of the language proposed in the Revised TO. It is unfortunate a more environmentally sustainable approach to managing flood risk in Upper Berryessa Creek has not been proposed. It is crucial the Water Board require more than the proposed minimum mitigation ratios of 2:1 and 1.5:1 for the lost functions, values and beneficial uses that will result from implementation of the Project. We thank you for the opportunity to provide comments and request that we be kept informed of any future opportunities to provide public comments.

Sincerely,



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