



DEPARTMENT OF THE ARMY  
SAN FRANCISCO DISTRICT, U.S. ARMY CORPS OF ENGINEERS  
1455 MARKET STREET  
SAN FRANCISCO, CALIFORNIA 94103-1398

September 19, 2016

Mr. Bruce H. Wolfe  
Executive Director  
San Francisco Regional Water Quality Control Board  
1515 Clay Street, Suite 1400  
Oakland, California 94612-1413

Dear Mr. Wolfe:

The United States Army Corps of Engineers, San Francisco District (Corps) appreciates the opportunity to officially comment on the final Tentative Order for waste discharge requirements (WDR) for the Berryessa Flood Risk Management Project (Project). As you know, the San Francisco Regional Water Quality Control Board (RWQCB) already issued a Clean Water Act (CWA) section 401 Water Quality Certification, Pub. L. No. 92-500, as amended, 33 U.S.C. § 1341, on March 14, 2016, (401 Certification) for this Project. And, in reliance on the conditions contained therein, the Corps has awarded a construction contract to complete this necessary flood risk management project. Therefore, the Corps strongly takes issue with the untimely WDR conditions and any indication from the RWQCB that Congress has waived sovereign immunity with regard to the Porter-Cologne Water Quality Control Act, thereby allowing the RWQCB to name the Corps as a Discharger in this WDR.

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C-2

On the one hand, the Corps is disappointed and frustrated with the WDR, especially considering the fact that our two agencies have been closely coordinating on this Project since 2012. On the other hand, we have experienced a successful partnership that culminated in the RWQCB's issuance of the Project's 401 Certification. In issuing it, the RWQCB certified that the Project would not violate State water quality standards and would "comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of [the CWA]." 33 U.S.C. § 1341(a)(1). Thus, the Corps and the RWQCB fulfilled its permissible mandate under the CWA.

C-3

What is most disappointing is the fact that the Corps and the RWQCB staff have thoroughly discussed, many times, all of the issues now presented in this correspondence. During our 401 Certification discussions, the Corps repeatedly informed the RWQCB staff that the practical effect of the provisions found in the WDR would be to inhibit the Project's ability to provide timely flood risk management to the new \$2.3 billion Milpitas BART station and rail line, representing \$900 million in federal funding. First, the acquisition requirements of the unwarranted mitigation requirements could adversely impact the benefit cost ratio of the Project thereby leading to its cancellation. Secondly, the mandate to review the plans and specifications for a Project that is already in construction could result in either a stop work order or termination of the Project depending on the significance of the changes to the plans and specifications deemed necessary by the RWQCB. Presumptively, if the RWQCB wants to review the plans

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C-4-c

and specifications, then it is implicit in that request the potential to demand contract modifications. The RWQCB led the Corps to believe these issues had been resolved with the issuance of the 401 Certification lacking these types of provisions and only mentioning a WDR issuance to the Santa Clara Valley Water District (SCVWD), the non-federal entity charged with operations and maintenance of the completed Project. When the RWQCB released its Administrative Draft WDR on May 6, 2016, the Corps dutifully repeated these same arguments in our May 13, 2016, response and it appears we must now do so again.

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As explained in the Corps' response of May 13, 2016, Congress has only provided a limited waiver of sovereign immunity under the CWA. It is well recognized law that federal projects are "subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous." *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976). While CWA section 401 provides a limited waiver, it in no way gives the RWQCB *carte blanche* to use separate state authority to regulate the very same aspects of the Project already resolved under that Certification. Further, there are several instances where the WDR conflicts with the provisions of the 401 (see Attachment). The RWQCB lacks the authority to modify the 401 Certification or continue to influence the Project through the WDR. The Corps has in good faith fully met its statutory obligations under the CWA section 401, and has full legal authority to complete construction of the Project in compliance with the 401 Certification. The RWQCB's permissible regulatory jurisdiction over the Project is legally limited by Congress to the 401 Certification and does not include the ability to add additional substantive conditions at a later date based on state authority in a WDR.

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C-07

The RWQCB fails to explain its insistence on utilizing public resources to double-regulate this Project, which seeks to provide substantial benefits to the community. The RWQCB is well aware that the Corps conducted a comprehensive environmental impact statement (EIS) with full public and agency review in 2014. If the RWQCB had concerns over the selected Project, then that was the time to have articulated them; however, the RWQCB provided no comment. That analysis determined that the Project would only provide positive benefits to the Project area by: (1) reducing flood risk and the potential for contamination impacts associated with said flooding, (2) providing bank stabilization to prevent sedimentation and improve water quality, and (3) removing invasive vegetation and replacing it with native species.

C-08

Despite its position that it cannot be named as a Discharger on the WDR, the Corps thoroughly reviewed the WDR in the spirit of comity and mutual understanding. In doing so, the Corps discovered numerous errors and inaccuracies in the WDR which have been grouped in the following categories and are detailed in the Attachment: (1) the requirement for mitigation provisions which lack scientific basis, (2) the failure to adhere to the legal boundaries of the limited waiver of sovereign immunity under CWA section 401, (3) the arbitrary and infeasible requirements for various required plans, and (4) technical errors. In addition, since it is clear that the WDR does not reflect full consideration or incorporation of all of the Corps' previous detailed comments, the Corps also incorporates by reference all its previous comments in its May 13, 2016, letter.

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Finally, as noted above, the Corps has relied upon the 401 Certification in the finalization of plans and specifications for our Project. The Corps awarded the construction contract on August 5, 2016, and the contractor will break ground on October 3, 2016. The 401 Certification is in compliance with the intent of the Project as a single purpose flood risk management project for which mitigation is not necessary. Therefore, to the extent that the 401 Certification and the WDR differ, this letter again formally notifies the RWQCB that those conflicting or unauthorized requirements in the WDR are not applicable to the Corps.

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The Corps appreciates the RWQCB's efforts in providing the federal government with a timely 401 Certification. The Corps will continue to fully comply with its provisions. In doing so, the Project will be in full compliance with all applicable environmental laws and regulations. Consistent with the findings in the 2014 EIS, no beneficial uses of Berryessa Creek will be impacted by this Project. In the future, the Corps hopes both our agencies will strive to achieve the type of early coordination typical of our relationship that will hopefully avoid this situation.

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If you have any questions or require additional information, please contact Benjamin Smalley at 415-503-6864 or [Benjamin.smalley@usace.army.mil](mailto:Benjamin.smalley@usace.army.mil).

Sincerely,

  
*for* John C. Morrow  
Lieutenant Colonel, US Army  
District Engineer

Enclosure

**Attachment**  
The Corps' Review Comments of WDR Provisions

The Corps review of the Waste Discharge Requirements set forth by the Regional Water Quality Control Board (RWQCB) identified multiple inaccuracies and inconsistencies that the Corps would like to identify to the RWQCB. The Corps grouped the identified findings into four broad categories; each category provides the thematic rationale behind the Corps' disagreement with the associated portion of the WDR enumerated below.

- (1) The WDR's requirements for mitigation are arbitrary and capricious and not based on science. (Sections 19, 20, 21, 27, 29)

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The WDR calls for extensive maintenance measures none of which were required in the 401 Certification. These extensive maintenance measures are based on unsubstantiated claims that the Project site provides potential habitat for listed species and that the Project will inhibit the beneficial uses that Berryessa Creek (Creek) currently provides. In fact, these claims are not only baseless but contradicted by all existing studies of the site. As the Corps has repeatedly pointed out during our years of coordination, the Project area contains no jurisdictional wetlands and only low-quality habitat. The Project portion of the Creek itself is a manmade creation constructed with an entirely artificial channel shape and flowing two miles farther north than its historic alignment.

Even the U.S. Fish and Wildlife Service's (USFWS) April 26, 2013, Draft Coordination Report conceded that "[t]he highly impacted nature of the creek provides little habitat or diversity for fish and wildlife species in its current state".

C-13-b

As outlined in the EIS, Environmental constraints which would inhibit the development of environmental benefits to the creek include:

1. Adjacent urban development and potential soil contamination
2. Poor water quality
3. Limited flows in long reaches of the channel
4. Lack of riparian zone
5. Limited establishment of aquatic vegetation/habitat due to lack of water availability and sediment movement in the system
6. Almost complete disconnection from the floodplain
7. Uniform aquatic habitat in trapezoidal or rectangular channels
8. Fish passage barriers
9. Poor aesthetic and recreational conditions for human use

Specifically, the Creek upstream of Calaveras Boulevard is an intermittent stream with occasional flows in the winter which are generally turbid due to sediment loading from the surrounding foothills and from bank erosion along the creek. Middle reaches of the creek are dry throughout most of the year. When summer flows are present they are caused by runoff from the watering of lawns, industrial discharges, and limited groundwater discharge. Such low summer

C-14

flows lead to stagnant water conditions, low dissolved oxygen content, and higher water temperatures, all of which contribute to the lack of aquatic species.

The project area vegetation consists of patchy annual grasses separated by bare dirt. The Santa Clara Valley Water District (SCVWD) conducts various required maintenance practices including spraying of herbicides and mowing of vegetation in order to maintain channel flow conveyance capacity, minimize erosion and for fire safety, further limiting the habitat quality and quantity.

