



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

September 19, 2016

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, San Francisco District (Corps) appreciates the opportunity to officially comment on the final Tentative Order for waste discharge requirements (WDR) for the Berryessa Flood Risk Management Project (Project). As you know, the San Francisco Regional Water Quality Control Board (RWQCB) already issued a Clean Water Act (CWA) section 401 Water Quality Certification, Pub. L. No. 92-500, as amended, 33 U.S.C. § 1341, on March 14, 2016, (401 Certification) for this Project. And, in reliance on the conditions contained therein, the Corps has awarded a construction contract to complete this necessary flood risk management project. Therefore, the Corps strongly takes issue with the untimely WDR conditions and any indication from the RWQCB that Congress has waived sovereign immunity with regard to the Porter-Cologne Water Quality Control Act, thereby allowing the RWQCB to name the Corps as a Discharger in this WDR.

On the one hand, the Corps is disappointed and frustrated with the WDR, especially considering the fact that our two agencies have been closely coordinating on this Project since 2012. On the other hand, we have experienced a successful partnership that culminated in the RWQCB's issuance of the Project's 401 Certification. In issuing it, the RWQCB certified that the Project would not violate State water quality standards and would "comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of [the CWA]." 33 U.S.C. § 1341(a)(1). Thus, the Corps and the RWQCB fulfilled its permissible mandate under the CWA.

What is most disappointing is the fact that the Corps and the RWQCB staff have thoroughly discussed, many times, all of the issues now presented in this correspondence. During our 401 Certification discussions, the Corps repeatedly informed the RWQCB staff that the practical effect of the provisions found in the WDR would be to 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. First, the acquisition requirements of the unwarranted mitigation requirements could adversely impact the benefit cost ratio of the Project thereby leading to its cancellation. Secondly, the mandate to review the plans and specifications for a Project that is already in construction could result in either a stop work order or termination of the Project depending on the significance of the changes to the plans and specifications deemed necessary by the RWQCB. Presumptively, if the RWQCB wants to review the plans

and specifications, then it is implicit in that request the potential to demand contract modifications. The RWQCB led the Corps to believe these issues had been resolved with the issuance of the 401 Certification lacking these types of provisions and only mentioning a WDR issuance to the Santa Clara Valley Water District (SCVWD), the non-federal entity charged with operations and maintenance of the completed Project. When the RWQCB released its Administrative Draft WDR on May 6, 2016, the Corps dutifully repeated these same arguments in our May 13, 2016, response and it appears we must now do so again.

As explained in the Corps' response of May 13, 2016, Congress has only provided a limited waiver of sovereign immunity under the CWA. It is well recognized law that federal projects are "subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous." *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976). While CWA section 401 provides a limited waiver, it in no way gives the RWQCB *carte blanche* to use separate state authority to regulate the very same aspects of the Project already resolved under that Certification. Further, there are several instances where the WDR conflicts with the provisions of the 401 (see Attachment). The RWQCB lacks the authority to modify the 401 Certification or continue to influence the Project through the WDR. The Corps has in good faith fully met its statutory obligations under the CWA section 401, and has full legal authority to complete construction of the Project in compliance with the 401 Certification. The RWQCB's permissible regulatory jurisdiction over the Project is legally limited by Congress to the 401 Certification and does not include the ability to add additional substantive conditions at a later date based on state authority in a WDR.

The RWQCB fails to explain its insistence on utilizing public resources to double-regulate this Project, which seeks to provide substantial benefits to the community. The RWQCB is well aware that the Corps conducted a comprehensive environmental impact statement (EIS) with full public and agency review in 2014. If the RWQCB had concerns over the selected Project, then that was the time to have articulated them; however, the RWQCB provided no comment. That analysis determined that the Project would only provide positive benefits to the Project area by: (1) reducing flood risk and the potential for contamination impacts associated with said flooding, (2) providing bank stabilization to prevent sedimentation and improve water quality, and (3) removing invasive vegetation and replacing it with native species.

Despite its position that it cannot be named as a Discharger on the WDR, the Corps thoroughly reviewed the WDR in the spirit of comity and mutual understanding. In doing so, the Corps discovered numerous errors and inaccuracies in the WDR which have been grouped in the following categories and are detailed in the Attachment: (1) the requirement for mitigation provisions which lack scientific basis, (2) the failure to adhere to the legal boundaries of the limited waiver of sovereign immunity under CWA section 401, (3) the arbitrary and infeasible requirements for various required plans, and (4) technical errors. In addition, since it is clear that the WDR does not reflect full consideration or incorporation of all of the Corps' previous detailed comments, the Corps also incorporates by reference all its previous comments in its May 13, 2016, letter.

