

**Appendix B:
Comments on Tentative Order**

**401 Water Quality Certification and
Waste Discharge Requirements**

**South San Francisco Bay
Shoreline Project**

**City of San Jose
Santa Clara County**

December 2017



November 15, 2017

Mr. Bruce H. Wolfe
Executive Officer
San Francisco Bay Regional Water Quality Control Board
1550 Clay St, 15th Floor
Oakland CA 94612

Dear Mr. Wolfe:

Thank you for this opportunity to comment on the draft Tentative Order for the South San Francisco Bay Shoreline Project. We appreciate the extensive amount of time that RWQCB staff have devoted to the Shoreline Project and that they have accommodated the construction schedule of the Corps process by drafting the Order within a very short timeframe.

This is a large and complex project has multiple phases and the RWQCB staff have sought to streamline the permitting process by providing a means to approve subsequent phases in the Tentative Order. The Conservancy appreciates this efficiency. However, the Conservancy also has concerns about the ramifications of some of the provisions of Tentative Order and how it will impact future project implementation. The key concerns are discussed more fully below. Specific comments on language in the Tentative Order are in the attached table of comments.

Voluntary Ecosystem Restoration vs. Mitigation

Most of our comments have to do with a misunderstanding of the purpose of the project. The Tentative Order initially correctly describes the project (pp. 2-3) as a multi-benefit project that seeks to restore former salt evaporation ponds, protect adjacent communities from flooding, and provide recreational opportunities. However, on p. 4, there is a different interpretation of the project purposes: "Phase I is expect to result in Project impacts and the ecosystem restoration work in Phases I, II, and III is intended to provide mitigation for those impacts." This description sets the stage for requirements that are extremely problematic.

The Conservancy would like to restate that the restoration options were selected for their own value in order to meet the project's ecosystem restoration goals. The Conservancy is involved in the Shoreline Project because it will implement the goals of the South Bay Salt Pond Restoration Project in an area where restoration is impossible without flood protection infrastructure.

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This project is not an infrastructure project with some mitigation elements – as is demonstrated by the vast amount of restoration proposed, much more than would be required to offset impacts. Furthermore, since the fill impacts from the flood protection measures (132.2 acres permanent fill or 8.76 acres net fill) are relatively minor when compared to the tremendous benefits from just the first phase of proposed restoration (restoring 1120 acres of existing ponds to tidal action), the Conservancy would expect that this project is self-mitigating by the end of Phase I. However, the Conservancy proposes to continue to restore ponds in Phases II and III, adding up to an additional 1780 acres of tidal restoration (pursuant to the adaptive management framework), because that is the goal of the project and the purpose of our agency, not to secure unnecessary, additional mitigation.

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Infeasibility of Mitigation

The Tentative Order currently states that if the restoration proposed in Phase II (900 acres) and Phase III (880 acres) is not implemented, then the project must provide compensatory mitigation elsewhere.

This requirement could adversely impact the ability of the Project to implement its Monitoring and Adaptive Management Plan (MAMP). The MAMP outlines project risks, a method for evaluating results, and a decision-making process to address or correct problems that arise while implementing the project. As described on p. 18 of the Tentative Order, the MAMP states that one of the potential ways to respond to adverse results to is to delay or halt pond breaching. (Indeed, having this ability to delay or stop the project is a primary reason that the restoration will be phased.)

The grounds upon which the Adaptive Management team might recommend that restoration be delayed or stopped are the same reasons that would make mitigation impossible elsewhere in San Francisco Bay. For example, if lack of sediment causes newly breached ponds to erode a significant amount of mudflat habitat, which millions of migratory shorebirds depend on, then pond breaching would likely need to stop in all of San Francisco Bay. Alternatively, if there is a Bay wide decline in pond-specialist species (e.g. grebes and phalaropes), then pond conversion in all of San Francisco Bay would need to be slowed or halted.

Obviously, the Shoreline Project expects to be successful; not implementing the wetland restoration proposed in Phase II and III is an extreme scenario. However, we are entering an era of greater uncertainty. The Conservancy and the other Project proponents have created a process through the MAMP to address uncertainty as much as possible. However, if the Project proponents are not able to implement all of the proposed restoration, there are not going to be alternatives at this scale available elsewhere.