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The only portion of the Creek with perennial flow and potentially suitable habitat for small, warmwater fish species is upstream at the confluence with Piedmont Creek. However, this reach has seasonally high water temperatures and low dissolved oxygen that would be lethal to anadromous fish and most other fish species during the summer months. The only fish species likely to be found in the Project area are the mosquitofish and California roach and only in the reach between Calaveras Boulevard and Piedmont Creek where there are constant flows due to the presence of a permitted water discharge source by a water bottling company. Neither the mosquitofish or California roach is State or federally listed, or has any special status.

Endangered species are not known to be present in the Creek. USFWS identified the steelhead as the only endangered species with any capability to use the Creek as habitat; yet, in reality, reaches with a normally dry creek bed, low flows, sheet flows over concrete channels, poor spawning substrate, and physical barriers to passage preclude steelhead migration into the Creek. Further, continuous flows of suitable depth (at least seven inches) for adult steelhead passage occurred for only an estimated two to five days during the two-year flow monitoring study, making steelhead use of the creek virtually impossible.

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The contention that construction of this Project will significantly restrict the beneficial uses of the Creek is completely unfounded. The USFWS stated that "since the stream hydrology would not be permanently affected, the cattails would likely reestablish naturally within a year to 3 years after construction." In addition, since the riprap will be buried and hydroseeded, the Project will improve the aquatic habitat compared to its current state. The WDR even specifically recognizes this effect in section 29 of the WDR findings but fails to give the Project credit for this mitigation.

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The EIS determined that there would be no adverse impacts associated with construction of the Project and therefore no mitigation is necessary. As such, the requirement for 20.2 acres of wetland restoration imposed by the WDR is unsupported by the facts. There is no net loss of Waters of the U.S. or the State and no permanent impacts to the aquatic habitat. The RWQCB fails to reconcile the fact that the Project improves the existing environment with the contention that it also causes permanent adverse impacts to the same Project area requiring extensive mitigation. In addition, there is no legal requirement for the Corps to account and mitigate for non-jurisdictional waters of the State. Even assuming such a requirement existed, 20.2 acres of mitigation land within the Berryessa watershed does not exist, making the mitigation requirement infeasible.

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The Corps requests the following changes:

- Removal of requirements for mitigation beyond what is found in the 401 Certification.
- Acknowledge in section 20 of the WDR findings that the various BMPs and the terms of the 401 Certification fully control and mitigate for any improbable water quality impacts.
- Remove all references to jurisdictional wetlands since the WDR recognizes that none exist in this Project area.

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(2) The WDR fails to recognize the legal boundaries of the limited waiver of sovereign immunity under CWA Section 401, and at times is in direct conflict with the 401 Certification. (Section 4, 10, 11, 16, 17, 23, 24, 25, 30)

It is axiomatic that state regulation of federal activity is only found where and to the extent a clear and unambiguous congressional mandate is found. *Hancock v. Train*, 426 U.S. 167, 178-79 (1976). The Corps does not contest the existence of such a limited waiver of sovereign immunity in the CWA section 401, but rather we point to the fact that the RWQCB has already issued the 401 Certification for the construction of the Project back in March 2016. Now the RWQCB seeks to regulate the very same aspects of the Project it already deemed in compliance with State water quality standards under its limited state authority.

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Even under state law it is questionable whether there is authority to levy the type of requirements found in the WDR. The RWQCB continually points to the Governor's Executive Order W-59-93 (August 23, 1993), which is incorporated into 4.23 of the San Francisco Bay Basin Water Quality Control Plan as justification for the excessive mitigation measures found in this WDR. Executive Order W59-93 provides a policy for ensuring "no overall net loss and long-term net gain in the quantity, quality, and permanence of wetlands acreage and values in California . . ." However, the Order goes on to say these goals should "be achieved through the voluntary participation of landowners . . . [and] not meant to be achieved on a permit-by-permit basis."

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It is unclear how the Executive Order applies to the Project. Not only are there no jurisdictional wetlands present in the Project area but there will be no permanent loss of wetland acreage either. Yet the RWQCB still contends that there are anywhere from 9.81 to 10.1 acres of permanent wetland loss. The RWQCB fails to explain how such a loss is possible when it recognizes that the Project will bring the environment back to its original state, albeit with some added improvements to the environment. One cannot lose permanently what it is gaining. If it is enhancement of wetlands that the RWQCB seeks to impose, then the Executive Order does not provide that authority. The very language of the Order states enhancement should be achieved voluntarily and not on a permit-by-permit basis. Therefore, even if state law applied to the construction of this Project, the Project is in full compliance with the RWQCB's policy of no net loss of wetlands.

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The Corps requests the following changes:

- Removal of the Corps as a discharger in the WDR.
- Removal of requirements to consider and mitigate for waters of the State.
- Removal of the requirement to follow CEQA.
- Removal of the contention that the Project causes a net loss in wetlands.
- Removal of the fee provision. Congress has not waived sovereign immunity with regard to fines under the CWA. See *Energy v. Ohio*, 503 U.S. 607 (1992). The fines provided

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for under the draft WDR may not be applicable to the Corps. The Corps lacks authority to pay them and will not pay them.

(3) The WDR contains arbitrary and infeasible requirements for various plans. (Section 10, 11, 12, 14, 22, 26, WDR Provision 7, 9, 12, 14, 22, and 28)

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The WDR has various requirements for plans, some of which the Corps has repeatedly informed the RWQCB are not necessary and would not be created, which are arbitrary and infeasible.

Specifically, the Corps requests the following changes:

- Removal of Executive Officer approval requirements for all plans. The Corps will not be seeking Executive Officer approval of any plans. It is not appropriate for the RWQCB to insert itself into the federal government's sovereign ability to negotiate and determine contract specifications and modifications. The Corps will provide plans to the RWQCB, when they are complete and for informational purposes.
- Removal of the requirement for a Utilities Plan. The Corps has repeatedly informed the RWQCB that a Utilities Plan is not necessary and one would not be made. All the required utilities' information is already in the design plans which have been provided to the RWQCB. A separate Utilities Plan is superfluous and a waste of public resources.
- Recognize that the Corps provided the Groundwater management plan to the RWQCB on January 26, 2016. We have received no response from the RWQCB. To the extent that the RWQCB believed Executive Officer approval was necessary, a 9 month timeline is not reasonable.
- Removal of the requirement for the following plans prior to construction: Mitigation and Monitoring plan, the Post-construction stormwater management plan, and the Operations and Maintenance manual. These plans, to the extent they are needed, will all be created after construction has begun or is completed. In fact, the time line for providing such plans has already passed since construction will begin on October 3rd. It does not make practical sense to provide plans such as the Operations and Maintenance manual prior to construction because, among other things, changes made during construction may affect such plans or manuals. Creating a version prior to construction would require substantial resources and would invariably be subject to changes once construction is complete.
- Removal of the requirement for the Adaptive Management Plan. We do not have congressional authorization to create an Adaptive Management Plan; therefore, we cannot make one.
- Recognize that the purpose of the Operations and Maintenance manual is for the safety and reliability of the functional performance of the flood risk management of the Project as approved by Congress. The Corps will not be changing the Manual unless there is a change in condition that requires formal initiation of the process by the SCVWD and approval by the Corps. The RWQCB has no authority to change this process.
- Removal of the requirement for a narrative description of changes for plans. No narrative description has been created and none was required in the 401 certification. The RWQCB has been provided 100 percent plans and can ask questions if necessary.
- Removal of the requirement for a lessons learned report. The Corps will not provide the RWQCB with a lessons learned report. To the extent any such report would be made, it would be for internal reasons. The RWQCB fails to provide and cannot provide a

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reasonable basis for requiring the Corps to create a lessons learned report for the RWQCB.

- (4) The WDR contains items that are poorly defined or technically or factually inaccurate. (Table 1, Table 2, Section 3, 5, 6, 15, 16, 18, 20, 25, 28, 31, Discharge Prohibitions 9, 10, WDR provision 13, 15, 16, 19, 20, 24, 27, 30, WDR Attachment A, Figure 3, Attachment C, Item b, Attachment C, Table 1)

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Please fix the following errors:

- There are several provisions of the WDR requiring submission of the 100% design or Planting Plans or refer to older versions of those plans. As the WDR recognizes in its findings section 11, Corps has already provided the RWQCB all required 100% plans. The WDR must be revised to consistently reflect this fact.
- The WDR findings section 3 should be revised to reflect that the cost contributions are for total project construction costs, not "structural flood control features." Further the correct percentages are 25-50%, rather than 35%. Any refunds for the Water District's contributions will be in accordance with the terms of the Project Partnership Agreement.
- Construction will begin in early October and is scheduled to be completed by December 31, 2017.
- Project elements in section 6 should be revised to state that: (1) it may be pre-cast or cast in place box culverts, (2) there are only two concrete access ramps on the right bank only, not three, (3) there are three areas, not two, where there is not space for the left bank road, and (4) the Corps will only replace or realign utilities where necessary.
- Section 11 refers to a ten-year requirement for vegetation monitoring. The 401 section II, Condition 11 required only that Corps "maintain trees and shrubs for five years as stated in the Application." The WDR and Attachment C need to be corrected to be consistent with the 401 Certification.
- At various points, the WDR states incorrect acre impacts. For instance, it states that there are a total of 9.81 acres of impact then it states 10.1 acres as the number. Also, there are references to both 5.92 acres of waters of the State and 5.63 acres of waters of the State. Please correct this inconsistencies.
- The WDR incorrectly states that buried riprap will permanently impact beneficial uses of the Creek. The USFWS stated that the vegetation would reestablish naturally. Again, returning the environment to its current state cannot permanently deprive the Creek of beneficial uses which the current environment sustains.
- Remove section 28. It does not appear to be related to the contents of the WDR.
- The amount of road construction should be separated out between the new and redeveloped.
- Add in to the WDR Section 20 that stormwater areas will be hydroseeded with native grasses to reduce run off and that road runoff will be directed to vegetated channel banks.
- The WDR must distinguish between above grade and buried floodwalls since they have different impacts to the environment.
- There are no jurisdictional wetlands therefore ecoatlas is not necessary or applicable.
- There should not be a requirement for Executive Officer Approval of the Dewatering Plan since the Corps will be abiding by the general permit.
- WDR provision 13 needs to clarify that this applies to imported fill only, not all fill.