Finally, as noted above, the Corps has relied upon the 401 Certification in the finalization of plans and specifications for our Project. The Corps awarded the construction contract on August 5, 2016, and the contractor will break ground on October 3, 2016. 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. Therefore, to the extent that the 401 Certification and the WDR differ, this letter again formally notifies the RWQCB that those conflicting or unauthorized requirements in the WDR are not applicable to the Corps.

The Corps appreciates the RWQCB's efforts in providing the federal government with a timely 401 Certification. The Corps will continue to fully comply 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 Berryessa Creek will be impacted by this Project. In the future, the Corps hopes both our agencies will strive to achieve the type of early coordination typical of our relationship that will hopefully avoid this situation.

If you have any questions or require additional information, please contact Benjamin Smalley at 415-503-6864 or [Benjamin.smalley@usace.army.mil](mailto:Benjamin.smalley@usace.army.mil).

Sincerely,

  
*for*

John C. Morrow  
Lieutenant Colonel, US Army  
District Engineer

Enclosure

**Attachment**  
The Corps' Review Comments of WDR Provisions

The Corps review of the Waste Discharge Requirements set forth by the Regional Water Quality Control Board (RWQCB) identified multiple inaccuracies and inconsistencies that the Corps would like to identify to the RWQCB. The Corps grouped the identified findings into four broad categories; each category provides the thematic rationale behind the Corps' disagreement with the associated portion of the WDR enumerated below.

- (1) The WDR's requirements for mitigation are arbitrary and capricious and not based on science. (Sections 19, 20, 21, 27, 29)

The WDR calls for extensive maintenance measures none of which were required in the 401 Certification. These extensive maintenance measures are based on unsubstantiated claims that the Project site provides potential habitat for listed species and that the Project will inhibit the beneficial uses that Berryessa Creek (Creek) currently provides. In fact, these claims are not only baseless but contradicted by all existing studies of the site. As the Corps has repeatedly pointed out during our years of coordination, the Project area contains no jurisdictional wetlands and only low-quality habitat. The Project portion of the Creek itself is a manmade creation constructed with an entirely artificial channel shape and flowing two miles farther north than its historic alignment.

Even the U.S. Fish and Wildlife Service's (USFWS) April 26, 2013, Draft Coordination Report conceded that "[t]he highly impacted nature of the creek provides little habitat or diversity for fish and wildlife species in its current state".

As outlined in the EIS, Environmental constraints which would inhibit the development of environmental benefits to the creek include:

1. Adjacent urban development and potential soil contamination
2. Poor water quality
3. Limited flows in long reaches of the channel
4. Lack of riparian zone
5. Limited establishment of aquatic vegetation/habitat due to lack of water availability and sediment movement in the system
6. Almost complete disconnection from the floodplain
7. Uniform aquatic habitat in trapezoidal or rectangular channels
8. Fish passage barriers
9. Poor aesthetic and recreational conditions for human use

Specifically, the Creek upstream of Calaveras Boulevard is an intermittent stream with occasional flows in the winter which are generally turbid due to sediment loading from the surrounding foothills and from bank erosion along the creek. Middle reaches of the creek are dry throughout most of the year. When summer flows are present they are caused by runoff from the watering of lawns, industrial discharges, and limited groundwater discharge. Such low summer

flows lead to stagnant water conditions, low dissolved oxygen content, and higher water temperatures, all of which contribute to the lack of aquatic species.

The project area vegetation consists of patchy annual grasses separated by bare dirt. The Santa Clara Valley Water District (SCVWD) conducts various required maintenance practices including spraying of herbicides and mowing of vegetation in order to maintain channel flow conveyance capacity, minimize erosion and for fire safety, further limiting the habitat quality and quantity.

The only portion of the Creek with perennial flow and potentially suitable habitat for small, warmwater fish species is upstream at the confluence with Piedmont Creek. However, this reach has seasonally high water temperatures and low dissolved oxygen that would be lethal to anadromous fish and most other fish species during the summer months. The only fish species likely to be found in the Project area are the mosquitofish and California roach and only in the reach between Calaveras Boulevard and Piedmont Creek where there are constant flows due to the presence of a permitted water discharge source by a water bottling company. Neither the mosquitofish or California roach is State or federally listed, or has any special status.

Endangered species are not known to be present in the Creek. USFWS identified the steelhead as the only endangered species with any capability to use the Creek as habitat; yet, in reality, reaches with a normally dry creek bed, low flows, sheet flows over concrete channels, poor spawning substrate, and physical barriers to passage preclude steelhead migration into the Creek. Further, continuous flows of suitable depth (at least seven inches) for adult steelhead passage occurred for only an estimated two to five days during the two-year flow monitoring study, making steelhead use of the creek virtually impossible.

