

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION**

RESPONSE TO COMMENTS

on the Tentative Orders for the

Upper Berryessa Creek Flood Risk Management Project
U.S. Army Corps of Engineers and Santa Clara Valley Water District
Milpitas and San Jose, Santa Clara County

The Water Board received written comments from the following parties on the tentative order circulated for public comment on August 19, 2016:

1. U.S. Army Corps of Engineers (Corps)
2. Santa Clara Valley Water District (District)
3. Guadalupe-Coyote Resource Conservation District (GCRCD)
4. Citizens Committee to Complete the Refuge (C), Audubon Society (A), and San Francisco Bay Keeper (B) (collectively CAB)

In response to the comments received, we revised the tentative order and circulated the revision on November 2, 2016. Water Board staff solicited comments on *only* the revisions in the revised tentative order and received comments from the following parties:

1. U.S. Army Corps of Engineers (Corps)
2. Santa Clara Valley Water District (District)
3. Citizens Committee to Complete the Refuge (C), Audubon Society (A), and San Francisco Bay Keeper (B) (collectively CAB)

Introduction

This Response to Comments uses a table, which consists of a summary of each comment and Water Board staff's response, to address specific comments received during both public comment periods. Note that comments received during the second comment period start with "RTO" (for "revised tentative order"). In addition, below is a summary of recurring concerns and overarching themes raised in the comments and our general responses to them.

Overall, the Revised Tentative Order's (RTO's) requirements are well-founded in the Water Board's mandate to protect water quality, in California Water Code requirements, and in associated policy. The RTO is consistent with the Water Board's mandate to protect existing and potential beneficial uses of State waters; accordingly, it is also consistent with the State's anti-degradation policy, while also ensuring no net loss and a long-term net gain in the functions, values, and extent of wetlands, which includes riverine wetlands of the type being impacted by the Upper Berryessa Creek Flood Risk Management Project (Project). The RTO is also consistent with existing Water Board orders for similar flood control projects co-sponsored by the Corps and a local, non-federal sponsor, including the District's Upper Guadalupe Flood Control Project and the Napa River Flood Control Project.

Summary

General Comment 1: Regulatory Authorities for Waste Discharge Requirements

The Corps and District raised a series of regulatory concerns, including whether the tentative order is necessary, noting that the Executive Officer had previously issued water quality certification for the Project to the Corps on March 14, 2016 (Certification). They questioned the Water Board's requirement to name both parties as the discharger in the order, and whether the Board has the authority to consider the order or require compensatory mitigation for Project impacts. The Corps also contends that the waste discharge requirements (WDRs) are not applicable to the Corps because Congress has not waived the federal government's sovereign immunity for compliance with State regulations such as the State's Porter-Cologne Water Quality Control Act.

Response: We issued the Certification solely to the Corps in March 2016 specifically to facilitate the Project's tight construction schedule to meet the flood risk management criteria necessary for the scheduled public opening of the new \$2.3-billion BART expansion project in December 2017. The Water Board's adoption of the RTO would be the second part of a two-phase permitting approach that we developed collaboratively with the Corps and District in late 2015 to ensure that the Corps could meet the Project's tight construction schedule. The first part was issuance of the Certification. In the Response to Comments, we provide extensive information to show the WDRs are necessary and appropriate for regulating the Project and its impacts, including descriptions of the Project's impacts to about 9.8 acres of State waters, due to the Project's discharges of dredge and fill materials in State waters and the Project's permanent impacts that will restrict the existing and potential beneficial uses of these waters.

It is not typical for the Water Board to use a two-phase permitting approach, where Certification is issued followed by the Board's consideration of more-detailed WDRs. However, the Board initially used that approach in 2001 to allow an important public safety project, the Eastern Span of the Bay Bridge seismic safety project, to proceed with contracting and to meet a tight construction schedule while certain project details were being finalized. For the Upper Berryessa Project, the time necessary for development of WDRs would have stalled the construction start date if we had not first issued the Certification.

In response to comments received during the first public comment period, we modified the initial tentative order to include a reissued Certification for the Project in addition to providing WDRs. This is intended to provide an efficient single-permit approach that avoids confusion about potentially similar requirements in separate Certification and WDRs orders, while recognizing the Corps' and District's joint responsibility for the Project. We also added information to clarify our understanding of which of the two dischargers is responsible for different tasks under the RTO.

Combining the Certification and WDRs into a single Board order also addresses the Corps' concerns about sovereign immunity. In the Response to Comments, we point out specific regulations, as well as the plain language of the federal Clean Water Act, that require the Corps to comply with local water quality standards including those of the Clean Water Act, the State's Porter-Cologne Act, and this Water Board's Basin Plan.