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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](mailto: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).

CAB-01

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.

CAB-02

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, 2016<sup>1</sup>, it appears to be possible that no MMP would be available until six months after the proposed start of construction.

CAB-03

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.”

CAB-04

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.

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<sup>1</sup> 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 FEIR<sup>2</sup> 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 informed<sup>3</sup> that its BMPs are routinely used and that suitable, timely nesting surveys are performed prior to

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

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

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CAB-08

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.

CAB-08

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.

CAB-09

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

September 22, 2016

Via e-mail and U.S. Mail

Susan Glendening  
San Francisco Bay Regional Water Quality Control Board  
1515 Clay Street, Suite 1400  
Oakland, CA 94612

**Subject: Re-transmittal of Comments on Waste Discharge Requirements for the Upper Berryessa Creek Flood Risk Management Project**

Dear Ms. Glendening:

Per your request, I am sending a modified copy of the comments on the Waste Discharge Requirements for the Upper Berryessa Flood Risk Management Project, originally sent by the District to the San Francisco Bay Regional Water Quality Control Board on September 19, 2016. Specifically, in order to better distinguish the lines shown on figure 13 of Exhibit 1 – Channel Stability & Geomorphic Characteristics, from each other, the line colors have been modified for clarity. All other aspects of the exhibit, and the overall comment package, remain unchanged.

If you have any questions, please contact me by phone at (408) 630-2035 or by email at [mrichrdson@valleywater.org](mailto:mrichrdson@valleywater.org).

Sincerely,



*For*  
Melanie Richardson, P.E.  
Interim Chief Operating Officer-Watersheds

Enclosures: Revised Comment Package on Waste Discharge Requirements for the Upper Berryessa Creek Flood Risk Management Project, Dated September 19, 2016

cc: N. Camacho, M. Richardson, N. Nguyen, R. Callender, R. Chan, J. Valencia, J. Manidakos, C. Hakes, File



September 19, 2016

Via e-mail and U.S. Mail

Susan Glendening  
San Francisco Bay Regional Water Quality Control Board  
1515 Clay Street, Suite 1400  
Oakland, CA 94612

**Subject: Comments on Waste Discharge Requirements for the Upper Berryessa Creek Flood Risk Management Project**

Dear Ms. Glendening:

The Santa Clara Valley Water District (District) appreciates this opportunity to comment on the tentative order for waste discharge requirements related to the Upper Berryessa Flood Risk Management Project (Project). The District urges the Regional Board NOT to adopt the tentative order for the reasons described in this letter. The tentative order would distract from the watershed-wide planning and habitat enhancements that the District is working on with many agencies, including the Regional Board. The Regional Board would also be responsible, under the California Constitution, for reimbursing the District for the millions of dollars that the District anticipates will cost to comply with the order's conditions. The tentative order is also legally unfounded for several reasons and unnecessary because the Regional Board previously issued 401 water quality certification to U.S. Army Corps of Engineers (USACE) for construction of the Project. Additionally, the tentative order includes numerous factual errors.

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## I. BACKGROUND

The Project is a single-purpose flood risk management project authorized by Congress through the Water Resources Development Act of 1990. The Project includes construction, and then operation and maintenance, of channel modifications and associated structures along 2.2 miles of Upper Berryessa Creek in the cities of Milpitas and San Jose, from I-680 downstream to Calaveras Boulevard, so as to meet Federal Emergency Management Administration (FEMA) certification standards. This Project provides 100-year flood protection for a new Milpitas BART station, a part of the Bay Area Rapid Transit (BART) system expansion project, to extend BART service from Fremont through Milpitas to San Jose. The BART expansion project is a \$2.3 billion (including \$900 million in federal funding) project, and the opening of the new station is expected in late 2017. Delays in this Upper Berryessa Project may result in delays and cost increases in the BART project.

The USACE is responsible for design and construction of the Project, and the District is responsible for acquiring real property rights needed for the project, making the land available to the USACE for construction, and conducting operations and maintenance (O&M) of the creek channel once the Project is constructed and the USACE transfers the Project to the District. The USACE is effectively leasing the District's property for the construction.

Construction of the Project will benefit the environment. It will result in a net increase of 3.18 acres in Waters of the United States, and will not affect jurisdictional wetlands or special status species. The biological value of the increased habitat area would also be improved over existing conditions as non-native and invasive vegetation would be removed and the area seeded with native wetland plant species. Grassland habitat, which the U.S. Fish and Wildlife Service has identified as an important habitat type in this area, would increase in area by 3 acres, and would be seeded with native grass and forbs, replacing the existing predominantly non-native vegetation cover. Finally, the Project would preserve existing upland trees and shrubs wherever possible, and would replace removed native trees and shrubs with native plantings at a 2:1 ratio.

The District is the lead agency under the California Environmental Quality Act (CEQA) for the Project, and the Regional Board is a responsible agency under CEQA. The District prepared a draft environmental impact report (EIR) for the Project. The Regional Board submitted extensive comments on the draft EIR, including on the Project's impacts to waters of the State and on sedimentation. Each of those comments was responded to, and changes were made in the final EIR. The District certified the final EIR in February 2016, finding that impacts to biological resources, soils, hydrology, and water quality (among other issues) would be less-than-significant if mitigation measures identified in the EIR were implemented. No suit or other challenge was filed to challenge the District's certification of the EIR, and the time to do so has now expired.

In 2015, the USACE, who is responsible for the design and construction of the Project, applied to the Regional Board for certification as sole permittee, under Section 401 of the federal Clean Water Act, that the Project does not violate state water quality standards. On March 14, 2016, the Regional Board, through the Executive Officer, issued to the USACE (but not to the District) a "Certification And Waste Discharge Requirements", confirming that construction of the Project, as conditioned in that order, would comply with the federal Clean Water Act and with "applicable requirements of State law." That document also confirmed that construction-related discharges would be regulated by the WDRs contained in State Water Resources Control Board Order No. 2003-0017-DWQ. Paragraph 5 of Order No. 2003-0017-DWQ provides that "[t]hese General WDRs fulfill the requirements of [the Water Code requiring WDRs for persons discharging or proposing to discharge] for proposed dredge or fill discharges to waters of the United States that are regulated under the State's CWA section 401 authority." The Regional Board's March 14, 2016 order thus had the effect of certifying that construction of the Project, as conditioned in that order, was consistent with all applicable laws and was regulated by pre-existing WDRs.

Regional Board staff are now asking the Regional Board to impose on both the USACE and the District new WDRs for construction of the Project. Those draft WDRs include an unnecessary new mitigation project (estimated to cost up to \$20 million) and new conditions that conflict with the ongoing construction of the Project. Those draft WDRs also impose new conditions related to O&M for the Project—even though the Project construction will not be completed until late 2017 at the earliest, the USACE has not yet drafted the O&M Manual for the project, and O&M activities will not occur until many months or years after project construction is completed. The District has repeatedly objected and continues to object to the Regional Board's issuance of new WDRs at this time. The District incorporates all its prior objections to the extent those objections have not been fully resolved.

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## II. THE PARTIES SHOULD FOCUS ON WATERSHED-WIDE PLANNING

As the Project EIR indicates and this letter further explains in Section V below, this specific Project will not impact jurisdictional wetlands and will result in a substantial increase in the quality and quantity of aquatic and upland habitat at the Project area. As a separate effort, the District is developing an integrated water resources master plan (i.e., the One Water Plan) to enable the District to develop its projects using an integrated and watershed-wide approach by considering water supply, flood protection and stream stewardship objectives. The focus will be to identify and implement multi-objective projects that, together, improve the overall health of watersheds and balance the District's aforementioned three mission components. Following development of countywide guidelines and objectives, the District will develop watershed-specific plans for each of its five major watershed areas. The countywide guidance is nearing completion and the plan for Coyote Watershed (within which the Project is located) is under development and is scheduled to be completed by June 2017.

The District is eager to work with and welcomes input from the Regional Board while the District is developing its One Water Plan. Regional Board input and review could include identification of possible metrics and targets to measure progress in improving the watersheds. The District believes that development and implementation of these plans would further the mutual goals of the District and the Regional Board to maintain and improve the quality and beneficial uses in the five watershed areas while allowing the District to fulfill its mandate to provide water supply and flood protection services to the communities and act as stewards for the region's streams. The Regional Board should defer further consideration of this project-specific tentative order, so as to focus on watershed-wide planning.