The contention that construction of this Project will significantly restrict the beneficial uses of the Creek is completely unfounded. The USFWS stated that "since the stream hydrology would not be permanently affected, the cattails would likely reestablish naturally within a year to 3 years after construction." In addition, since the riprap will be buried and hydroseeded, the Project will improve the aquatic habitat compared to its current state. The WDR even specifically recognizes this effect in section 29 of the WDR findings but fails to give the Project credit for this mitigation.

The EIS determined that there would be no adverse impacts associated with construction of the Project and therefore no mitigation is necessary. As such, the requirement for 20.2 acres of wetland restoration imposed by the WDR is unsupported by the facts. There is no net loss of Waters of the U.S. or the State and no permanent impacts to the aquatic habitat. The RWQCB fails to reconcile the fact that the Project improves the existing environment with the contention that it also causes permanent adverse impacts to the same Project area requiring extensive mitigation. In addition, there is no legal requirement for the Corps to account and mitigate for non-jurisdictional waters of the State. Even assuming such a requirement existed, 20.2 acres of mitigation land within the Berryessa watershed does not exist, making the mitigation requirement infeasible.

The Corps requests the following changes:

- Removal of requirements for mitigation beyond what is found in the 401 Certification.
- Acknowledge in section 20 of the WDR findings that the various BMPs and the terms of the 401 Certification fully control and mitigate for any improbable water quality impacts.
- Remove all references to jurisdictional wetlands since the WDR recognizes that none exist in this Project area.

(2) The WDR fails to recognize the legal boundaries of the limited waiver of sovereign immunity under CWA Section 401, and at times is in direct conflict with the 401 Certification. (Section 4, 10, 11, 16, 17, 23, 24, 25, 30)

It is axiomatic that state regulation of federal activity is only found where and to the extent a clear and unambiguous congressional mandate is found. *Hancock v. Train*, 426 U.S. 167, 178-79 (1976). The Corps does not contest the existence of such a limited waiver of sovereign immunity in the CWA section 401, but rather we point to the fact that the RWQCB has already issued the 401 Certification for the construction of the Project back in March 2016. Now the RWQCB seeks to regulate the very same aspects of the Project it already deemed in compliance with State water quality standards under its limited state authority.

Even under state law it is questionable whether there is authority to levy the type of requirements found in the WDR. The RWQCB continually points to the Governor's Executive Order W-59-93 (August 23, 1993), which is incorporated into 4.23 of the San Francisco Bay Basin Water Quality Control Plan as justification for the excessive mitigation measures found in this WDR. Executive Order W59-93 provides a policy for ensuring "no overall net loss and long-term net gain in the quantity, quality, and permanence of wetlands acreage and values in California . . ." However, the Order goes on to say these goals should "be achieved through the voluntary participation of landowners . . . [and] not meant to be achieved on a permit-by-permit basis."

It is unclear how the Executive Order applies to the Project. Not only are there no jurisdictional wetlands present in the Project area but there will be no permanent loss of wetland acreage either. Yet the RWQCB still contends that there are anywhere from 9.81 to 10.1 acres of permanent wetland loss. The RWQCB fails to explain how such a loss is possible when it recognizes that the Project will bring the environment back to its original state, albeit with some added improvements to the environment. One cannot lose permanently what it is gaining. If it is enhancement of wetlands that the RWQCB seeks to impose, then the Executive Order does not provide that authority. The very language of the Order states enhancement should be achieved voluntarily and not on a permit-by-permit basis. Therefore, even if state law applied to the construction of this Project, the Project is in full compliance with the RWQCB's policy of no net loss of wetlands.

The Corps requests the following changes:

- Removal of the Corps as a discharger in the WDR.
- Removal of requirements to consider and mitigate for waters of the State.
- Removal of the requirement to follow CEQA.
- Removal of the contention that the Project causes a net loss in wetlands.
- Removal of the fee provision. 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 the Corps. The Corps lacks authority to pay them and will not pay them.

- (3) The WDR contains arbitrary and infeasible requirements for various plans. (Section 10, 11, 12, 14, 22, 26, WDR Provision 7, 9, 12, 14, 22, and 28)

The WDR has various requirements for plans, some of which the Corps has repeatedly informed the RWQCB are not necessary and would not be created, which are arbitrary and infeasible.

