

Item Number 8
Supporting Document 7
Response to Comments
October 14, 2020

**California Regional Water Quality Control Board
San Diego Region**

Response to Comments

Order No. R9-2020-0150

City of San Diego

January 2016 Sanitary Sewer Overflow

**Settlement Agreement and Stipulation for Entry
Of Administrative Civil Liability**

**October 14, 2020
Place ID CW-631631**

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

2375 Northside Drive, Suite 100, San Diego, California 92108
Phone • (619) 516-1990 • Fax (619) 516-1994
<http://www.waterboards.ca.gov/sandiego>

Documents are available at: <http://www.waterboards.ca.gov/sandiego>

Introduction

The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) Prosecution Team has prepared this Response to Comments on Tentative Order No. R9-2020-0150 (Tentative Order). The Tentative Order was available for public review and comment for a minimum of 30 days, with the comment period ending on August 10, 2020.

Timely written comments were received from:

1. Matthew Costa, July 21, 2020
2. Jean Linder, July 21, 2020
3. The Environmental Center of San Diego, August 5, 2020
4. Stay Cool for Grandkids, August 6, 2020
5. Judith Nicolaidis, August 6, 2020
6. The Environmental Health Coalition, August 6, 2020
7. Molly Morrissey, August 8, 2020
8. Chuck Dunning, August 10, 2020
9. San Diego Audubon Society, August 10, 2020
10. ReWild Coalition, August 10, 2020
11. Edie Munk, August 10, 2020
12. U.S. Fish and Wildlife Service, August 10, 2020
13. Coastal Environmental Rights Foundation, August 10, 2020
14. Megan Flaherty, August 10, 2020 comment letter
15. Jonathan Appelbaum, August 10, 2020
16. Katie Glade, August 10, 2020
17. Citizens Coordinate for Century 3, August 10, 2020
18. Renaissance, August 10, 2020
19. Utaw Cuseo-White, August 10, 2020
20. Gary Cannon, August 10, 2020

An additional comment letter was received after the close of written comments. The Board Chair may refuse to admit late comments if there is a showing of prejudice to the Board or any party. In this case, the Board Chair has allowed the late comment to be admitted under the rules ([Cal. Code Regs., tit. 23, § 648.4, subd. \(e\).](#)).

21. Tim Fleming, August 11, 2020

All comments received were in general support of the Tentative Order and, more specifically, the proposed Supplemental Environmental Project (SEP) that is included as a condition of the Tentative Order. Comment letters that were provided solely to show support do not need a response. Some of the support letters, however, included additional comments, suggestions, and requests for clarification related to the SEP. The summary below is intended to address these. The Prosecution Team has reviewed all the comments received and determined that no modifications to the Tentative Order were warranted in response to these comments.

Comments and Responses

Most of the comments received regarding the proposed SEP can be characterized as one of two general comments, and responses to these two general comments are summarized as follows:

- 1) **Requests for additional work to be included in the SEP.** Adding more work to the proposed SEP would require either additional money or the removal of existing elements. Additional funds are not available: the proposed SEP makes full use of the deferred liability as allowed by the State Water Board's Water Quality Enforcement Policy and Policy on Supplemental Environmental Projects (SEP Policy), and the City does not have any additional funding available beyond this amount. Therefore, adding more work to the SEP would likely require the removal of existing elements. Such a revision to the SEP proposal would mean re-entering settlement negotiations with the City which would, at a minimum, further delay implementation of the SEP. At worst, re-entering settlement negotiations could derail the settlement agreement altogether.

The Prosecution Team does not recommend entertaining revisions to the SEP because it believes that the current SEP proposal has the highest likelihood of maximizing water quality benefits. Other components, such as a comparative carbon sequestration analysis, could be informative, but not at the cost of replacing existing SEP components. The Prosecution Team believes that additional SEP elements proposed could be more appropriately pursued by academic partners, or through alternative funding avenues.

