



DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, U.S. ARMY CORPS OF ENGINEERS
1455 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94103-1398

March 13, 2016

Executive Office

Mr. Bruce H. Wolfe
Executive Director
San Francisco Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, California 94612-1413

Dear Mr. Wolfe:

The United States Army Corps of Engineers (USACE), San Francisco District appreciates the San Francisco Regional Water Quality Control Board's (RWQCB) efforts and partnership with regard to the regionally significant Berryessa Flood Risk Management Project (Project). Following the RWQCB's issuance of the Project's March 14, 2016 Clean Water Act (CWA) Section 401 Water Quality Certification, the USACE has been diligently working in full reliance on the document to ensure that the Project incorporates all its conditions. USACE has coordinated this letter with the SCVWD.

USACE appreciates the RWQCB's consideration in reaching out to USACE to discuss the May 6, 2016, Administrative Draft Water Discharge Requirements (draft WDR) prior to publishing it for public comment. Under the circumstances, USACE may not be identified as a Discharger. Congress has only provided a limited waiver of sovereign immunity under the CWA. USACE has fully met its statutory obligations under the CWA Section 401, Pub. L. No. 92-500, as amended, 33 U.S.C. § 1341, when the RWQCB issued the Project's 401 Certification. By doing so, the RWQCB has certified that the Project "will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of [the CWA]." 33 U.S.C. § 1341(a)(1). Accordingly, USACE respectfully requests the RWQCB to remove USACE from the WDR.

Additionally, there are several conditions which the RWQCB seeks to impose through the draft WDR that will adversely impact the completion of the Project. By its Order, the RWQCB will inhibit the Project's ability to provide timely flood risk management to the new \$2.3 billion Milpitas BART station and rail line, representing \$900 million in federal funding. Although a detailed, but not exclusive list of the deviations between the March 401 Certification and the draft WDR's is herewith attached, there are five significant conditions which are discussed below:

Maintenance: The draft WDR calls for extensive maintenance measures none of which were required in the 401 Certification. While the Santa Clara Valley Water District (SCVWD), the non-federal sponsor (NFS) and USACE understand that the operations and maintenance of the Project is the responsibility of the NFS, it is not clear who the responsible agency is in the eyes of the RWQCB. By statute Congress has placed the operation and maintenance responsibility with the NFS. Accordingly, it is improper to include USACE as a responsible party to the future Project operations and maintenance.

Mitigation: Significant mitigation measures have been outlined in the draft WDR, none of which were called for in either the NEPA EIS or the CEQA EIR for the Project. These measures may lead to changes that would require supplementing the EIS and EIR, creating additional unnecessary delays. Further the draft WDR requires mitigation for apparent impacts to waters of the State. Federal sovereign immunity has not been waived for those alleged impacts to State waters and no mitigation has been authorized by the federal government.

Work Window: The RWQCB has no basis for arbitrarily imposing such a restrictive work window. Article I, section J, 4 of the 401 Certification restricts work to periods where the creek has minimal flows for the purpose of avoiding impacts to fish and other aquatic life. USACE has committed to limiting construction to days where there is no 0.5 inch or greater precipitation forecasted by the National Weather Service in their 72-hour forecast for the Project area so as to be in compliance with the 401 Certification.

Various required Plans: The draft WDR requires that several Plans (Final 100% Design Plans, Utilities Plan, Dewatering Plan, Groundwater Management Plan, Maintenance Guidelines Plan, Mitigation and Monitoring Plan, and Post-Construction Stormwater Management Plan) be subject to the acceptability of the RWQCB's Executive Officer. To the degree that USACE determines such plans are otherwise required, USACE will provide them to the RWQCB, when they are complete, for informational purposes. It is not appropriate for the RWQCB to insert itself into the federal government's sovereign ability to negotiate and determine contract specifications and modifications.

Monetary Fines: Congress has not waived sovereign immunity with regard to fines under the CWA. See *Energy v. Ohio*, 503 U.S. 607 (1992). The fines provided for under the draft WDR may not be applicable to USACE. USACE lacks authority to pay them and will not pay them.