Since mitigation is infeasible, the current language in the Tentative Order could create a scenario where the project will have no choice but to restore all the ponds, regardless of the

Mr. Bruce H. Wolfe
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input from the Adaptive Management monitoring and applied studies, undermining this carefully crafted program. For these reasons, the Conservancy requests changes to the Tentative Order language in the attached comments.

RWQCB and Adaptive Management Decision-Making

The project fully intends to communicate adaptive management decisions to our stakeholders and including the RWQCB. However, requiring the RWQCB's Executive Director approval for not implementing the restoration in Phase II and III essentially gives Executive Director "veto power" over the decision-making process outlined in the MAMP. The Adaptive Management decision-makers have to consider a broad suite of issues that include, but are not limited to, enhancing the resources overseen by the RWQCB. Making an adaptive management action subject to RWQCB approval (except to the extent that a proposed action requires a permit) would give the RWQCB a role not shared by any other stakeholder.

The Conservancy suggests an alternative approach in comment number nine. We propose that the Order should describe a process (e.g. the Technical Advisory Committee) for involving and informing RWQCB staff in the Adaptive Management decision-making process. The Order should clarify that the RWQCB shares the understanding of the Shoreline Project that there may be valid reasons that the Adaptive Management decision-makers recommend halting or delaying pond restoration and that the Project would not be held responsible for natural processes beyond anyone's control.

— There are also additional concerns discussed in the attached table of comments.

We appreciate that the RWQCB's flexible approach in crafting an Order for a lengthy, complex project with different agencies and future phases. We hope that some of the requirements can be modified to better accommodate the realities of implementing an ambitious ecosystem restoration and flood protection project in a new era of uncertainty with rising seas and climate change.

Sincerely,



Amy Hutzel
Deputy Executive Officer

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(CONT.)

CONSERVANCY
CL-3

COMMENTS
1-20



United States Department of the Interior



FISH AND WILDLIFE SERVICE

San Francisco Bay National Wildlife Refuge Complex
1 Marshlands Road
Fremont, California 94555

November 15, 2017

Mr. Bruce H. Wolfe
Executive Officer
San Francisco Bay Regional Water Quality Control Board
1550 Clay St, 15th Floor
Oakland CA 94612

Dear Mr. Wolfe:

Thank you for this opportunity to provide comments on the draft Tentative Order for the South San Francisco Bay Shoreline Project (Project). A portion of the Project will be constructed on lands owned by the U.S. Fish and Wildlife Service and managed as part of the Don Edwards San Francisco Bay National Wildlife Refuge (Refuge). As a project team member, I want to express our appreciation for the work of the Regional Water Quality Control Board (RWQCB) staff. Your staff have contributed a considerable amount of time and effort working collaboratively and proactively with our project team in meeting RWQCB requirements while accommodating the federal processes and schedules that U.S. Army Corp of Engineers (USACE) must follow for their Congressionally approved projects.

We all share the common goal and sense of urgency for achieving flood risk reduction for a highly vulnerable section of shoreline in South San Francisco Bay through the construction of a flood risk management levee integrated with ecosystem restoration and public recreation improvements. The draft Order allows for Phase I of the Project to be initiated in the near term while charting a framework for future project phases to be implemented in sequence based upon adaptive management. The Refuge shares many of the same comments as the USACE and non-federal sponsors provided on the draft Order. As the federal landowner for the portion of the levee to be constructed along Refuge Ponds A12-13 and A16 and the restoration of Refuge Ponds A9-15, I want to reiterate the following comments for your consideration.

COMMENT 21 [The draft Order initially correctly describes the Project (pp. 2-3) as a multi-benefit project that seeks to restore former salt evaporation ponds, protect adjacent communities from flooding, and provide recreational opportunities. However, on p. 4, there is a different interpretation of the project purpose: "Phase I is expected to result in Project impacts and the ecosystem restoration work in Phases I, II, and III is intended to provide mitigation for those impacts." The restoration components of the project were not presented under NEPA/CEQA or the federal Clean Water Act as being mitigation for project impacts; therefore that interpretation is incorrect and should be revised appropriately. It is our position that the Project as described in the NEPA/CEQA document does not need nor require mitigation.