- 2) **Requests to be more specific in describing the expanded restoration alternative in the SEP.** The level of specificity in the SEP proposal needs to strike a careful balance: sufficient specificity to determine whether the project is worthwhile and conforms to the State Water Board's [Policy on Supplemental Environmental Projects](#) (SEP Policy), but not so specific as to render the project alternative infeasible based on restrictive requirements. For example, if the SEP were to require a specific habitat management strategy (like managed retreat), it is possible that the target wetland acreage at 2100 could not be maintained with that specified management strategy, given the context and project boundaries. In such a case, too much specificity in the SEP could inadvertently preclude the expanded alternative from consideration in the Program Environmental Impact Report (PEIR).

The Prosecution Team believes the existing description of the expanded restoration alternative achieves the appropriate balance between qualitatively describing the requirements and not prescribing a project that could never actually be implemented.

Additionally, many of the requests for specificity are reasonable suggestions that should be addressed during the CEQA process. The City will proceed with CEQA environmental review if the Tentative Order is approved. As part of that review, during the public review periods for both the De Anza Draft PEIR and the draft Mission Bay Park Plan Amendment, the public will have the opportunity to directly comment to the City regarding the analysis, conclusions, and mitigation included in each project alternative. The San Diego Water Board would do well not to interfere with this public process.

The remaining comments are addressed below.

Concern that the SEP components are truly supplemental.

No.	Comment	Response	Action Taken
1	<p>San Diego Audubon Society: To make it clear that the first two technical studies funded in this SEP proposal are truly supplemental, we suggest that the text be edited to clearly describe the modeling studies' relationship to the alternative identified in #1.</p>	<p>As stated in the SEP, the technical studies are intended to supplement the Mission Bay Park Improvement Plan PEIR and the Rose Creek Preliminary Engineering Report (PER) and to inform whichever restoration alternative is ultimately selected through the De Anza Cove PEIR.</p> <p>The proposed technical studies are considered supplemental work in accordance with the definition in the State Water Board's SEP Policy. In section III of that Policy, supplemental work is defined as work not otherwise required by any rule or regulation. Absent this settlement agreement, the City would have no legal obligation to complete these technical studies.</p>	None.
2	<p>Coastal Environmental Rights Foundation: We urge the Regional Board to ensure all actions taken in furtherance of the SEP are truly additive. The SEP should not be a new funding source (of \$1.25 million) for the City's prior commitments or responsibilities.</p>	<p>Thank you for this comment. The Prosecution Team takes seriously its obligation to ensure that all components of proposed SEP projects are truly supplemental, and conformant to the SEP Policy. We are not aware of any prior commitments to complete the work proposed in the SEP prior to when the City reached a settlement in concept with the Prosecution Team.</p> <p>Absent this settlement agreement, the City would have no obligation to undertake any of the components of this SEP. Therefore, the Prosecution Team understands the SEP to be truly additive.</p>	None.

3	<p>San Diego Audubon Society: It appears as though the current text on the top of Page 7 states that the two additional technical studies will be conducted for one of the two alternatives as opposed to both. Therefore, we request that this text be edited to indicate that the two additional technical studies will be conducted for both restoration alternatives as well as existing conditions.</p>	<p>This comment correctly interprets the text in question. The studies would support the design of the selected alternative, rather than providing information that would assist in choosing among the alternatives. While the studies <i>could</i> be conducted for both alternatives, and for the existing conditions (the “no project” option), the studies will in fact be conducted separately from the De Anza PEIR and Council vote processes. Therefore, the technical studies will apply only to the one selected alternative.</p> <p>As described in general comment no. 2 above, further opportunities for public comment will also occur during CEQA scoping for the Mission Bay Park Improvements PEIR. The technical studies from the SEP will provide information to support the implementation of the selected alternative and of other components of the Mission Bay Park Improvements Project.</p>	None.
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Requests to be more specific in describing the expanded restoration alternative.

