

December 6, 2012

Ms. Margaret Beth
California Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay Street, Suite 1400, Oakland, CA 94612

Dear Ms. Beth:

The Santa Clara Valley Water District ("District") hereby submits the following comments on the Tentative Order No. R2-2012-XXXX to issue Waste Discharge Requirements and Water Quality Certification (TO) for the District's Stream Maintenance Program 2012-2022 (SMP), issued by the San Francisco Bay Regional Water Quality Control Board ("Regional Board") on October 15, 2012. The TO is scheduled for hearing before the Regional Board on February 14, 2013. The District requests that the TO be revised to reflect the changes discussed in this letter.

The TO reflects work by the District with a multi-agency working group comprised of all the agencies with regulatory authority over the Santa Clara Valley Water District (District) Stream Maintenance Program (SMP), working on renewal of the program. This work has taken place over a 2.5 year period in an effort to renew the SMP, which first attained authorization in 2002.

In addition to the multi-agency working group, the District has been working directly with Regional Board staff on numerous issues. Many changes have been made since the original draft TO was provided to the District. Almost all issues have been worked out. In fact, the District agrees in principal and concept with the objectives of the TO. However, the District continues to have issues with the specific language of certain findings and conditions of the TO. We intend to continue to work with Regional Board staff to resolve issues.

Attached is a red-lined version of the TO as released for public comment. These redlines reflect our remaining issues. Here is a summary of the issues:

Finding No. 7

TO Finding No. 7 reads, "This Order does not authorize disturbance of the stream bed and banks in reaches where there is a reasonable possibility of anadromous fish spawning."

While the District acknowledges that the Regional Board has authority to regulate beneficial uses of waters of the state, the Regional Board's authority in regulating the beneficial use of fish spawning is defined as specifically listed criteria including dissolved oxygen levels, water temperature, size distribution and organic content of sediments, water depth, and current velocity. See Water Quality Control Plan for the San Francisco Bay Region, December 2011, pg 2-6.

Pursuant to the December 2011 Final Subsequent EIR (FSEIR) for the SMP, the District will implement a number of measures to avoid and/or minimize project impacts on water quality, those criterion included under the beneficial use of Fish Spawning (SPWN) (Basin Plan section



2.1.18), and these impacts will be reduced to less than significant levels without requiring mitigation.

The FSEIR December 2011 analyzed the potential impacts on:

- Impact WQ-1: Water Quality Degradation Resulting in Violation of Water Quality Standards or Waste Discharge Requirements Caused by Ground-Disturbing Activities (Significance Criterion A; Less than Significant)
- Impact WQ-2: Water Quality Degradation Resulting in Violation of Water Quality Standards or Waste Discharge Requirements Caused by Instream Maintenance Activities (Significance Criterion A; Less than Significant)
- Impact WQ-4: Water Quality Degradation Resulting in Violation of Water Quality Standards or Waste Discharge Requirements Caused by the Use of Pesticides, including Herbicides (Significance Criterion A; Less than Significant)

Where required, the applicable Water Quality Monitoring and/or Sediment Characterization Plans will be implemented as specified by the Regional Board permits. With the implementation of BMPs, impacts related to water quality degradation caused by the Proposed Project activities would be less than significant and would not require mitigation.

The District believes that the exclusion specified in Finding No. 7 is not supported by technical and scientific evidence. With respect to the beneficial use of fish spawning, SMP activities are not expected to reduce dissolved oxygen levels in the streams where maintenance activities would occur. The Water Quality Monitoring Plan, developed by Regional Board staff and incorporated into the Program (Condition D. 59), requires sampling for: turbidity, pH, dissolved oxygen, and temperature, with exceedance limits for each. The SMP's FSEIR record contains substantial evidence supporting the conclusion that the measures proposed in the FSEIR would properly minimize the potential for water quality and aquatic habitat impacts, including turbidity, dissolved oxygen levels, and temperature. The Water Quality Monitoring Plan would provide a credible mechanism for monitoring conditions relating to the fish spawning beneficial use and providing measures for corrective action should that be found necessary. The Regional Board has not provided substantial evidence in the findings to support its conclusion that SMP activities would pose a threat to water quality or that the monitoring program already proposed would not be able to address this potential impact.