COMMENT 22 [The Refuge is involved in this Project because it will implement a portion of the South Bay Salt Pond Restoration Project, consistent with the Refuge's Comprehensive Conservation Plan that fulfills the purposes for which the Refuge was established for the protection and restoration of habitat for fish and wildlife, including federally listed species such as the California Ridgway's rail and salt marsh harvest mouse. The wetland restoration would be impossible without the construction of flood risk management infrastructure, and in turn, the flood risk management levee as integrated with the proposed wetland restoration features will be more resilient and sustainable in the face of climate change. The project description fully describes the considerable amount of restoration proposed, an amount in our opinion much higher than would be required as mitigation to offset impacts. For example, during Phase I the net fill impacts from the flood protection measures (8.67 acres) are minor when compared to the tremendous benefits from just Phase I of proposed restoration (restoring 1120 acres of existing ponds to tidal action).

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(CONT.)

In addition, as the Project continues to restore additional ponds in Phases II and III, it will be adding up to an additional 1780 acres of tidal restoration, as described in the project description.

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The draft Order further states that if the restoration proposed in Phase II (900 acres) and Phase III (880 acres) is not implemented, then the Project must provide compensatory mitigation (CNMP) elsewhere. This requirement as stated in an order could adversely impact the ability of the Project to implement the USACE's approved Monitoring and Adaptive Management Plan (MAMP). The MAMP outlines project risks, a method for evaluating results, and a decision-making process to address or correct problems that arise while implementing the Project. As described on p. 18 of the draft Order, the MAMP states that one of the potential ways to respond to adverse results is to delay or halt pond breaching so that we can apply the best available science, address uncertainty, and inform future phases in an adaptive management framework. We respectfully request and concur with the USACE that references to CMMP be removed from the draft Order accordingly.

COMMENT
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We all certainly expect the Shoreline Project to be successful in achieving the multi-benefits of flood risk reduction, ecosystem restoration, and recreation opportunities. The MAMP was prepared to address uncertainty as much as possible, and indeed the South Bay Salt Pond Restoration Project has a proven track record of using adaptive management as described in the MAMP and provides a mechanism through technical working groups and stakeholder forums to keep RWQCB staff updated and part of the decision-making process should uncertainties arise throughout the project. We recommend that the Order describe a process for how RWQCB staff wish to be engaged and informed through the USACE's adaptive management decision-making process. The Order should clarify that the RWQCB shares a similar concern of the Shoreline Project that there may be valid reasons that the project team may recommend halting or delaying pond restoration elements due to natural processes beyond anyone's control in furtherance of the Project as described.

Again, thank you for your staff's willingness and flexibility in working with the project team to craft the Tentative Order for this project. We recognize that such a lengthy and complex project with multiple phases means that there are additional details to be provided on future reaches and project phases. We appreciate the opportunity to seek the Board's approval of an order that allows Phase I to move forward with construction and restoration as soon as feasible as we continue to plan together for the other reaches with RWQCB staff.

Sincerely,



Anne Morkill
Refuge Complex Manager
San Francisco Bay National Wildlife Refuge Complex

CC: LTC David A. Kaulfers, U.S. Army Corp of Engineers
Rechelle Blank, Santa Clara Valley Water District
Brenda Buxton, California Coastal Conservancy
John Bourgeois, South Bay Salt Pond Restoration Project

November 15, 2017

Tahsa Sturgis
San Francisco Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Subject: Comment Letter – South Bay Shoreline Project Order Comments

Dear Ms. Sturgis:

The Santa Clara Valley Water District (District) appreciates the opportunity to comment on the tentative "Water Quality Certification and Waste Discharge Requirements for: U.S. Army Corps of Engineers, South San Francisco Bay Shoreline Project, Santa Clara County" (Tentative Order) from the San Francisco Bay Regional Water Quality Control Board (Regional Board). The South San Francisco Bay Shoreline Project (Project) is an important multi-purpose project whose primary purposes are to restore up to 2,900 acres of diked, former salt ponds to tidal marsh, and to provide protection from tidal flooding and sea-level rise to homes, businesses, and infrastructure in Santa Clara County. Restoring tidal action to these former salt ponds, while providing long-term flood-protection, is good for the environment and people, and it fulfills an important policy of the San Francisco Bay Plan.

The District is partnering on this \$177 million Project with the U.S. Army Corps of Engineers (USACE), the California Coastal Conservancy (Coastal Conservancy), and the U.S. Fish and Wildlife Service. USACE is contributing \$71 million in federal dollars to the Project.