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Focusing on the entire watershed, rather than just this one Project, is also required by the Water Code. Section 13263(a) requires waste discharge requirements to "take into consideration ... the provisions of Section 13241." Section 13241, in turn, requires consideration of regional issues, such as the "coordinated control of all factors which affect water quality in the area", "[e]conomic considerations", and "[t]he need for developing housing within the region". Because the tentative order considers none of these things, it does not fully comply with requirements in Sections 13263 and 13241.

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## III. THE TENTATIVE ORDER WOULD MAKE THE REGIONAL BOARD RESPONSIBLE FOR MILLIONS OF DOLLARS IN MITIGATION COSTS

The tentative order would impose numerous conditions related to Project construction above and beyond those contained in the Section 401 certification issued to the USACE. Many of those conditions would likely be extremely expensive. The order would require, for example, off-site "restoration" of more than 20 acres of waters or wetlands in the area. (Finding 21; Provision 16.) Such a large project in this area would cost millions of dollars.

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The California Constitution requires state agencies to reimburse local governments for the costs associated with mandates imposed by those state agencies that go beyond whatever mandates federal law imposes. (Cal. Const., art. XIII B, § 6(a).) The California Supreme Court just last month broadly construed this constitutional provision to hold that a Regional Board must reimburse local water agencies for the costs associated with complying with conditions in a waste discharge

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requirement order because those conditions derived from State, not federal, law. (*Department of Finance v. Commission on State Mandates* (August 29, 2016) 1 Cal.5th \_\_\_, no. S214855.)

The conditions in the tentative order that go beyond those contained in the 401 certification are based on State law, not any federal mandate. The 401 certification already found that the project, as certified in that order, would comply with federal law, so any additional requirements in the tentative order could only be derived from the supposed requirements of State law. And the tentative order imposes conditions related to supposed impacts to "waters of the State", which is also a concept found only in State law. Because the tentative order's new conditions go beyond what might be required under federal law, the Regional Board will be responsible for reimbursing the District for all its costs associated with those new conditions.

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If, despite the other objections contained in this letter, the Regional Board nevertheless decides to adopt the tentative order, it should understand that it will ultimately be responsible for the very substantial costs of these new conditions, including all mitigation costs and the fees referred to in Provision 37 (this provision is discussed in Section V below).

#### **IV. THE REGIONAL BOARD DOES NOT HAVE AUTHORITY TO ISSUE WDRS TO THE DISTRICT FOR CONSTRUCTION OF THE PROJECT**

##### **A. Additional Conditions On A Project The Regional Board Has Certified Complies With All Laws Are Unjustified**

The Section 401 certification already found that construction of the Project, as conditioned in that order, "will comply with the applicable provisions" of federal and state law. The Project has not changed since this certification was issued. The Regional Board, having certified that construction of the project complies with all applicable laws, has no legal authority or justification for imposing additional construction-related mitigation conditions on the District or anybody else now.

Regional Board staff's response to this argument is that the certification "explicitly directs that mitigation would be deferred to the WDRs to be considered later this year." Although the certification referred to the *possibility* that the Regional Board might subsequently "consider[]" construction-related WDRs, the certification was not conditioned in any way on the Regional Board issuing additional construction-related WDRs. Nor could the Executive Officer, in such an order, pre-commit the Regional Board to issuing additional construction-related WDRs. Now that the Regional Board is being asked to consider additional construction-related WDRs, it should reject them for lack of legal authority.

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Regional Board staff have also referred to various communications from Regional Board staff in which additional construction-related mitigation was raised. The District has repeatedly objected to additional construction-related mitigation. (See letters dated 30 March, 29 April, and 16 May.) Regional Board staff communications, over the District's objections, do not provide legal authority or justification for additional construction-related mitigation where there otherwise is no such authority or justification.

Regional Board staff have also justified their approach by stating that the 401 certification was "incomplete". But there is no such thing as an incomplete certification. Either a project complies with all applicable law (and is certified), or it does not. The certification here is complete.

**B. The District Should Not Be Named As A Discharger For Construction Of The Project**

The tentative order names both the District and the USACE as a "Discharger" relative to construction of the Project. (Findings 4 and 6.) The District is not a discharger relative to construction of the Project.

The tentative order invokes Water Code section 13263 as the source of the Regional Board's authority to issue WDRs to the District for construction-related discharges. (Finding 21.) Section 13263 authorizes the Regional Board to issue WDRs for a "proposed discharge". But the District is not proposing any discharges related to construction of the Project—the USACE is. Because the District is not proposing any construction-related discharges, Section 13263, on its face, does not authorize the Regional Board to name the District as a construction-related discharger.

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Regional Board staff argue that the District should also be named as a construction-related discharger because the District owns the property on which the Project will be built. But Water Code section 13270 prohibits the Regional Board from issuing WDRs to one public agency for discharges on that agency's property by another public agency.

"Section 13270 prohibits a Regional Board from requiring a report of waste discharge and from issuing requirements to any lessor public agency which leases land to another public agency..." (State Water Board Order WQ 90-3 (San Diego Unified Port District).) Here, because the District, a public agency, is effectively leasing land to the USACE, another public agency, for construction of the Project, Section 13270 prohibits the Regional Board from issuing WDRs to the District for construction of the project on the District's property.

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The Regional Board is already regulating construction of the Project via the Section 401 certification which names USACE as the sole permittee. No good reason exists to now name the District as an additional discharger for construction.

**C. Issuing WDRs To The District Violates CEQA**

**1. CEQA Guidelines Section 15096 Prohibits The Regional Board From Second-Guessing The Environmental Analysis Of The Lead Agency**

CEQA also significantly restricts the Regional Board's authority to impose mitigation measures arising from impacts that the certified EIR found to be less-than-significant. Section 15096(e) of the CEQA Guidelines provides that, if a responsible agency thinks that a certified EIR is "not adequate for use by the responsible agency", then it "must" either: (i) "[t]ake the issue to court within 30 days", or (ii) prepare a subsequent EIR "if permissible under Section 15162", or (iii) assume the lead agency role per Section 15052(a)(3). If the responsible agency does not take one of these three actions, it shall "[b]e deemed to have waived any objection to the adequacy of the EIR". (Section 15096(e)(2).) If the responsible agency does not challenge the EIR, then "the responsible agency must consider the environmental effects of the project as shown in the EIR". (Section 15096(f), emphasis added.) These provisions leave no room for a responsible agency to second-guess the EIR's findings about less-than-significant environmental impacts beyond the three ways specified in Section 15096(e).

Regional Board staff appear to read Section 15096(g) to allow the Regional Board, when acting as a CEQA responsible agency, to find significant effects, and impose additional mitigation measures,

even if the EIR finds those effects to be less-than-significant, and without taking any of the actions listed in Section 15096(e). (See Finding 26 (quoting Section 15096(g)(2)).) But Section 15096(g) does not say this. Subsection (g)(1) begins by noting that a responsible agency's role "is more limited than a lead agency." The responsible agency's authority to review "any significant effect the project would have on the environment" can only be referring to significant effects *identified in the lead agency's EIR*, not to effects the responsible agency might think are significant but which are not identified as such in the EIR. The District's interpretation is bolstered by the fact that CEQA prescribes that, where a project is to be carried out or approved by more than one agency, "the determination of whether the project may have a significant effect on the environment shall be made by the *lead agency*." (Pub. Res. Code § 21165(a), emphasis added.) To read Section 15096(g) any other way would deprive Section 15096(e) (which deems objections to the EIR "waived" unless the other steps in that paragraph are taken) and Section 15096(f) (which requires the responsible agency to consider the environmental effects "as shown" in the EIR) of all meaning.

In short, the Regional Board may not adopt additional mitigation for the Upper Berryessa project for impacts identified in the EIR as less-than-significant without at least taking one of the three actions in Section 15096(e). Otherwise, the Regional Board is deemed to have waived any objection to the EIR's findings about less-than-significant impacts and to the adequacy of the EIR's mitigation measures, and the Regional Board cannot impose additional mitigation.

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The case law on this issue squarely supports the District. The only published case to interpret Section 15096, *Ogden*, turned on whether a responsible agency could second guess the lead agency's determination that an impact was less than significant without taking the steps identified in Section 15096(e). (*Ogden Env't'l Serv. v. City of San Diego* (S.D. Cal. 1988) 687 F.Supp. 1436, 1450-1452.) *Ogden* found for the lead agency, holding that if the responsible agency believes that the lead agency's environmental review was inadequate; the responsible agency "must take the necessary steps to challenge the lead agency's findings or otherwise be deemed to have waived any objection." (*Id.* at 1451, citing Section 15096(e).) Because the Regional Board has not taken any of the necessary steps to challenge the District's findings about less-than-significant impacts on waters, the Regional Board is deemed to have waived any objection.

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Another case held that a responsible agency violated CEQA by not giving adequate consideration to the lead agency's EIR. (*RiverWatch v. Olivenhain Mun. Water Dist.* (2009) 170 Cal.App.4th 1186, 1207.) To reach that result, *RiverWatch* applied the rule that a responsible agency "must consider the environmental effects of the project *as shown in the EIR*", and that, before approving the project, the responsible agency must "find either that the project's significant environmental effects *identified in the EIR* have been avoided or mitigated, or that unmitigated effects are outweighed by the project's benefits." (*Id.*, emphasis added.) *RiverWatch* does not authorize responsible agencies to second guess the findings in the EIR; rather, *RiverWatch* effectively cautions responsible agencies, such as the Regional Board, against second guessing the findings in the EIR.