General Comment 2: Compensatory Mitigation Requirement

- a. California Environmental Quality Act (CEQA) Mitigation Measures.** *The District commented that the impacts identified in the Environmental Impact Report (EIR) pursuant to CEQA are either less-than-significant or have been reduced to less-than-significant levels through mitigation measures in the EIR, thereby making the WDRs' requirements for compensatory mitigation unnecessary. Similarly, the Corps commented that the Environmental Impact Statement pursuant to the federal National Environmental Protection Act found the project would not have lasting impacts in the aquatic habitat.*

Response: The Response to Comments describes the Project's impacts in detail, presents the reasons why the EIR mitigation measures are not adequate, and provides the regulations authorizing the Water Board to require additional mitigation under CEQA. We note that based on our discussions with the Corps and District over the past year, any compensatory mitigation will need to occur offsite due to constraints imposed by the Corps within the Project reach.

- b. Mitigation Plan is Not Yet Developed.** *In general, GCRC and CAB expressed concern about the Project's impacts and supported the order's requirement for compensatory mitigation. However, they requested that the order incorporate additional detail regarding mitigation requirements.*

Response: We have not yet received a compensatory mitigation proposal from the District, although one would be required by the RTO due to the Project's temporary and permanent impacts. These permanent impacts include lining of more than 10,000 linear feet of Upper Berryessa Creek with rock riprap under a thin layer of soil. Because we have not received a specific plan, the RTO retains the requirement to submit and implement a mitigation and monitoring plan that achieves certain amounts of mitigation within a specified timeframe. Our intent is to continue to work with the District, including by considering watershed and creek restoration projects that it is already planning, to identify work that would satisfy mitigation requirements in the RTO while, ideally, also meeting the District's stewardship and restoration goals. In addition, the public will have opportunity to comment on a draft plan before the Executive Officer accepts the plan.

- c. Jurisdictional Wetlands.** *The Corps and District commented that the Project does not include jurisdictional wetlands, so the State No Net Loss Policy and Basin Plan's Wetland Fill Policy are not applicable to the Project, and the Water Board's assertion that mitigation is required for the Project's impacts to wetlands is invalid.*

Response: The Corps and District have applied a limited definition of wetlands, based on the Corps' 1987 manual for defining a wetland. In the Response to Comments, we explain that creek waters are riverine wetlands that are subject to the two policies. Further, mitigation for impacts to waters of the State is required to comply with the State's anti-degradation policy regardless of whether the waters are classified as wetlands or not. Accordingly, the Water Board is authorized to require compensatory mitigation.

General Comment 3: Adoption of the WDRs Would Jeopardize Completion of the Project

The Corps and District commented on potential practical effects of adopting the order, such as that it could delay Project construction, that certain timelines were impractical, and that the order did not clearly identify whether the District or Corps was responsible for a particular Project element. They also identified areas where additional information had been submitted that was not necessarily reflected in the order.

Response: In discussions with District and Corps staff subsequent to receiving their comment letters, neither we nor District or Corps staff have been able to identify aspects of the RTO that would significantly delay the construction timeline. The Project is now under construction, with an anticipated completion date in December 2017. The intent of the two-phase permitting approach, mentioned under General Comment 1, has been to facilitate timely construction of this important public safety project while ensuring compliance with State water quality standards. The RTO has been updated to remove requirements for plans and information that has been submitted since issuance of the Certification in March 2016 and to revise submittal dates consistent with information submitted by the Corps and District.

General Comment 4: The WDR is an Unfunded Mandate

The District commented that the WDRs are an unfunded mandate, and it is not responsible for any fees for the WDRs.

Response: In the Response to Comments, we explain that the RTO's requirements implement the federal Clean Water Act, so it is not an unfunded mandate. Further, in our discussions with the District, we have expressed our ability to be flexible in accepting a compensatory mitigation project that is already part of the District's capital improvement plans, which may not require the District to budget additional funds. The District is responsible under the Water Code to pay fees due under the RTO.

General Comment 5: CEQA Process for Mitigation Would be the Water Board's Responsibility

The District commented that the Water Board would be responsible for any CEQA requirements stemming from the compensatory mitigation requirements in the order.

Response: A discussion about environmental review for compensatory mitigation is premature since a mitigation project has not yet been proposed. Further, the District is already serving as lead agency on projects that the Water Board may be able to accept as compensatory mitigation. These projects are already part of the District's capital improvement plans or will be considered for the District's One Water Plan. It is likely the Water Board's CEQA role for such projects would be as a responsible agency.

General Comment 6: Sediment Transport

The Corps and District assert that the rock armoring of channel beds and banks is justified due to their assessment of a high erosion potential of the creek bed and banks within the project reach. Sediment transport processes in the reach are a significant issue because one of the Corps' stated design goals for the project is to reduce sedimentation and reduce maintenance needs for sedimentation.