*DISTRICT
CL-1* While the District appreciates that the Tentative Order would approve the Project, the District shares the concerns of USACE and the Coastal Conservancy that the Tentative Order, if adopted, would impose unprecedented, onerous, and unwarranted conditions on a Project the Regional Board should be unreservedly supporting. The fundamental problem with the Tentative Order is that it treats the up-to 2,900 acres of tidal marsh restoration as mere mitigation for 8.76 acres of net fill needed for the flood protection, rather than as a key element of the Project. The tidal marsh restoration is key to the Project, as the Regional Board previously recognized for the South Bay Salt Pond Restoration Project: the main reason why the new flood protection system needs to be built is because the Project will be breaching the salt-pond dikes to create new tidal marsh. Nor is the Tentative Order's proposed mitigation ratio of approximately 330:1 reasonable. The District requests that the Regional Board revise the Tentative Order to incorporate the comments below.

*COMMENTS
25-42* **I. Restoring Tidal Marsh Is Not Proposed as Mitigation and Should Not be Characterized as Mitigation for the Project, As The Regional Board Has Previously Recognized**

The tentative order, in finding 22, treats the 2,900 acres of restored tidal marsh proposed by the Project as mitigation for the project's net fill of 8.76 acres of waters. The Project's tidal marsh restoration is not proposed to be mitigation for the fill; rather, the fill is necessary in large part *because* of the tidal marsh restoration. The fill is being placed on the landside of the restored tidal marsh to construct new flood protection that becomes necessary in large part because the dikes

that currently provide an incidental measure of flood protection have to be breached in order to restore the tidal marsh.

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The Regional Board has previously—and correctly—recognized, for the South Bay Salt Pond Restoration Project (SBSRP), that tidal marsh restoration is not mitigation for the fill that may be necessary for the restoration. The Regional Board's findings for that project (R2-2008-0078) recognized that restoring tidal marsh should not be viewed as mitigation: finding 96 of the SBSRP order found that "[n]o penalties will be imposed for a failure to achieve the interim and final habitat goals, since this is a restoration (not a mitigation) project", and finding 16 found that "[n]o compensatory mitigation is required for impacts to existing wetlands and waters of the State, since this restoration project will result in many more acres of restored and enhanced habitats than the acres of habitat that are impacted."

Although the Tentative Order, in finding 9, states that it is modeled after SBSRP, it treats the restoration component of this Project very differently than restoration was treated in SBSRP. The Regional Board should be consistent: the Tentative Order should not treat the restoration component of the Project as mitigation for fill, just as the Regional Board treated the fill necessary for the restoration component of SBSRP. No compensatory mitigation should be required here.

II. The Tentative Order Misapplies The No-Net-Loss Policy

The Tentative Order, in findings 32 and 33, cites the California Wetlands Conservation Policy (Executive Order W-59-93), often called the "no-net-loss policy", and the Basin Plan (which incorporates the no-net-loss policy), as the principal basis for requiring 2,900 acres of mitigation for 8.76 acres of net fill here. As described below, the Tentative Order misapplies the no-net-loss policy.

The policy focuses on a programmatic approach to preserving and enhancing wetlands: it requires State agencies to "encourage partnerships to make restoration, landowner incentive programs, and cooperative planning efforts the primary focus of wetlands conservation."¹ The Project is developed through a cooperative partnership between agencies and landowners to restore wetlands and waters. The policy "is not meant to be achieved on a permit-by-permit basis". Yet the Tentative Order tries to apply the policy to this individual permit, without regard to the broader partnership represented by this Project, contrary to the policy's direction that it is to be implemented on a programmatic, rather than permit-by-permit, basis.

The Regional Board should read the no-net-loss policy as encouraging approval of the Project as-is, rather than as requiring conditioning the Project on thousands of acres of mitigation.

III. No Mitigation Should be Required Because The Project Provides Significant Benefits To Beneficial Uses, As The Regional Board Previously Recognized

Water Code section 13263(a) requires waste discharge requirements to implement relevant water quality control plans, and to take into consideration the beneficial uses to be protected. The water quality control plan here—the Basin Plan—incorporates the no-net-loss policy, but, as just discussed, that policy supports approval of the Project as is, rather than with thousands of acres

¹ https://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/wrapp2008/executive_order_w59_93.pdf

of mitigation. Nor does the Tentative Order justify its conditions as necessary to promote beneficial uses: in fact, the Tentative Order recognizes that the Project as-is will provide significant benefits to beneficial uses. No additional mitigation is necessary.