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Adopting the tentative order without taking any of the steps in Section 15096(e) would violate CEQA.

## 2. CEQA Requires The Regional Board To Conduct Environmental Review Of The Large Project Regional Board Staff Is Proposing

The certified EIR concludes that both temporary and permanent impacts on waters would be less than significant. Putting aside that the Regional Board could have but did not challenge the certified EIR, and even assuming, for the sake of argument, that the Regional Board has authority to impose additional mitigation for impacts on waters (which the District contends it does not), CEQA requires the Regional Board to conduct additional environmental review before adopting WDRs with additional mitigation. The off-site mitigation that would be required by the tentative order includes the "restoration" of more than 20 acres of "riverine wetland area." (Finding 21; Provision 16.) Such a large off-site mitigation project is likely to have significant environmental effects; its ostensible purpose is to mitigate for other supposed significant environmental effects of the Project on waters. This is a "project" under CEQA for which the Regional Board would have to conduct environmental review before imposing. (See *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 401 ("mitigation measures must be discussed in an EIR").)

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The tentative order contains none of the findings required by CEQA, and gives no reason why any exemption or exclusion should apply—and the District is aware of none.

Regional Board staff have suggested that, if additional environmental review is required, it will be up to "the District to prepare CEQA documentation." The District respectfully disagrees. The District, as the lead agency, has already approved the project as-is. If additional environmental review were required at this point because the Regional Board has identified new significant effects or proposed substantial project changes as mitigation, such review would be the Regional Board's responsibility. (See CEQA Guidelines § 15162(c) (after project approval by lead agency, "a subsequent EIR or negative declaration shall only be prepared by the public agency which grants the next discretionary approval").) Failure by the Regional Board to conduct additional environmental review before adopting the tentative order would violate CEQA.

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### V. THE WDRS ARE FLAWED

#### A. The Tentative Order Overestimates 'Waters Of The State'

Finding 18 in the tentative order claims that the Project will affect 10.1 acres of waters of the State. This conflicts with the finding in the certified EIR, which found less than 5 acres of affected waters of the State. The Regional Board does not have authority to second-guess the findings in the certified EIR. (See Section IV.C.1 above.)

Included in the 10.1 acres of "waters of the State" alleged in the tentative order is a non-wetland "area of 5.92 acres from the ordinary high water mark elevation to the tops of banks". There is no authority supporting the assertion that *non-wetland* areas above the ordinary high water mark are "waters of the State". The Water Code defines "waters of the State" as "any surface water or groundwater". (Water Code § 13050(e).) No regulations exist further refining this definition. The statutory phrase "surface water or groundwater" cannot reasonably be interpreted to include non-wetland areas above the ordinary high water mark. This area is not waters of the State.

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What is more, the tentative order's proposed mitigation ratios of 1.5:1 (for temporary impacts) and 2:1 (for permanent impacts) in Finding 21 and Provision 16 are arbitrary and not supported by

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evidence. There is no basis for mitigation ratios greater than 1:1. Section 4.23 of the Basin Plan provides that the "Water Board will evaluate both the project and the proposed mitigation together to ensure that there will be no net loss of wetland acreage and no net loss of wetland function." As shown elsewhere in this comment letter, the Project will not impact wetlands at all, and will improve other aquatic habitat. Because there will be no net loss of wetland acreage or function, and aquatic habitat will be improved, no mitigation is appropriate. There is certainly no basis for mitigation ratios of 1.5:1 or 2:1.

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#### **B. There Needs To Be Standards For All Submissions**

Numerous provisions of the tentative order require plans or communications containing, but "not limited to", certain information. (See, e.g., Provisions 15, 15.f.vii, 16, 16.b, and 19.) Another provision would require notification to the Regional Board "whenever an adverse condition occurs as a result of this discharge", and defines "adverse condition" to include, but not be "limited to", certain events. (Provision 30.) The tentative order then threatens serious penalties for violation of any provision. These kinds of penalties would be "criminal in nature". (See *Tull v. United States* (1987) 481 U.S. 412, 418-421 (discussing analogous civil penalties under federal Clean Water Act).)

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Due process requires that, before imposing criminal sanctions, the offense must be defined with "sufficient definiteness that ordinary people can understand what conduct is prohibited". (*Skilling v. United States* (2010) 561 U.S. 358, 402 (quoting *Kolender v. Lawson* (1983) 461 U.S. 352, 357), internal brackets, numbers, and quotation marks omitted.) The open-ended provisions in the tentative order that include, but are "not limited to", certain requirements, do not define in advance with sufficient definiteness what must be done to comply. These provisions violate due process and are invalid.

#### **C. The Sedimentation Analysis Is Flawed**

The tentative order would find that the Project will make the system more depositional and thereby cause sedimentation problems. (Finding 16.) However, studies and observations by the District strongly suggest that the assumptions in the tentative order about current conditions are flawed in that current conditions are erosional, so making the system more depositional would bring the system closer to equilibrium. Sediment transport modeling and analysis on the Project design by Tetra Tech also show a system closer to equilibrium after the Project is completed.

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Bringing the system closer to equilibrium should reduce the need for O&M in this case. The District's Hydrology, Hydraulics, and Geomorphology Unit has prepared technical memoranda (attached as Exhibits 1 and 2) explaining these sedimentation issues, and responding to Regional Board staff's analysis of this issue.

#### **D. The Tentative Order Includes Errors, Omissions, And Problematic Conditions**

The tentative order contains numerous other errors, omissions, and problematic conditions. Those are described here:

**1. Finding 3**

This finding incorrectly states that both the USACE and the District will be responsible for Project construction. Only the USACE will be responsible for Project construction.

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**2. Finding 4**

This finding incorrectly states that the District is a "Discharger" collectively with the USACE. The District is not a construction-related discharger (see Section IV.B above), and is not currently proposing any discharges associated with operations and maintenance.

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**3. Finding 5**

This finding incorrectly states that construction of the Lower Berryessa Creek and Lower Calera Creek Flood Protection Improvements Project will be completed in October 2017. The current schedule shows completion of that Project (except for revegetation planting) in October 2018.

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**4. Finding 6**

Finding 6 incorrectly states that the mitigation and monitoring requirements are necessary for the compliance with federal and state regulations. There are no federal monitoring requirements, and no additional construction-related mitigation is appropriate.

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**5. Finding 6.e**

This finding incorrectly states that the Project will include a third ramp, downstream of the Montague Expressway crossing. The Project will include construction of only two ramps, both located upstream of the Montague Expressway crossing.

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**6. Finding 6.i**

Finding 6.i could be read to suggest that the Project will replace and realign all utilities within the Project right-of-way. This overstates the Project impact. Only utilities directly affected by construction will be replaced or realigned; that replacement or realignment will be performed by the USACE as part of Project construction.

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**7. Finding 6 Table 1**

This finding incorrectly lists the area of ramps as 0.01 acre. The correct area is 0.1 acre.

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**8. Findings 7-9**

As a general matter, since both USACE and the District are named as "dischargers", the tentative order fails to make clear which of the two agencies would be responsible for complying with the conditions. Findings 7-9 fail to state what organization will be performing the tasks described in these sections. The USACE will be performing these tasks.

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## 9. Findings 10-15

Finding 10 requires submission and approval by the Executive Officer of a number of plans before the beginning of construction. First, there is no legal basis for the submission of additional construction-related plans. (See Section IV above.) Second, construction is scheduled to begin before the Regional Board's consideration of the tentative order; thus, even if adopted, the submittal of these plans prior to start of construction would be infeasible.

With respect to utilities plan (see Finding 12), Regional Board staff considered, but ultimately rejected, conditioning the Section 401 certification on the submission of a utilities plan. So there is no basis to require such a plan now, when that plan was not previously included in the 401 certification.

With respect to dewatering plan, after noting that the groundwater management plan only addressed the Jones Chemical site, Finding 14 indicates that the order will require submission and implementation of "a complete Dewatering Plan that meets the minimum criteria outlined in Provision 9, acceptable to the Executive Officer." The 401 certification simply requires submission of a dewatering plan consistent with EIR Mitigation Measure WAQ-B and USACE's 90 percent specifications with no reference to acceptance by the Executive Officer. As described above, the Regional Board has no authority to require a construction-related dewatering plan, because it has already required one in the 401 certification—especially one that includes broader requirements than the one required in the 401 certification. However, the District understands that USACE will prepare a dewatering plan for the entire project area.

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The District also notes several discrepancies related to these findings. For example, note Provision 9 requires dewatering plan to be submitted 30 days prior to start of dewatering activities, which is inconsistent with the due date stated in Finding 10, which requires the listed plans to be submitted before the beginning of construction. Similarly, Provision 12 requires post-construction stormwater management plan to be submitted no later than 60 days prior to construction, which is inconsistent with the "before construction" due date in Finding 10. Also, Finding 10 fails to mention that USACE submitted a project groundwater management plan to the Regional Board on or about January 26, 2016.

## 10. Finding 16

This finding makes incorrect statements about sedimentation. (See Section V.C above.)

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This finding incorrectly states that development of the O&M Manual will be a "collaboration of the Water Board and other appropriate state agencies." The USACE alone will be developing the O&M Manual. Other statements throughout this finding about what the O&M Manual will set, include, or adapt are premature or already specified in the Section 401 certification.