No.	Comment	Response	Action Taken.
4	<p>US Fish and Wildlife Service: We recommend that the restored habitat maximize wetland restoration to offset their historic loss and current underrepresentation compared to recreation and commercial development in Mission Bay. We recommend that the alternative extend across the entire</p>	<p>The primary goal of the SEP is to include an expanded alternative, which would maximize acreage of restored wetlands. The Prosecution Team acknowledges the historic loss of wetlands in our region, and specifically in Mission Bay, and understands that this is an unprecedented opportunity to restore a small portion of the wetlands that have been lost.</p>	None.

	peninsula of De Anza Point and establish wetlands in De Anza Cove for sustainability, to support wildlife, and to improve water quality.	Please also see general response no. 2 above regarding the risk of being overly specific in defining the expanded alternative.	
5	US Fish and Wildlife Service: We recommend that the SEP clarify that the acreage of wetlands within the Kendall-Frost Marsh/Northern Wildlife Preserve today be retained in addition to the 80 acres of wetlands in 2100.	<p>The Kendall-Frost Marsh Reserve / Northern Wildlife Preserve (KFR) is owned and managed by UCSD, and thus its management and maintenance is beyond the scope of both the City's responsibility and this SEP.</p> <p>However, this SEP would do two things to make the KFR wetlands more resilient to sea level rise and other climate change impacts, thus increasing the likelihood that the extent of KFR wetlands today will persist through 2100. First, the proposed habitat restoration of the Kendall-Frost Reserve would remove invasive species, clear debris, and restore native plants within KFR. A healthy wetland with native plants would be more resilient to climate change. Second, wetland restoration in Mission Bay, outside of KFR, would increase the total area of contiguous wetlands in Mission Bay. Wetlands that are larger, unfragmented, and contiguous are more resilient to climate change and other stressors.</p> <p>Therefore, while the proposed SEP does not have the authority to prescribe that the KFR wetlands be retained through 2100, the SEP activities are designed to support that result.</p>	None.
6	Coastal Environmental Rights Foundation: While it is unclear from the SEP whether the planning studies are truly supplemental CERF hopes the additional study and technical	Please see general response no. 2 above.	None.

	<p>information will focus on the wetland and marshland restoration efforts, building on the work of the ReWild coalition. To that end, we request additional detailed information regarding the scope of the new “expanded wetland” project alternative in the De Anza PEIR</p>		
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Requests to add a carbon sequestration analysis			
No.	Comment	Response	Action Taken
7	<p>Stay Cool for Kids: Stay Cool asks RWQCB to help conduct a comparative carbon sequestration analysis of the alternatives, so that we can understand the values of the projects in relation to the City’s Climate Action Plan, and to investigate the long-term costs and benefits of this SEP-funded proposal compared to other alternatives.</p>	Please see general response no. 1 above.	None
8	<p>San Diego Audubon Society: We also ask the San Diego Water Board to help conduct a comparative carbon sequestration analysis of the alternatives, so that we can understand the values of the</p>	Please see general response no. 1 above.	None

	<p>projects in relation to the City’s Climate Action Plan, and to investigate the long-term costs and benefits of this SEP-funded proposal compared to other alternatives.</p>		
9	<p>ReWild Coalition: We also ask the San Diego Water Board to help conduct a comparative carbon sequestration analysis of the alternatives, so that we can understand the values of the projects in relation to the City’s Climate Action Plan, and to investigate the long-term costs and benefits of this SEP-funded proposal compared to other alternatives.</p>	Please see general response no. 1 above.	None.
10	<p>Megan Flaherty: I would also recommend that some sort of carbon sequestration analysis be carried out in this area, to gauge the current and potential sequestration benefits in this area, under a variety of restoration plans. Seeing as the City is moving forward on their Climate Action Plan, having a better understanding of how coastal wetland habitats can be used to sequester carbon will be extremely valuable, and would provide additional information for City staff and elected officials to base their final decisions on.</p>	Please see general response no. 1 above.	None.