Specifically, the Corps requests the following changes:

- Removal of Executive Officer approval requirements for all plans. The Corps will not be seeking Executive Officer approval of any plans. 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. The Corps will provide plans to the RWQCB, when they are complete and for informational purposes.
- Removal of the requirement for a Utilities Plan. The Corps has repeatedly informed the RWQCB that a Utilities Plan is not necessary and one would not be made. All the required utilities' information is already in the design plans which have been provided to the RWQCB. A separate Utilities Plan is superfluous and a waste of public resources.
- Recognize that the Corps provided the Groundwater management plan to the RWQCB on January 26, 2016. We have received no response from the RWQCB. To the extent that the RWQCB believed Executive Officer approval was necessary, a 9 month timeline is not reasonable.
- Removal of the requirement for the following plans prior to construction: Mitigation and Monitoring plan, the Post-construction stormwater management plan, and the Operations and Maintenance manual. These plans, to the extent they are needed, will all be created after construction has begun or is completed. In fact, the time line for providing such plans has already passed since construction will begin on October 3rd. It does not make practical sense to provide plans such as the Operations and Maintenance manual prior to construction because, among other things, changes made during construction may affect such plans or manuals. Creating a version prior to construction would require substantial resources and would invariably be subject to changes once construction is complete.
- Removal of the requirement for the Adaptive Management Plan. We do not have congressional authorization to create an Adaptive Management Plan; therefore, we cannot make one.
- Recognize that the purpose of the Operations and Maintenance manual is for the safety and reliability of the functional performance of the flood risk management of the Project as approved by Congress. The Corps will not be changing the Manual unless there is a change in condition that requires formal initiation of the process by the SCVWD and approval by the Corps. The RWQCB has no authority to change this process.
- Removal of the requirement for a narrative description of changes for plans. No narrative description has been created and none was required in the 401 certification. The RWQCB has been provided 100 percent plans and can ask questions if necessary.
- Removal of the requirement for a lessons learned report. The Corps will not provide the RWQCB with a lessons learned report. To the extent any such report would be made, it would be for internal reasons. The RWQCB fails to provide and cannot provide a

reasonable basis for requiring the Corps to create a lessons learned report for the RWQCB.

- (4) The WDR contains items that are poorly defined or technically or factually inaccurate. (Table 1, Table 2, Section 3, 5, 6, 15, 16, 18, 20, 25, 28, 31, Discharge Prohibitions 9, 10, WDR provision 13, 15, 16, 19, 20, 24, 27, 30, WDR Attachment A, Figure 3, Attachment C, Item b, Attachment C, Table 1)

Please fix the following errors:

- There are several provisions of the WDR requiring submission of the 100% design or Planting Plans or refer to older versions of those plans. As the WDR recognizes in its findings section 11, Corps has already provided the RWQCB all required 100% plans. The WDR must be revised to consistently reflect this fact.
- The WDR findings section 3 should be revised to reflect that the cost contributions are for total project construction costs, not “structural flood control features.” Further the correct percentages are 25-50%, rather than 35%. Any refunds for the Water District’s contributions will be in accordance with the terms of the Project Partnership Agreement.
- Construction will begin in early October and is scheduled to be completed by December 31, 2017.
- Project elements in section 6 should be revised to state that: (1) it may be pre-cast or cast in place box culverts, (2) there are only two concrete access ramps on the right bank only, not three, (3) there are three areas, not two, where there is not space for the left bank road, and (4) the Corps will only replace or realign utilities where necessary.
- Section 11 refers to a ten-year requirement for vegetation monitoring. The 401 section II, Condition 11 required only that Corps “maintain trees and shrubs for five years as stated in the Application.” The WDR and Attachment C need to be corrected to be consistent with the 401 Certification.
- At various points, the WDR states incorrect acre impacts. For instance, it states that there are a total of 9.81 acres of impact then it states 10.1 acres as the number. Also, there are references to both 5.92 acres of waters of the State and 5.63 acres of waters of the State. Please correct this inconsistencies.
- The WDR incorrectly states that buried riprap will permanently impact beneficial uses of the Creek. The USFWS stated that the vegetation would reestablish naturally. Again, returning the environment to its current state cannot permanently deprive the Creek of beneficial uses which the current environment sustains.
- Remove section 28. It does not appear to be related to the contents of the WDR.
- The amount of road construction should be separated out between the new and redeveloped.
- Add in to the WDR Section 20 that stormwater areas will be hydroseeded with native grasses to reduce run off and that road runoff will be directed to vegetated channel banks.
- The WDR must distinguish between above grade and buried floodwalls since they have different impacts to the environment.
- There are no jurisdictional wetlands therefore ecoatlas is not necessary or applicable.
- There should not be a requirement for Executive Officer Approval of the Dewatering Plan since the Corps will be abiding by the general permit.
- WDR provision 13 needs to clarify that this applies to imported fill only, not all fill.