Response: Water Board staff has interpreted the geomorphologic processes in the Project reach differently from the Corps and District design team. We assert that the Project is a net depositional system, meaning that it is one where sediment tends to deposit over time. Further, we assert that sediment deposition will increase as compared to the current channel because the Project will create a wider channel cross section with relatively slower flows, which have less ability to convey sediment. It is our understanding that the Corps' operation and maintenance (O&M) guidelines will require aggraded sediment to be removed once it reaches a specified depth. This is likely to result in repeated disturbance of and continual impacts to the creek over the Project's life. It is our intention to validate the understanding of sediment transport processes within the Project through the RTO's requirement to develop and implement an Adaptive Management Plan. That plan will guide decisions about future O&M because the design data alone are insufficient to fully inform O&M. The RTO's requirement for an Adaptive Management Plan includes monitoring to inform how to conduct O&M activities with the least amount of impacts to the creek, which is consistent with the process in the District's Stream Maintenance Program to develop maintenance guidelines for a creek. In addition, the RTO requires the O&M manual to be developed in an open process with interagency collaboration and opportunities for public comment. An interagency review process for a flood control project's O&M manual is not a novel idea, as Water Board staff and other agencies are currently participating in the development of the O&M manual for the Napa River flood control project.

Comments on Revised Tentative Order

General Comment 7: Rescission of the Existing Water Quality Certification in Revised Tentative Order

Corps staff disputed the Water Board's authority to rescind the existing Certification and replace it with the WDRs and a reissued Certification. They stated that there have been no changes in the circumstances, standards, or plans for the Project, thus the triggers for rescission under either the Clean Water Act codified under U.S. Code, section 1341(a)(2)), or the Porter-Cologne Act, section 13381, have not occurred.

Response: The RTO would rescind the Certification, and reissue it as a joint certification and WDRs order, in response to the Corps' and District's comments on the initial tentative order that separate WDRs and water quality certification would result in duplicative permit coverage for the same project. However, Corps and District management had previously agreed to a two-phase permitting process that included issuance of the separate approvals. Thus, the circumstances under which we issued the Certification to the Corps have changed.

In December 2015, the Water Board was urged by the Corps and District to issue a Certification for the Project as quickly as possible to prevent any delay in the Project's construction. We agreed to issue the Certification as the first part of a two-phase permitting approach that we developed together with the Corps and District to resolve the permitting impasse in effect until December 2015

(see General Comment 1). Now that the Certification is in place and construction underway, Corps and District staff are opposing the second part of the two-phase permitting approach. However, the issuance of the Certification would not have been feasible without the corresponding step of issuance of WDRs for the Project, as indicated several times in the Certification itself.

General Comment 8: Sediment Transport

District and Water Board staffs have had a series of discussions regarding sediment transport through the project reach, including via the exchange of technical memoranda. Water Board staff believes the reach is depositional. By contrast, District staff contends that the Project reach is net erosional.

Response: This issue is significant because the Corps' future operation and maintenance requirements for the Project are likely to require removal of sediment that has accumulated to a certain depth, and restoration of the original design cross section, in order to maintain flood transport capacity over time. The greater the rate of sediment deposition and accumulation in the Project reach, the more frequent the need for sediment removal, along with its concomitant impacts to water quality and beneficial uses. Water Board staff evaluated four lines of evidence and found that the Project's design is likely to increase existing rates of sedimentation in the Project reach by widening the channel. This channel widening will reduce flow velocities and reduce associated transport of sediment from upstream of the Project reach through it. Revisions to the Project's design (e.g., with a low flow channel and associated floodplain benches) could have helped address this issue, but the Corps determined such revisions were not feasible under the constraints of the Corps' project planning process. As a result, the effects will be evaluated and addressed through the RTO's requirements for an Adaptive Management Plan and compensatory mitigation plan.

Staff-Initiated Changes

Water Board staff made the following changes in the RTO to more accurately describe the Project or clarify the RTO's requirements. We also made minor editorial changes in wording, punctuation, and formatting, though such edits are not itemized in the list below:

Staff-Initiated Change 1: In Finding 2, we corrected the flooding frequency of the creek's flow overtopping the banks from "...every four to 25 years" to "...once every 10 to 20 years." This change reflects information in the EIR, section 2.3.

Staff-Initiated Change 2: The enumeration in the publically-noticed RTO was incorrect due to an editing error made in response to comments on the initial tentative order. We re-numbered the provisions accordingly.

Staff-Initiated Change 3: We deleted Provision 12 (Final 100 Percent Design Plans) because it is no longer necessary since the Corps submitted 100 percent design plans dated August 4, 2016, and a final Planting Plan dated April 1, 2016. In addition, this provision required the Discharger to construct the Project in conformance with the 100 percent Design Plans. This requirement is already stipulated in Provision 3, making Provision 12 redundant and unnecessary. We re-numbered the provisions accordingly.

Staff-Initiated Change 4: We removed the letter in Attachment B, "Water Board Letter to Corps dated August 14, 2015, Regarding Groundwater Management Plan Requirement", because the Corps submitted an acceptable Groundwater Management Plan to the Water Board in early 2016.

As such, we moved the “Guidelines for Vegetation Performance Standards and Criteria in Mitigation Sites” from Attachment C to Attachment B, and Attachment C now contains the comments on the RTO and responses to these comments.