



September 19, 2016

Via e-mail

Susan Glendening
Environmental Specialist
Water Quality Control Board
1515 Clay Street, Ste. 1400
Oakland, CA 94612
susan.glendening@waterboards.ca.gov

RE: Tentative Order, Waste Discharge Requirements for the Santa Clara Valley Water District and U.S. Army Corps of Engineers to implement the Upper Berryessa Creek Flood Risk Management Project

Dear Ms. Glendening:

The Citizens Committee to Complete the Refuge, Santa Clara Valley Audubon Society and San Francisco Baykeeper appreciate this opportunity to comment on the Tentative Order (Order) for Waste Discharge Requirements (WDR) for the Upper Berryessa Creek Flood Risk Project (Project) of the Santa Clara Valley Water District (SCVWD) and the U.S. Army Corps of Engineers (USACE).

Previously we have reviewed and commented on this Project inclusive of a comment letter to the Regional Water Quality Control Board (Water Board) in regards to the Section 401 Water Quality Certification Application (CCCR to S. Glendening, 12/1/2015) and with that letter, a joint comment letter to the SCVWD's Draft Environmental Impact Report (J. Manidakos, SCVWD, 11/30/2015). We bring that background forward in our consideration of the Order and comments herein.

At this point, we remain uncomfortably aware that the Project will use the vintage trapezoidal channel model, out-of-date with current, preferred standards for creek redesign. We continue to regret the use of that design but respond here with the desire to help ensure that other current standards are applied.

As the outcome of our review, we ask the Water Board to consider improvements to the Order on the following topics:

1. Clarification of the Mitigation and Monitoring Plan availability schedule.
2. Contingency fund to provide for Mitigation and Monitoring changes.
3. Statement specific to potential sediment impacts downstream of the Project.
4. Addition of State of California standards for pre-construction nesting surveys.

Our requests arise from observations of content of the Order, as discussed here.

1. Mitigation and Monitoring Plan (MMP) Completion and Availability Schedule

Our reading of the Findings and Provisions left us concerned that there are inconsistencies of timing between planned project construction and MMP availability. The concerns arise from the following statements of the Order:

- Finding 5 states that construction activities are “expected to begin in October 2016 and be completed in approximately nine months.”
- Finding 21 states: “This Order requires the Discharger to submit a Mitigation and Monitoring Plan...before beginning Project construction (Provision 16), and to timely implement the MMP.”
- Provision 16 appears to conflict with Findings 5 and 21 when it states: “No less than six months from the date this Order is adopted...submit a final” MMP. As the proposed date of adoption is October 12, 2016¹, it appears to be possible that no MMP would be available until six months after the proposed start of construction.

As MMPs provide time-critical Project guidance, we believe the conflicting statements may be unintended and possibly inadequately stated. As written, it causes us to be concerned that the Project’s MMP may not be complete at least 30 days prior to any construction, a period that would allow for preparation of protective actions. We ask that the Order be revised to clarify the Water Board’s intention for MMP completion and availability.

2. Mitigation and Monitoring and Adaptive Management Contingency Funds

Finding 21’s discussion of the MMP states that “...the Water Board may require a higher amount of mitigation...” and provides examples of situations when that might occur. Subsequently, Provision 16a regarding the MMP states: “The Water Board may require additional area and/or linear feet based on type and proximity of the mitigation project.”

Given these potential mitigation changes, we are concerned that neither the Findings nor the Provisions of the Order set any expectation that the Project establish a contingency fund as may be required in changed Order situations. We ask that the Order include such a requirement.

¹ See San Francisco Bay RWQCB Notice of Opportunity to Comment and Public Hearing, WDR for the Upper Berryessa Creek Flood Risk Management Project, August 2016

3. Sediment downstream impacts

In comments of our prior letters regarding this Project, we raised concerns about potential sediment deposition impacts. We are pleased to see that the Water Board, in background studies and in the Order, has given considerable attention to this issue. From our review of the Order we have one concern, possibly a simple oversight.

We are aware that the Water Board has jurisdiction regarding downstream impacts of the Project. For example, Provision 4 states: "...shall not cause the turbidity in the receiving water (i.e., water in these creeks and in waters to which they discharge) to increase by more than..." Clearly this Provision applies to all receiving waters inclusive of waters downstream of the Project footprint.

That jurisdictional inclusion is not apparent in Provision 15f, Geomorphology Report of the Adaptive Management Plan. This Provision defines the situations and requirements for reporting on sediment data but does not state that the same reporting expectations apply to areas downstream of the Project and as impacts of the Project. We ask that the Order be revised to define the requirements as inclusive of potential downstream impacts.

4. Pre-construction Nesting Surveys

This is a topic that is not included in the Order but has been omitted or overlooked in other documents of this Project. In letters mentioned previously, our comments have highlighted the need to address this issue as potential nesting areas exist within the Project footprint. We bring it forward here for consideration of inclusion in the Order.

The SCVWD, in its FEIR² response to our comments to its Project DEIR, stated that it had received no comments on this issue from the California Department of Fish and Wildlife (CDFW). That response was to the survey recommendations we included and for which the CDFW was cited as the source. We also understand that because the USACE is lead agency for the Project, the CDFW did not participate in the Project permit process, as otherwise would have occurred regarding a Streambed Alteration Permit. We speculate that that circumstance may explain the lack of CDFW comment on the DEIR. The omission is unfortunate as State-mandated nesting surveys are routine, best practice requirements for projects in the Region.

We note also that the Order cites the existing SCVWD Stream Maintenance Program (SMP) as providing guidance consistent with the Order's maintenance requirements. While we have not reviewed that document in detail, we have been informed³ that its BMPs are routinely used and that suitable, timely nesting surveys are performed prior to

² SCVWD Upper Berryessa Creek Flood Risk Management Project, Final Environmental Impact Report, January 2016, Ch. 7, p. 7-21.

³ Sunny Williams, SCVWD Stream Maintenance Program presentation, One Water Plan/Coyote Watershed, Stakeholder Workgroup Meeting, 9/15/2016

maintenance actions. We are pleased to know that guidance will apply to the Project but note that it applies only to maintenance, not to construction.

Finally, we note that the USACE permit incorporates the biological opinion of the US Fish and Wildlife Service. While that inclusion is significant and appropriate, it is Federal in content, thereby omitting nesting protections generally provided by the State of California.

We ask that the Order add State nesting survey actions to requirements involving construction of the Project. At minimum, it may be suitable to require that nesting survey BMPs of the SCVWD SMP be adopted to be applied as pre-construction requirements in this Project.

In closing, please understand that it is our hope that these comments are helpful to the Water Board for its action providing an appropriate and effective Order, helping to ensure that the USACE and SCVWD can produce a functionally- and environmentally-successful flood risk management project. Again, we appreciate the opportunity to submit these comments.

Sincerely,



Eileen McLaughlin
Board Member,
Citizens Committee to
Complete the Refuge



Shani Kleinhaus,
Environmental Advocate,
Santa Clara Valley Audubon
Society



Ian Wren
Staff Scientist,
San Francisco Baykeeper