In as much as SMP work activities affect potential spawning gravel, though not a regulated beneficial use, the FSEIR had the following conclusion:

“By implementing these BMPs, SCVWD is expected to be able to reduce impacts to steelhead. Nevertheless, the Proposed Project would result in residual impacts to this species and its habitats because complete avoidance could not be accomplished while still meeting the project goals for public health and safety directives. This impact would be significant because of the regional rarity of this species and the importance of Santa Clara County creeks to the species (Significance Criteria A, B, and E). Implementation of Mitigation Measure BIO-8 would reduce this residual impact to a less-than-significant level.” (FSEIR 3.3-106)

This conclusion therefore, is the purpose for applying to the federal agency with authority to regulate impacts to salmonids.

Potential impacts on Non-Special-Status Fish and Amphibians were also assessed in the FSEIR and found not to need mitigation beyond that which will be provided for habitat assessed impacts. "Mitigation Measure BIO-1 and Mitigation Measure BIO-2 would require SCVWD to provide compensatory mitigation for impacts to wetland, aquatic, and riparian habitats. This mitigation may take a variety of forms, but all potential mitigation for impacts to those habitats would benefit non-special-status fish or amphibians, either directly or indirectly. Mitigation Measure BIO-1 and Mitigation Measure BIO-2 would result in benefits to these species through wetland, aquatic, and riparian habitat restoration, enhancement, and protection, which would help to maintain water quality, cover, and instream habitat complexity for them. In addition, implementation of Mitigation Measure BIO-9 would increase instream complexity, and thus would be expected to benefit non-special-status fish or amphibians in a manner similar to that described for steelhead. Mitigation Measure BIO-1, Mitigation Measure BIO-2, and Mitigation Measure BIO-9 would be implemented to reduce the impact to non-special status fish and amphibians to a less-than-significant level." (FSEIR 3.3-105)

Indeed, in Finding No. 35 of the TO, the Regional Board states that it has considered the FSEIR for the SMP and finds that the significant environmental impacts of the proposed activities have been identified and mitigated to less than significant levels. Thus, the Regional Board's exclusion from its permit authorization any activities that may result in "disturbance of the stream bed and banks in reaches where there is a reasonable possibility of anadromous fish spawning" in Finding No. 7 is internally inconsistent with Finding No. 35.

In addition, it is unclear from the exclusion language who will be making the determination of whether there is a reasonable possibility of anadromous fish spawning in a reach, or the process and standard by which the determination is to be made.

As the FSEIR concluded that there are less than significant impacts to water quality, the related criterion to the SPWN beneficial use, as well as the potential impacts to non-special-status fish and amphibians, the District therefore believes that Finding No. 7 must be removed from the TO.

Finding No. 35

TO Finding No. 35 reads, "The Regional Water Board, as a responsible agency under [California Environmental Quality Act] CEQA, has considered the [Final Subsequent Environmental Impact Report] FSEIR, and finds that the significant environmental impacts of the proposed activities, which are within the Regional Water Board's purview and jurisdiction, have been identified and mitigated to less than significant levels. The monitoring required in this Order will provide information regarding the effectiveness of the required mitigation measures. In adopting this Order, the Regional Water Board has eliminated or substantially lessened the effects on water quality, and therefore approves the SMP."

The District contends that in light of the current language of Finding No. 7, excluding significant portions of the proposed project area, is not supported by the adopted FSEIR for the project. Specifically, the FSEIR determined that impacts to steelhead from the project as proposed would be less than significant with mitigation. Therefore, a finding that excludes a portion of the project area is not consistent with the conclusion of the FSEIR. As a responsible agency the

Regional Board must therefore, make separate findings that support the language of their permit, and cannot rely on the District FSEIR as adopted. Otherwise, the TO should be revised to be consistent with the December 2011 *FSEIR Stream Maintenance Program Update*, . Again, the District will continue to work with the Regional Board staff on this matter.