Finally, USACE has relied upon the 401 Certification in the finalization of our 100% designs. The 401 Certification is in compliance with the intent of the Project as a single purpose flood risk management project for which mitigation is not necessary. The differing requirements in the draft WDR would require redesign of the Project and reauthorization that would delay solicitation and commencement of construction, jeopardizing critical flood risk management necessary for the region. Therefore to the extent that the 401 Certification and the WDR differ, this letter formally notifies the RWQCB that those conflicting or unauthorized requirements in the WDR are not applicable to USACE.

USACE appreciates the RWQCB's efforts in providing the federal government with the necessary 401 Certification. USACE will be fully complying with its provisions. In doing so, the Project will be in full compliance with all applicable environmental laws and regulations. Consistent with the findings in the 2014 EIS, no beneficial uses of the Creek will be jeopardized by this Project.

If you have any questions or require additional information, please contact Ms. Amanda Cruz at (415) 503-6955 or amanda.b.cruz@usace.army.mil.

Sincerely,


 John C. Morrow
Lieutenant Colonel, US Army
District Engineer

**List of Draft Waste Discharge Requirements Deviations
from the 401 Certification for which there is
No Legal Requirement for USACE to Implement**

1. Order A.10 and B.9: USACE will provide the Dewatering Plan to the RWQCB. USACE does not guarantee a 30 day review period and will not be submitting the document for Executive Officer written approval.
2. Order B.2. As explained in the letter, USACE will provide applicable plans and reports for informational purposes. USACE is not required to obtain Executive Officer approval. USACE will not be creating a Utility Plan.
3. Order B.4. The 401 Certification does not require monitoring of receiving waters for turbidity increases.
4. Order B.6. As discussed in the letter, the imposition of restrictive construction work window conflicts with the 401 Certification.
5. Order B.7. The 401 certification does not require a set time for monitoring in the Planting Plan, therefore, USACE has designed the Planting Plan to monitor for 5 years not 10 years.
6. Order B.8. The 401 Certification does not require a Utility Plan and USACE will not be creating one.
7. Order B.11. Discharge and Receiving Waters Objectives were not included in the 401 Certification. USACE will abide by the applicable requirements of the Dewatering Plan as discussed in the 401 Certification.
8. Order B.15, 16, 18. The Project does not have mitigation requirements. No mitigation or monitoring plan will be created and no mitigation reporting will be done. USACE has committed to the requirements of the Planting Plan as outlined in the 401 Certification and takes no issue with Order B. 17. RWQCB may contact USACE to obtain the most up to date Project schedules. USACE will not have a formal Impacts Log.
9. Order B.19-26. USACE will comply with the reporting requirements in the 401 Certification. Anything beyond that is not a requirement for USACE.
10. Order B.31 and B.36 and fine requirements. USACE is not able to comply with these requirements unless provided with a Congressional waiver of sovereign immunity. There is no waiver for fees and fines under State law.

List of Orders that are the Non-Federal Sponsor's Responsibility

1. Order B.12. The Post-Construction Stormwater Management Plan is not the responsibility of USACE and will not be completed prior to construction. Specifically, any operations and maintenance information will not yet be completed to provide support for the plan. To the degree that this is applicable, it may be a SCVWD's responsibility.
2. Order B.13 and 14. USACE and the NFS, SCVWD develop the operations and maintenance plan upon completion of construction. Maintenance is the responsibility of SCVWD. Therefore, Order B.13 and 14 are not applicable to USACE. As for timing, if the SCVWD agrees to do so, the Maintenance Guidelines Plan would be developed by them after construction is completed.
3. Order B.29. USACE's contractor will make whatever notifications are required by Federal, State, and municipal laws, codes, and regulations applicable to the Project as required by FAR 52.236-7 Permits and Responsibilities clause.

Orders USACE has already abided by

1. Order B.10. The Groundwater Management Plan was submitted to the RWQCB in January of 2016.