The Tentative Order, in finding 31, lists a number of beneficial uses in the Project area, but the Tentative Order identifies no beneficial uses that will be adversely impacted by the Project. Finding 16 goes on at length, and in great detail, about how the Project as-is is expected to "result in a significant contribution to tidal wetland restoration", providing water quality and associated habitat and vegetation benefits "on a spatially significant scale".

In the SBSRP, the Regional Board recognized that salt pond restoration projects promote beneficial uses and require no compensatory mitigation: in Finding 16 in its order for that project (R2-2008-0078), the Regional Board found that "[n]o compensatory mitigation is required for impacts to existing wetlands and waters of the State, since this restoration project will result in many more acres of restored and enhanced habitats than the acres of habitat that are impacted." Similar benefits would be generated by the Project, and thus the same approach should be used here.

Because the Project as-is significantly promotes beneficial uses, no additional mitigation is required.

IV. A Mitigation Ratio Of 330:1 Is Excessive And Unjustified

Even if mitigation were required for the 8.76 acres of net fill, the Tentative Order would require 2,900 acres of mitigation—a ratio of nearly 330:1. That kind of ratio is unprecedented and unjustified.

Compensatory mitigation requirements must be roughly proportionate to a project's impacts. (*Dolan v. City of Tigard* (1994) 512 U.S. 374, 391.) A 330:1 mitigation ratio, for a project that is largely a restoration project, is also not roughly proportionate to any impacts this project may have.

Requiring a mitigation ration of 330:1, or anything close to that, would set an unfortunate precedent. It would signal that the Regional Board wants to stand in the way of restoration projects by imposing onerous conditions, rather than promoting such projects by blessing them with streamlined approvals. The Regional Board should rethink the Tentative Order's excessive and unjustified mitigation for this Project.

V. If Phases II And III Restoration Are Not Built, No Additional Mitigation Should Be Required

The ecosystem restoration component of the Project will occur in three phases (Phases I, II, and III) of pond breaches to establish tidal connection. The Tentative Order requires all phases of the restoration to be completed, and requires additional mitigation to be proposed for approval if not all phases are implemented (Findings 8, 22). Phase 1 of the restoration is scheduled to be constructed in 2022, and completion of this phase would result in restoration of up to over 1,000 acres of tidal marsh habitat. The design and construction of Phases 2 and 3 restoration will be guided by the Project's Monitoring and Adaptive Management Plan. Phases II and III of the Project are likely to be built, adding many hundreds of acres of restored tidal marsh to the Project. Only

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in the unlikely event that Phase I causes unavoidable but undesirable outcomes would Phases II and III be reconsidered.

Even if Phase I does not result in all of the restoration benefits predicted, no additional mitigation should be required. Finding 96 of SBSRP (Order No. R2-2008-0078) stated that "No penalties will be imposed for a failure to achieve the interim and final habitat goals, since this is a restoration (not a mitigation) project"; that order instead envisioned a collaborative process to achieve the desired results. A similar approach should be used here.

VI. The District Should Not be Named as A Discharger in the Water Quality Certification or Waste Discharge Requirements

If the Regional Board revises the Tentative Order's current approach of treating the restoration component of this Project as mitigation for the fill necessary for the Project, then the following discussion becomes less important from a practical perspective. Nevertheless, the District is compelled to raise these issues until the Tentative Order is revised to drop its objectionable mitigation conditions.

As the District and USACE have explained to the Regional Board in other contexts, the Regional Board's authority to impose waste discharge requirements is limited to discharges of "waste". (Water Code section 13260(a)(1); see *Lake Madrone Water District* (1989) 209 Cal.App.3d 163 (flushing unwanted sediment accumulated behind dam was a discharge of waste).) The term "waste" is commonly understood as meaning "something discarded 'as worthless or useless.'" (*Waste Management of the Desert v. Palm Springs Recycling Center, Inc.* (1994) 7 Cal.4th 478, 485.) But constructing a beneficial project is not a discharge of something worthless or useless. (See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency* (D.NV 1999) 34 F.Supp.2d 1226, 1254 (distinguishing *Lake Madrone* to hold that "building a house" is not a discharge of waste under Porter-Cologne), *rev'd in part on other grounds*, 216 F.3d 764, *aff'd*, 535 U.S. 302.) This Project—restoring tidal marsh and constructing flood protection—is beneficial; it is not a discharge of waste subject to waste discharge requirements.