Requests to include landward migration as an option and/or remove augmentation

No.	Comment	Response	Action Taken
11	<p>San Diego Audubon Society: The SEP proposal states that the wetland will be designed to be resilient to sea level rise with options including “augmentation, accommodation, vertical accretion, or other habitat management strategies.” Augmentation is being studied currently but has not been shown to be an effective strategy to preserve habitat value through sea level rise, and it’s irresponsible to pin our hopes on augmentation to meet acreage goals. Instead, we ask that the SEP proposal include landward migration (i.e. managed retreat) as a potential management action and include it as an equivalent, comparable option in the SEP planning.</p>	<p>This list of potential habitat management strategies is simply illustrative, not exhaustive, and does not preclude the City from full consideration of other strategies not specified here, including managed retreat. The City is not committed to considering only the three listed strategies, as indicated by the inclusion of “...or other habitat management strategies.” The SEP does not commit to augmentation as the only method of meeting the restored acreage goal.</p> <p>Instead of committing to one method, what the City would be committed to under the expanded restoration alternative is creating 80 new, restored acres that exist in 2100, measured by taking into account potential loss due to sea level rise. Which strategies the City uses to achieve that target will be open to public comments on the Draft De Anza Revitalization PEIR and draft Mission Bay Park Plan Amendment.</p> <p>Please also see general response no. 2 above.</p>	None.
12	<p>ReWild Coalition: We ask that the SEP proposal include landward migration (i.e. managed retreat) as a potential management action and include it as an equivalent, comparable option in the SEP planning.</p>	Please see general response no. 2 and response to comment no. 11 above.	None.

13	<p>US Fish and Wildlife Service: However, we do not recommend reliance on sediment augmentation, vertical accretion, or other habitat management strategies as referenced in the SEP to maintain wetland acreage with sea level rise because these have yet to be demonstrated <i>in situ</i> as effective in keeping pace with sea level rise in Southern California.</p>	Please see general response no. 2 and response to comment no. 11 above.	None.

Other Comments

No.	Comment	Response	Action Taken
14	<p>Environmental Center of San Diego: The City's plans stand directly in the way of any functional habitat restoration at De Anza Cove. The confluence of stream and bay will be completely disrupted by the city's current plan alternative.</p>	<p>This comment refers to the existing project alternative for De Anza Cove. If this settlement and SEP are approved, the City would have an alternative for wetland restoration in De Anza Cove, and that expanded alternative would likely address the concerns of the Environmental Center of San Diego.</p> <p>To voice support for one of the alternatives, the Prosecution Team encourages the Environmental Center of San Diego to participate in the CEQA process and communicate with City Council.</p>	None.

15	<p>Coastal Environmental Rights Foundation: Use of SEP funds (which result from the City’s violation of the Clean Water Act and Water Code) to tailor the City’s CEQA review process to the Council’s expectation is potentially problematic. Therefore, CERF urges the Regional Board to ensure the project alternative is tethered to science and is driven by the goal of maximizing water quality benefits and wetland creation, as intended by the Mission Bay Park Master Plan.</p>	<p>The primary goal of the SEP is to include in the City’s CEQA review process an expanded alternative that would maximize acreage of restored wetlands, thereby maximizing water quality benefits. While the description of the expanded alternative cannot be overly specific (please see general response no. 2 above), the Prosecution Team believes that, as described in the SEP, the expanded alternative relies on robust science and existing feasibility studies to maximize water quality benefits.</p>	None.
16	<p>San Diego Audubon Society: We ask that the Water Board and the City ensure that the land uses and access opportunities in this alternative are accessible to all San Diegans, including disadvantaged communities. In particular, Indigenous communities should be given space to reconnect with Mission Bay and Rose Creek and the opportunity to help define what that space looks like.</p>	<p>Thank you for this comment. The San Diego Water Board supports abundant, easy access to water resources for all San Diegans, including Indigenous people and people living in communities lacking in resources and natural areas.</p> <p>To voice support for equitable public access, the Prosecution Team encourages the San Diego Audubon Society to participate in the CEQA process and communicate with City Council.</p>	None.
17	<p>ReWild Coalition: We ask that the Water Board and the City ensure that the land uses and access opportunities in this alternative are accessible to all San Diegans, including disadvantaged communities. In particular, Indigenous communities should be given space to</p>	Please see response 16	None.

	reconnect with Mission Bay and Rose Creek and the opportunity to help define what that space looks like.		
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