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This finding notes that the tentative order would authorize the District to conduct maintenance consistent with the District's existing Stream Maintenance Program. The USACE has yet to draft the O&M Manual. Depending on what the O&M Manual calls for, the District may need to approach the Regional Board for modifications to the tentative order. In addition, the statement that "... compliance with this Order will be determined by compliance with the terms of this Order" does not make logical sense.

**11. Finding 17**

This finding refers to submittal of an adaptive management plan to guide future maintenance activities. Note that Finding 10 requires such a plan to be submitted before construction, which is inconsistent with the requirement in Provision 15 to submit the plan no later than 6 months after the tentative order.

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**12. Finding 19**

Finding 19 speculates that the project area "provides potential habitat for rare or endangered species." This finding is not supported by any evidence and contradicts the Final EIR and the U.S. Fish and Wildlife Coordination Act Report (CAR). With regard to federally protected species, the CAR states "The [USACE] has determined that the project would have no effect on federally-listed threatened or endangered species, and therefore no further consultation is required with the Service or NOAA Fisheries." With respect to state-protected species, the CAR states "The [USACE] has determined that due to the limitations in suitable habitat, the project would have no effect on State-listed species as well." Section 3.5.5.1 of the Final EIR analyzes the potential for the proposed project to "have a substantial adverse impact on, either directly or through habitat modification, on any species identified as candidate, sensitive, or special status in local or regional plans, policies, or regulations or by the CDFW, or USFWS." The Final EIR concludes that impacts from construction and operation of the project would be "less than significant". Similarly, Section 5.5.3.3 of the Final EIS for the Project states that it "would not substantially modify the existing habitat or adversely affect Federal and State listed species, therefore would have a less than significant effect." The Draft WDR improperly ignores these findings, which are based on intensive biological field investigations of the project area, and baselessly asserts that the project would affect protected species.

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**13. Finding 20**

This finding describes construction-related impacts. The District is not responsible for construction, and the Regional Board has no authority to impose conditions on the District related to construction. (See Section IV above.).

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Finding 20 states that the project will result in permanent impacts to waters of the State and waters of the United States. This assumption of permanent impact is contrary to the findings of the EIR, which found that impacts to waters would be less than significant, and to those of the USFWS CAR, which states "Based on our review, the proposed project would result in the temporary loss of habitat acreage and value for species inhabiting emergent wetland and annual grassland habitat. Wildlife species utilizing these areas would be displaced during construction activities and would likely return to the area following the completion of the project."

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This finding also incorrectly states that buried rock riprap in the creek bed will permanently impact beneficial uses of the creek. While construction disturbance of the creek will result in a temporary impact to in-stream habitat, after construction is complete the rock riprap will be covered with native soil and seeded with native hydrophilic vegetation. This will result in an improvement in habitat compared to the existing condition. As stated in the certified EIR, the project will benefit the following beneficial uses of the creek designated in the Basin Plan: warm freshwater habitat (WARM) and wildlife habitat (WILDLIFE). The Regional Board does not have authority to second-guess that finding. (See Section IV.C.1 above.)

**14. Finding 21**

This finding refers to a requirement for submission of a Mitigation and Monitoring Plan (MMP) prior to the start of construction; however, this is not consistent with the Plans and Reporting Requirement section of the 401 certification. The specified due date is also inconsistent with Provision 16 in the tentative order which states that the MMP shall be submitted no less than six months from the date the order is adopted. The Regional Board also has no authority to impose additional construction-related conditions now. (See Section IV above.)

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Paragraph 1 of this finding cites policies for mitigation impacts to jurisdictional wetlands. But wetland delineation studies performed in 2015/2016 found no jurisdictional wetlands to be present in the project area. The results of these investigations are summarized in section 3.5.2.7 of the Final EIR for the project and the entire wetlands delineation report is reprinted as Appendix C of the Final EIR. The Section 401 certification acknowledged (Finding I) that "[n]o jurisdictional wetlands are in the Project." No jurisdictional wetlands are present in the Project area, and none will be impacted.

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Paragraph 2 of this finding fails to consider or quantify features of the Project design that will offset and mitigate impacts of Project construction to habitat included in Waters of the United States and State. For example, the project will create 16.0 acres of habitat within Waters of the U.S. and State. Section 3.5.5 of the Final EIR analyzes in detail the potential impacts of the proposed project on habitat. The proposed project would result in a net increase of 3.18 acres in Waters of the U.S. The habitat value of this increased area would also be improved over baseline conditions as non-native and invasive vegetation would be removed and the area seeded with native wetland plant species. Additionally, grassland habitat, which the USFWS identified as an important habitat type in the CAR, would increase in area by 3 acres, and would be seeded with native grass and forbs, replacing the existing predominantly non-native vegetation cover. Finally, the project would preserve existing upland trees and shrubs wherever possible, and would replace removed native trees and shrubs with native plantings at an overall ratio of 2:1. Overall, the project would result in a substantial increase in habitat acreage, and replacement of the predominantly non-native species now present within those habitats with native plantings, which will be maintained to ensure they thrive.

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Paragraph 5 of this finding requires ten years of monitoring and reporting for mitigation tree/shrub plantings, which exceeds the five years of monitoring required by the Regional Board and CDFW for the Lower Berryessa Creek and Lower Calera Creek Flood Protection Improvements Project (see CIQWS Place no. 768945 (MB), SAA 1600-2013-0159-R3). Furthermore, this is inconsistent with the 5 year maintenance requirement under the condition 11 of the 401 certification.

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This finding also refers to a requirement for off-site mitigation for construction-related impacts. The Regional Board does not have authority to impose these conditions on the District now. (See Section IV above.)

S-46

**15. Finding 22**

Finding 22 refers to requirement for monitoring and technical reports. The Regional Board has no authority to impose additional reporting conditions related to construction on the District now. (See Section IV above.) This finding also does not clarify responsibility for particular reports.

S-47

**16. Finding 23**

Finding 23 incorrectly asserts that the project 401 Certification states that the WDR will address "an off-site mitigation plan". The project 401 Certification does not require or discuss off-site mitigation for project impacts. In fact, the Final EIR finds that on-site plantings will mitigate for all project impacts to habitat.

S-48

**17. Finding 25**

Finding 25 incorrectly lists the mitigation measures that the Project EIR has identified to mitigate the significant impacts to less-than-significant levels. This finding includes the following measure which is not contained in the EIR: pre-construction aquatic life and wildlife surveys. This measure was not included in the EIR because the environmental impact analysis concluded that the Project would not result in significant impacts on any special status aquatic or wildlife species.

S-49

**18. Findings 28, 30**

These findings cite the Basin Plan Wetlands Fill Policy and the California Wetlands Conservation Policy. But no jurisdictional wetlands are present in the project area and the project will not impact wetlands. These policies cannot legally be applied to the Project.

S-50

**19. Provisions**

The Regional Board does not have authority to impose any provisions related to construction. (See Section IV above.)

S-51

Provisions 6, 8, and 9 do not clarify that the USACE will be performing project construction and will be the sole discharger during the project construction phase.

S-52

Provision 9, 12, 15 and 16 all have submission due dates that are inconsistent with the due date specified in Finding Section 10.

S-53

Provision 8 contains requirements for a construction-related utilities plan. As described above, the Regional Board considered but ultimately did not include a requirement for a utilities plan in the 401 certification, and it does not have authority to now impose construction-related conditions. (See Section IV above.)

S-54

Provision 9 contains requirements for a construction-related dewatering plan, but dewatering was already addressed in the 401 certification, and the Regional Board does not have authority to impose construction-related conditions now. (See Section IV above.)

S-55

Provision 12 states that the post-construction stormwater monitoring plan is due 60 days prior to start of construction. This was not a requirement under the 401 certification and, to the extent it is intended to require a stormwater monitoring plan for in-channel construction work, may not be legally imposed as a construction-related condition now. (See Section IV above.) Construction is also scheduled to begin before the Regional Board's consideration of the tentative order so, even if adopted, the condition would be infeasible.

S-56

Provision 13a requires extensive testing for contaminants for all "imported soil fill material." Planting soil or soil amendments used during Project revegetation will be obtained from commercial sources and will be free of contaminants.

S-57

Provision 13a also requires submission of the Adaptive Management Plan six months after the order would be issued, which is before the project Operations & Maintenance (O&M) Manual will be available. This condition would be infeasible because adaptive management principles need to be incorporated into the O&M Manual for this management approach to be effective. The Adaptive Management Plan and the O&M Manual must dovetail, which will require the simultaneous and integrated preparation of the two plans.

S-58

Provision 15, Part F requirements are based off the incorrect assumptions about sedimentation in Finding 16. (See Sections V above.)

S-59

- Part F, i: Part A would require surveys to be conducted and analyzed periodically, which conflicts with the thresholds here of five 2-yr events, one 10-yr event, or to evaluate whether flow events have occurred that can enable sedimentation analysis, as this would be done every time a survey is performed. Other projects, like the Lower Silver Creek capital project (Order R2-2002-0012), have required merely a downscaled geomorphology report that summarizes how the channel is behaving every few years (i.e., is the channel incising/aggrading?) with the type of data collected in Part A.
- Part F, ii: It is extremely difficult to determine sedimentation rates, both pre-project, and post-project. This requirement assumes that sedimentation will occur and sediment removal can be used as quantitative data, which will not be the case (current or in the future).
- Part F, iii and iv: These requirements for analyses on the UPRR bridges and stage-discharge relationships are unnecessary. Since cross section and profile monitoring will already be performed to determine capacity and sedimentation processes for O&M, conclusions about aggradation and degradation would already be known.