Nor would Water Code section 13376 authorize the Regional Board to issue a permit to the District for dredge-and-fill discharges. Water Code section 13372(b) unambiguously makes Water Code section 13376 operative "only to discharges for which the state has an approved permit program" under Section 404 of the Clean Water Act. California does not have an approved permit program under Section 404, and thus section 13376 cannot give the Regional Board authority.

Even if this Project were a discharge of waste, the Tentative Order, in finding 4, recognizes that this project will be built on the District's property. Water Code section 13270 precludes issuing waste discharge requirements to one public agency for discharges of waste on that agency's property by another public agency. Because this Project will be constructed by USACE on the District's property, and both are public agencies, Water Code section 13270 prohibits issuing waste discharge requirements for the construction of the Project to the District.

Nor may the Regional Board issue a Section 401 certification to the District. Section 401 applies only to persons who apply for a federal license or permit. (33 U.S.C. 1341(a).) The District has not applied for a federal license or permit, and thus Section 401 does not apply to the District.

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VII. Feasibility Constraints Of Alternative Levee Alignments Should Be More Clearly Acknowledged

Finding 13 discusses an alternative, more landward, levee alignment east of Artesian Slough for Reaches 4 and 5 that the Tentative Order describes, in finding 21 and elsewhere, as having greater environmental benefits with fewer impacts. The District and its Project partners considered suggestions for alternative alignments in the EIR/EIS process, including the Regional Board's suggestion of the alternative alignment raised in the Tentative Order. The District has considered, and will consider, alternative alignments, though the District is mindful that alternative alignments need to be feasible. Different alternative alignments raise various feasibility constraints, including enduring that any alternative is within the scope of the Project authorized for the USACE by Congress, avoiding interference with the City of San Jose's current plan for the San Jose-Santa Clara Regional Wastewater Facility, maintaining adequate buffers against a nearby San Jose Police Department bomb facility, and achieving consensus among stakeholders for the inclusion of legacy biosolid lagoons on the bayside of the proposed levee.

The District and its Project partners expect to continue assessing whether these constraints can be overcome by the alternative alignment discussed in the Tentative Order, or by some variation of that alternative alignment. While Attachment C to the Tentative Order acknowledges some of these constraints, that appendix and those constraints are not clearly acknowledged in, or incorporated into, the Tentative Order itself. The Tentative Order should more clearly acknowledge that alternative alignments may not be achievable, and the Regional Board should not be linking possible future mitigation requirements to alternatives that may not be achievable.

VIII. Impacts Mitigated To Less-Than-Significant Levels Are Not Under The Regional Board's Jurisdiction

The main impact identified in the Tentative Order—filling of waters of the United States—was analyzed in Section 4.6.5 of the EIR/EIS. The EIR/EIS concluded, in Section 4.6.6, that the fill of waters associated with the Project would have only less-than-significant impacts. Because impacts from fill would be less-than-significant, CEQA does not allow the Regional Board to impose additional mitigation for fill-related impacts.

As for other impacts identified in the EIR/EIS, the Tentative Order, in finding 30, correctly notes that the EIR/EIS found that the mitigation measures proposed in the EIR/EIS "would mitigate all of these impacts to less than significant levels". The Regional Board does not have authority to second-guess the conclusion of the EIR/EIS that no additional mitigation is necessary for these impacts that will already be mitigated to less-than-significant levels. (See *Ogden Env'tl Serv. v. City of San Diego* (S.D. Cal. 1988) 687 F.Supp. 1436, 1450-1452 (responsible agency does not have authority over impacts mitigated to less-than-significant levels).)

IX. The Technical Advisory Committee (TAC) Is Advisory

Provision B.20 requires the formation of a technical advisory committee (TAC) to assess, review, and suggest adaptive management strategies. The Mitigation and Adaptive Management Plan (MAMP), included as Attachment B to the Tentative Order, in Section 5, already prescribes a process for how decision-making will occur as part of the adaptive management process. While the District does not object to receiving suggestions and advice from the TAC, the ecosystem restoration activities would be undertaken through the MAMP's adaptive management process,

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and the Tentative Order should make clear that the TAC has no actual decision-making authority in the adaptive management process.

X. No Fees Are Applicable

Finding 50 prescribes fees that the District would be responsible for. But Government Code section 6103(a) exempts the District from having to pay any fees.

XI. Other Technical Comments

Finding 5 states that, after 10 years, the Non-Federal Sponsors will assume the costs of the ponds' operation, maintenance, and management. This finding should be changed to make clear that responsibilities for costs, which will also include costs of operating and maintaining the new flood protection structures, will be allocated pursuant to the Project Partnership Agreement, which has not yet been completed.