Condition No. 64

1. Conflicting Requirements

Condition No. 64a) is the section that applies to maintenance guidelines for both modified and unmodified channels. Subsection ii states, "For channels which may be subject to sediment removal, estimate active (bankfull) channel dimensions or dimensions which can best establish quasi stable hydrogeomorphic conditions that do not cause nuisance or excessive erosion or deposition. These dimensions shall be developed using a combination of information from regional stream restoration curves, reference reach data, computation of effective discharges, shear stresses and other assessments, as well as addressing different reach conditions and constraints. These active channel dimensions shall guide the management approaches contained in the Maintenance Guidelines and inform how to finish grading in reaches undergoing sediment removal."

The District contends that the general language of 64a) conflicts with the requirements of 64b) Modified Channels and 64c) Unmodified Channels, and should be stricken from the TO. Specifically, Condition 64a) prescribes the methodology for developing sediment removal targets for all channels, but requires a quantified methodology. Subsection 64b) requires a similar method for modified channels where the District most often already maintains and utilizes a hydraulic model to develop roughness targets. There is often more information available for modified channels from the original design specifications and it is in these channels that a significant amount of the flood risk occurs. On the other hand, 64c) unmodified channels mostly do not have current hydraulic models, as no capital work has occurred there. This is consistent with the fact that lower flood risk occurs along unmodified channels. As a result of these conditions on unmodified channels, District employs best professional engineering judgment and historic field observations under various conditions, to determine roughness objectives. This approach is consistent with subsection 64c) but not 64a).

Therefore, the District contends that striking 64a) in favor of 64b) and 64c) is consistent with existing District practice and with Regional Board intent to have sediment and vegetation roughness objectives.

2. Duplicative Language

Condition 64a) Subsection iii requires, "a map that shows all maintained channels for modified and unmodified channels types, and identified salmonid habitat and migration corridors, other sensitive habitats and areas with high ecological values, and those channels for which minimum flow capacity and corresponding maintenance requirements are specified with the US Army Corps of Engineers."

The District contends that this section is not needed. All of these elements are found to the degree appropriate in the Maintenance Guidelines that the District is committed to

developing. Thus, to state them in a section that applies to all channels is unnecessarily prescriptive without allowing the District to develop the information required for a specific maintenance reach and channel type. In addition, Finding No. 7 and the elimination of salmonid areas from this permit is in conflict with this requirement.

3. Beneficial Use Criteria

Section 64a)iii requires, "the following shall be notated in the MG [maintenance guideline] and updated as new information and when observations are made. Suggested corrective actions may be included as notations to inform potential futures actions: 3. Channel reaches that do or potentially could function as migration spawning, or high flow refugia habitat for salmonids."

The District contends that for the reasons stated in the section entitled "Finding No. 7," subsection 3 must match the language of Finding No. 7, which would identify channels that could function as high quality habitat suitable for the reproduction and early development of fish. In so doing measurable criteria would need to be established locating spawning habitat protected by the Basin Plan SPWN Beneficial Use.

The District agrees in principal with the objectives of the TO. However, for the previously stated reasons, the District continues to have disagreement with specific language of the TO. More time is needed to work with Regional Board staff to achieve permit language with which both agencies can agree. Therefore, the District respectfully requests continuance of consideration of this TO and resolution to above stated concerns.

Thank you for providing the District the opportunity to comment on this TO. The District has had and continues to have, a good working relationship with staff and looks forward to developing a TO that achieves the objectives of both agencies.

Sincerely,



Norma Camacho
Chief Operating Officer
Watersheds Division

cc: Beau Goldie, Ann Draper, Shree Dharasker, Rita Chan, Sunny Williams--SCVWD
Gary Stern--NOAA Fisheries
Cameron Johnson--Army Corps of Engineer