S-60

S-61

S-62

Provisions 16.a and 19 refer to an undefined mitigation project to mitigate for wetlands impacts even though the Project will not impact jurisdictional wetlands. There is no authority or justification for these provisions. The Regional Board would also need to comply with CEQA before committing to such a project. (See Section IV above.)

S-65

Provision 18 requires pre-construction surveys for aquatic life and wildlife. However, the certified EIR determined that no significant impacts would result to aquatic life or wildlife, and the Regional Board does not have authority to second-guess that EIR finding. (See comment on Finding 19, and Section IV, above.) Construction is also scheduled to begin before the Regional Board's consideration of the tentative order so, even if adopted, the condition would be infeasible.

S-66

Provision 28 requires submission of as-built drawings eight weeks after completion of construction, which is insufficient to complete these complex drawings. The Regional Board lacks authority to impose additional construction-related conditions now. (See Section IV above.)

S-67

Provision 37 requires the discharger to pay fees. There is no authority under the Water Code for requiring the District to pay fees. In any event, the Regional Board would be responsible for any fees the District might be required to pay. (See Section III above.)

S-68

**20. Attachment A**

Attachment A, Figures 2 and 3, use the terminology "Channel Bed rock armoring," which fails to account for the fact that the rock will be covered with native soil and vegetated. "Vegetated buried bed and bank rock" more accurately describes the proposed Project.

S-63

Attachment A, Figure 3, incorrectly shows the upstream boundary of vegetated buried bed and bank rock.

S-64

**21. Attachment C**

Attachment C, item b requires plantings based on the outdated 2013 U.S. Fish and Wildlife Service Coordination Act Report. The certified EIR's Mitigation Measure BIO-B for replacement plantings of native trees and shrubs already addresses this issue. The Regional Board does not have authority to second-guess the EIR. (See Section IV.C.1 above.)

S-69

Attachment C, item c requires irrigation of wetlands plantings. The Project does not include wetlands plantings and none are necessary to mitigate project impacts.

S-70

Performance standards contained in Attachment C, Table 1, Grass and aquatic hydroseed area exceed those approved by RWQCB and CDFW for Lower Berryessa Creek and Lower Calera Creek Flood Protection Improvements Project (see CIQWS Place no. 768945 (MB), SAA 1600-2013-0159-R3). It is not possible to maintain non-native vegetation to 10% in this area where abundant amounts of non-natives are growing in the urbanized areas surrounding the creek and provide continuous input of non-native seeds. The following standards were approved by CDFW and RWQCB for the Lower Berryessa Creek and Lower Calera Creek Flood Protection Improvements Project:

S-71

- Year 1: 40% cover
- Year 2: 50% cover
- Year 3: 60% cover
- Year 4: 70% cover
- Year 5: 70% cover

Maintain invasive (but not non-native) plants  $\leq$  10%

Attachment C, Table 1 addresses riparian plantings. The Project will not impact riparian trees/shrubs and does not include riparian planting.

S-72

Attachment C, Table 1 addresses Seasonal wetland communities at the off-site mitigation area. The project will not impact jurisdictional wetlands and does not include off-site mitigation for impacts to seasonal wetland communities. The Regional Board lacks authority to require off-site mitigation. (See Section IV above.)

S-73

**VI. PROCEDURAL REQUIREMENTS**

The Regional Board's consideration of the tentative order is an adjudicatory proceeding. As such, certain procedures required by due process should be followed.

**A. Right Of Reply**

If, after receiving this comment letter, Regional Board staff intend to advance additional arguments, documents, or evidence, then the District requests that it be given a reasonable amount of time to review those additional materials and reply to them before any hearing.

S-74

**B. Hearing**

The District requests a hearing on the tentative order, with the right to call witnesses and to cross-examination.

S-75

**C. Separation Of Functions And Ex Parte Communications**

When acting in an adjudicatory proceeding, agencies must institute an internal separation of functions between prosecutors, decision-makers, and the decision-makers' advisors, and prohibit ex parte communications between them. (*Morongo Band of Mission Indians v. State Water Res. Control Bd.* (2009) 45 Cal.4th 731,737-739; *Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 10-15.) Although the District has previously asked, Regional Board staff have yet to explain how the Regional Board will implement these requirements here, and which people will serve each function. Those questions need to be answered.

S-76

**VII. CONCLUSION**

Based on the reasons stated above, the tentative order should be rejected. The District shares the Regional Board's interest in protecting water quality of the state. In lieu of issuing a costly and legally unfounded WDR, the District invites the Regional Board to participate in the watershed-wide planning underway as part of the District's One Water Program. The District believes that the watershed-wide planning approach is a comprehensive and more effective approach for the two agencies to work together collaboratively towards furthering our mutual goal of achieving water quality objectives.

S-77

S-78

If you have any questions, please contact me by phone at (408) 630-2035 or by email at [mrichardson@valleywater.org](mailto:mrichardson@valleywater.org).

Sincerely,



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

Enclosures: Exhibit 1 – Channel Stability & Geomorphologic Characteristics  
Exhibit 2 – Responses to RWQCB Memo for Project Team

cc: N. Camacho, M. Richardson, N. Nguyen, R. Callender, R. Chan, J. Valencia, J. Manidakos, C. Hakes, File



# TECHNICAL MEMORANDUM

## EXHIBIT 1

**PROJECT:** Upper Berryessa Flood Protection Project      **DATE:** July 20<sup>th</sup>, 2016  
**SUBJECT:** Channel Stability & Geomorphologic Characteristics  
**PREPARED:** Jack Xu, PE, CFM

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### 1. PURPOSE

The purpose of this report is to summarize current Upper Berryessa channel geomorphology and its potential impacts to the current proposed project.

### 2. EXISTING CREEK MORPHOLOGY

To determine the existing geomorphology of Upper Berryessa, several analyses were performed:

- Review of existing literature.
- Field visit to characterize the current creek state.
- Historical comparison of channel geometry.

These analyses will focus in general on sedimentation and degradation issues, since any plan form movement of the creek has not been allowed in recent history due to urbanization and right of way constraints, and is also not applicable to the project.

### **LITERATURE REVIEW**

In 2009, Colorado State University completed a geomorphic assessment<sup>1</sup> of Berryessa Creek. This study stopped upstream of I-680, which is just upstream of the Upper Berryessa Flood Control Project reach (Figure 1).

In the study, Jordan compared historical construction drawings from the District<sup>2</sup>, as well as from the US Army Corps<sup>3</sup>, with a 2004 survey of the channel profile. The findings show a generally degradational trend for the creek from the 1960's to the mid 2000's for Berryessa Creek reaches upstream of I-680 (Figure 2).

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<sup>1</sup> B.A. Jordan, W.K. Annable, and C.C. Watson. Colorado State University. An Urban Geomorphic Assessment of the Berryessa and Upper Penitencia Creek Watersheds in San Jose, California. April 30, 2009.

<sup>2</sup> Santa Clara County Flood Control and Water District (SCCFCWD) (1967). Report on Channel Improvements on Berryessa and Tularcitos Creeks, Zone E-1, Projects 40017 and 40040.

<sup>3</sup> United States Army Corps of Engineers (USACE) (1993). Coyote and Berryessa Creeks, California Berryessa Creek General Design Memorandum.