Finding 7 states that Alviso has over 2,000 residents and 500 structures. It would be more accurate to state that Alviso has over 2,500 residents and 1,100 structures.

Finding 8 could be read to suggest that the Project is intended to allow the Union Pacific railroad tracks to continue functioning over Artesian Slough. Keeping the railroad functioning has nothing to do with Artesian Slough. The reference to Artesian Slough should be deleted as it relates to the railroad.

Finding 10, among other findings, refers to Reaches 4 and 5 of the FRM levee as being a "proposed conceptual" alignment. That alignment is not conceptual; it is the Congress-authorized alignment. All references to the "proposed conceptual" alignment for Reaches 4 and 5 should be changed to "authorized" alignment.

Finding 10 states that "Where the levee crosses an existing water feature, such as a slough, structures will be installed to allow flow during normal conditions and during flood conditions." As described in the Project EIR, a tide gate closure structure is being designed to be placed across the Artesian Slough to prevent water from overtopping existing levees along the slough during future high-tide events. The tide gate structure will be designed in coordination with the City of San Jose to allow for the city's wastewater treatment plant's discharge during storms. It is expected that the tide gate structure would remain open during normal and flood conditions, but that the opening would be regulated depending on flow conditions. The District suggests that the word "allow" be revised to "regulate".

Finding 10 discusses planting or seeding of marsh vegetation at the toe of the levee following construction. Generally, in the San Francisco Bay it is not necessary to seed marsh plain species because tidal waters have sufficient seed source. Active planting and seeding of marsh vegetation will be done as an adaptive management measure only as necessary.

Finding 10 (in the section on "Ponds A12 and A18 Tidal Restoration") gets the descriptions of Ponds A12 and A18 reversed. The finding currently suggests that the bottom elevation of Pond A18 is lower than the bottom elevation of Pond A12. In fact, as noted in Section 3.8.3.2 of the

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EIR/EIS, Pond A12 has the lowest bottom elevation of all the ponds. The Tentative Order should reverse the descriptions of Ponds A12 and A18.

Finding 30 incorrectly identifies the CEQA lead agency as the California State Coastal Conservancy. The Tentative Order should indicate the Santa Clara Valley Water District as the lead agency under CEQA. The Tentative Order also incorrectly identifies the Environmental Impact Report (EIR) certification date as September 24, 2015. The District certified the EIR for the project on March 22, 2016.

Sincerely,



Melanie Richardson, P.E.
Interim Chief Operating Officer
Watersheds

cc: N. Camacho, R. Callender, N. Nguyen, R. Gibson, R. Blank, B. Wolfe, K. Lichten

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COMMENTS



DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, US ARMY CORPS OF ENGINEERS
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November 15, 2017

Mr. Bruce H. Wolfe
Executive Officer
San Francisco Bay Regional Water Quality Control Board
1515 Clay St, Suite 1400
Oakland CA 94612

Dear Mr. Wolfe:

COMMENTS
43-56

Thank you for this opportunity to comment on the draft Tentative Order for the South San Francisco Bay Shoreline Project. We appreciate the large amount of time and effort that your staff has devoted to working with the project sponsors to resolve a number of issues. In addition, your staff have worked hard to accommodate the federal processes and schedules that the U.S. Army Corps of Engineers (USACE) must follow for its projects. USACE has a number of concerns which are presented in the attached table of comments. We would like to highlight a few of these concerns in this letter.

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First, the project's flood risk management and ecosystem restoration features are interdependent; the latter were not formulated by assessing mitigation needs. The ecosystem restoration components of the project were formulated to take advantage of restoration opportunities resulting from construction of flood risk management features. Without construction of these features, tidal habitat restoration would not be feasible in the project area due to the resulting increased flood risk. In addition, the restoration components of the project were not presented under NEPA, CEQA, or the federal Clean Water Act as being mitigation for project impacts. The entire project was evaluated as an integrated whole and was determined to have an overall positive effect on habitat, fish and wildlife, and water quality. It is our position that the project as described in the NEPA/CEQA document does not need mitigation.

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Second, the adaptive management process proposed for the project has been a vital element in alleviating concerns and securing support for the project from a wide variety of stakeholders, as well as in addressing potential impacts of breaching ponds that were discussed in the NEPA/CEQA document. This process, to be administered by a broad-based adaptive management team, is intended to be science-based and responsive to the results of the project's proposed monitoring program. However, the draft Tentative Order would effectively mandate tidal restoration of all the managed ponds on the project site, voiding this collaborative process and negating the scientific foundation of the proposed adaptive management process. To avoid this outcome, in the event that tidal restoration needs to

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slow or stop, the project sponsors would need to assume onerous off-site restoration burdens that likely would not be technically feasible.

CORPS
CL-3

Finally, the draft Tentative Order's proposed Contingency Mitigation and Monitoring Plan (CMMP) would be problematic for several reasons. As explained earlier, USACE restoration projects cannot have habitat mitigation as a component and the project as described should not require mitigation. Also, the conditions that would result in a delay or cessation of pond breaching, such as excessive impacts to water birds or a shortage of sediment in the Bay, would also apply to tidal restoration in alternate locations. In addition, the required offsite habitat restoration plan is not a part of the Congressionally-authorized project and USACE cannot spend federal funds on developing such a plan. For all these reasons, we request that the CMMP be removed from the draft Tentative Order.

USACE has reviewed the comment letter and comments from the State Coastal Conservancy and concurs with their comments as well.

Again, USACE appreciates the flexibility shown by RWQCB staff and your interest in working with the project sponsors towards the goals of managing flood risk and restoring valuable tidal habitats on a timely basis in the face of rising sea levels. We look forward to receiving the Water Quality Certification in December, as this will support our schedule to compete for federal funding that will be finalized in January and announced in February, thereby enabling a late spring construction contract award for Reach 1.

Please direct all questions or requests for more information concerning this matter to Bill DeJager at (415) 503-6866 or at William.R.DeJager@usace.army.mil.

Sincerely,

**KENDALL.THOM
AS.R.1231850356**

Digitally signed by
KENDALL.THOMAS.R.1231850356
DN: c=US, o=U.S. Government,
ou=DoD, ou=PKI, ou=USA,
cn=KENDALL.THOMAS.R.1231850356
Date: 2017.11.15 15:49:55 -08'00'

Thomas R. Kendall, P.E.
Chief, Planning Branch

Enclosure

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Assembly California Legislature

KANSEN CHU

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CHAIR: ASSEMBLY COMMITTEE ON ARTS, ENTERTAINMENT,
SPORTS, TOURISM, AND INTERNET MEDIA
ASSEMBLYMEMBER, TWENTY-FIFTH DISTRICT



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INVESTMENT PROMOTION
FOSTER CARE
IMPROVING BAY AREA
TRANSPORTATION SYSTEMS

APPOINTMENTS
COMMISSION ON ECONOMIC
DEVELOPMENT

October 2, 2017

Larry Goldzband
Executive Director
San Francisco Bay Conservation and Development Commission
455 Golden Gate Ave., Suite 10600
San Francisco, CA 94103

Bruce Wolfe
Executive Officer
San Francisco Bay Regional Water Quality Control Board
1515 Clay St., Suite 1400
Oakland, CA 94612

Dear Mr. Goldzband and Mr. Wolfe:

I am writing to ask your agencies to give full consideration to the permit applications submitted by the U.S. Army Corps of Engineers for construction of the South San Francisco Bay Shoreline Project.

Authorized by Congress in the Water Infrastructure Improvements for the Nation Act in 2016, the Shoreline Project will restore close to 3,000 acres of former salt ponds to tidal wetlands and provide coastal flood risk management for northern San Jose. The Shoreline Project is a critical part of the South Bay Salt Pond Restoration Project, the largest wetland restoration effort on the west coast of the United States. Over 15,000 acres of former commercial salt ponds were acquired in 2003 by state and federal resource agencies, followed by an extensive public planning process, and the start of restoration actions and monitoring in 2009. The Shoreline Project will double the acres of wetlands restored to date as part of South Bay Salt Ponds Project, while providing flood management for: 650 housing units and 2500 residents and infrastructure in the community of Alviso; the San José-Santa Clara Regional Wastewater Facility, which cleans the wastewater of over 1.5 million people in the South Bay; and State Route 237, a major Silicon Valley artery.

I thank you for your work to protect San Francisco Bay and I urge your agencies to approve permits for the construction of the South San Francisco Bay Shoreline Project.

Sincerely,

A handwritten signature in black ink that reads "Kansen Chu".

KANSEN CHU
State Assemblymember, 25th AD