Figure 1: Upper Berryessa Creek Project Location Map

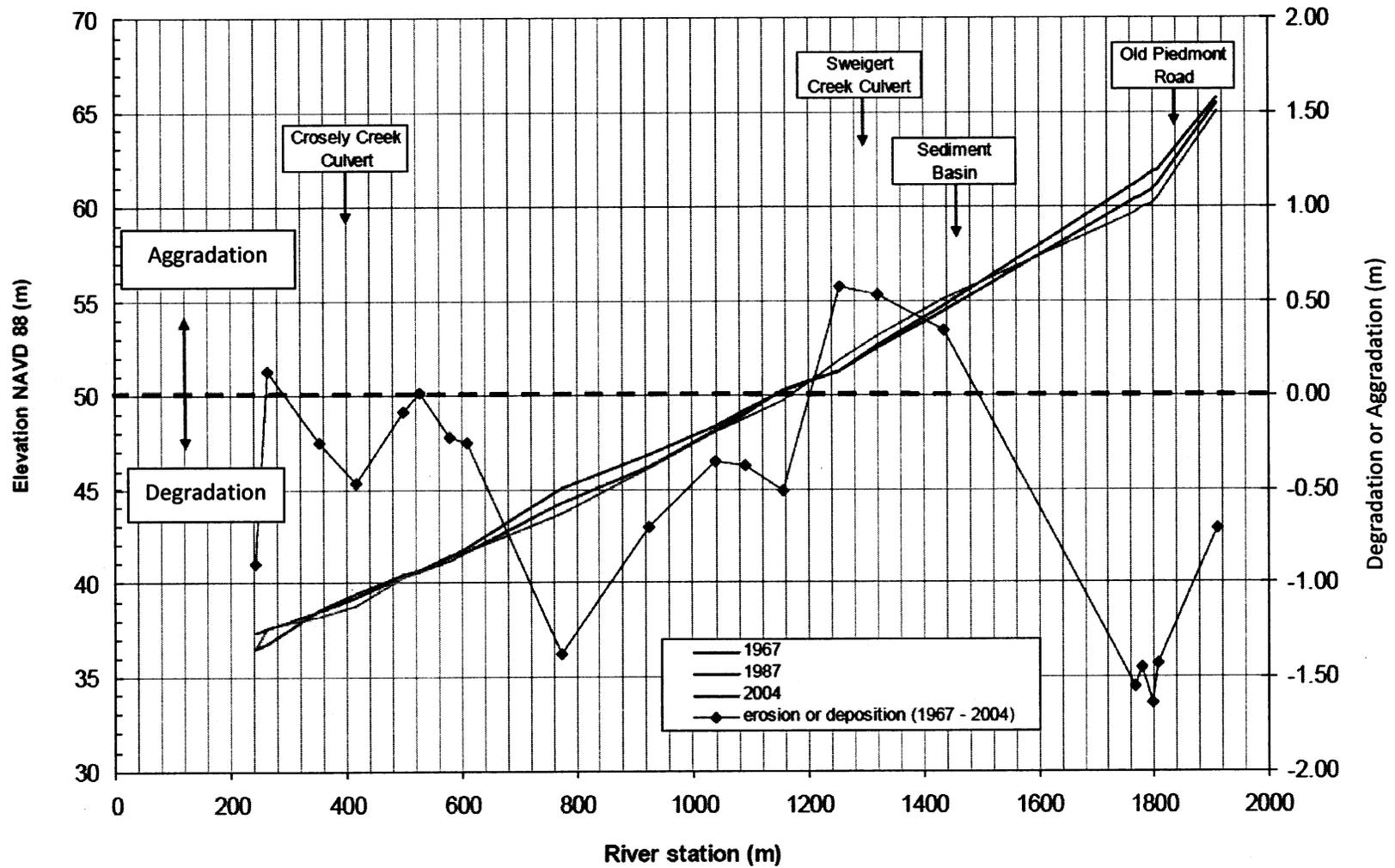


Figure 2: Berryessa Historical Longitudinal Profile (Piedmont to I-680 from Jordan 2009)

**FIELD VISIT**

District staff visited the Upper Berryessa project reach in the summer of 2016 to collect field observations on existing creek behavior. The following observations overwhelmingly point to a channel that has incised. Figures 3A and 3B show local erosion attributed to incision.



**Figure 3A:** Bank erosion upstream of Montague Expressway



**Figure 3B:** A deep and narrow low flow channel near Piedmont Creek

Figures 4A, 4B, and 4C are storm sewer outfalls. 4A and 4B are located upstream of Los Coches Street. The lighter sackcrete (newer) outfall seems to tie in properly with the channel, indicating at least some length of stability. The darker sackcrete (older) outfalls to a high bench and has a 3' drop where there is no sackcrete reinforcement, indicating that the channel has incised over this time. Figure 4C is upstream of Montague Expressway, and it is evident the entire outfall structure has collapsed from its original location due to the channel bed dropping.



**Figures 4A, 4B, and 4C (left to right): Storm Sewer Outfalls**

Figures 5A and 5B depict the end of a 90 degree bend in Berryessa Creek just upstream of Montague Expressway. This bend is a concrete trapezoid channel, which then drops into the current natural channel that has incised up to this point. The concrete bottom acts as a grade control structure, preventing the head cut from progressing upstream.



**Figure 5A:** 2.5' Drop upstream of Montague Expressway



**Figure 5B:** View of drop upstream of Montague Expressway

Figures 6A and 6B show the creek just upstream of the Los Coches Street crossing. It is evident that there is significant channel erosion and down cutting occurring in the vicinity of the bridge, around, and under the concrete apron (Figure 7A). This erosion does not appear to be caused by local obstruction, since the channel thalweg ties in well both upstream and downstream. Instead, the erosion is a product of channel incision.



**Figure 6A:** Erosion upstream of Los Coches Street



**Figure 6B:** View of erosion upstream of Los Coches Street



# Guadalupe-Coyote Resource Conservation District (GCRCD)

*An independent special district of the State of California*

888 N. 1st Street, Suite 204, San Jose, CA 95112  
Phone: 408-288-5888 Email: [gcrd@gcrd.org](mailto:gcrd@gcrd.org)

Via e-mail

September 19, 2016

Susan Glendening  
Environmental Specialist  
San Francisco Estuary Partnership/  
San Francisco Regional Water Board  
1515 Clay Street, Suite 1400  
Oakland, CA 94612  
[Susan.Glendening@waterboards.ca.gov](mailto:Susan.Glendening@waterboards.ca.gov)

Dear Ms. Glendening:

The Guadalupe-Coyote Resource Conservation District (GCRCD) appreciates this opportunity to provide comments regarding the Tentative Order for Waste Discharge Requirements for *Santa Clara Valley Water District and U.S. Army Corps of Engineers, Upper Berryessa Creek Flood Risk Management Project, Santa Clara County*. GCRCD is an independent special district of the State of California dedicated to the conservation of natural resources in Santa Clara County. We are concerned with the potentially significant impacts of the project, as proposed to be approved in the tentative order, on our watersheds, and request that the San Francisco Bay Region of the California Regional Water Quality Control Board (RWQCB) amend the proposed order to address those concerns.

RCD-01

1. The project does not meet its 2001 NOP objectives.

While acknowledging that the original NOP describes a larger project, the U.S. Army Corps' (Corps) decision to remove the higher-quality watershed area from the project should not reduce its obligation to meet the stated objectives, which include:

RCD-02

- improve flood protection in the cities of San Jose and Milpitas;
- reduce sedimentation and maintenance requirements in the creek;
- provide for recreational amenities; and
- integrate ecosystem restoration into the project.

It is alarming that the project appears to make no attempt to improve the ecological condition of the creek, and focuses on stability, rip rap, vegetation (roughness) maintenance, and sediment routing. It appears that the Mitigation Plan is the only opportunity for any ecological improvements, yet the plan does not specify where those improvements would occur, although it is presumed to be on a completely different creek. The one exception is the intent to replace non-native grasses with native.

RCD-03  
RCD-04

2. The tentative order inaccurately states that the Project site does not presently support any rare or endangered species.

This statement does not appear to consider recent studies, and likely includes assumptions regarding temperature impacts that may not be based upon scientific evidence specific to the Coyote Creek watershed. The Santa Clara Valley Habitat Plan (HP), Appendix L, indicates that in other areas of the Coyote Creek watershed steelhead have been known to adapt to warmer temperatures, which should be examined. The HP also contains the following references to other potential species on Berryessa Creek in Volume 4 (pages 4-83,84):

*Impacts to California red-legged frog, California tiger salamander, and western pond turtle in the Diablo Range are limited to the Coyote Watershed, primarily within the San José planning limit of urban growth. For California red-legged frog, this includes impacts to primary and refugia habitat from dam seismic retrofits at Anderson Dam, implementation of flood protection projects on Coyote, Mid-Coyote, Upper Penitencia, Fisher, Lower Silver, Upper Silver, Berryessa, Quimby, Sierra, South Babb, and Thompson creeks; and levee reconstruction on Berryessa, Thompson, Coyote, and Upper Penitencia Creeks. Dam and reservoir maintenance is anticipated to impact potential breeding and upland habitat at the Coyote dam. Development within the planning limit of urban growth of San José, rural development, bridge construction/reconstruction, and construction of County Park facilities and infrastructure are expected to impact the lower stream reaches that serve as California red-legged frog primary habitat and adjacent secondary habitat. This is expected to include impacts to two California red-legged frog known occurrences on Metcalf Creek and Coyote Creek.*

RCD-05

*The impact locations for western pond turtle are similar to those from California red-legged frog. Impacts to western pond turtle primary and secondary habitat are expected to occur from dam seismic retrofits at Anderson Dam, implementation of flood protection projects in Coyote, Mid-Coyote, Upper Penitencia, Fisher, Lower Silver, Upper Silver, Berryessa, Fisher, Quimby, Sierra, South Babb, and Thompson creeks; and levee reconstruction and maintenance in Berryessa, Thompson, Coyote, and Upper Penitencia creeks. Dam and reservoir maintenance is anticipated to impact potential habitat on Coyote Creek below Coyote and Anderson dams. Development within the planning limit of urban growth of San José, rural development, bridge construction/reconstruction, and construction of County Park facilities and infrastructure are expected to impact the lower stream reaches that serve as primary habitat and adjacent secondary habitat.*

Whether or not the project identified suitable habitat because of limitations imposed by previous work does not mean the project should not consider a design that could support future habitat. The USFWS memo stated:

*“A variety of suitable habitats for the western pond turtle, a State-listed species of concern, are present within the Coyote Creek watershed. These habitats include aquatic, riparian woodland, and adjacent upland. Adults have been observed at various locations in Coyote Creek (SCVWD 2005). The stream channel downstream from Los Coches Creek has a small, constant flow throughout the year, and may provide suitable aquatic habitat for the western pond turtle. However, steep channel slopes do not provide suitable nesting habitat for western ponds turtles within the study area. Lower Berryessa and Lower Penitencia creeks do provide some marginal basking habitats within the channel; yet this species has not been documented to occur. The Corps has determined*

RCD-06

*that due to the limitations in suitable habitat, the project would have no effect on State-listed species as well (Corps 2013)."*

RCD-06

3. The Corps has not adequately addressed sedimentation issues within the Project area.

The *Final Independent External Peer Review Report for the Berryessa Creek, Santa Clara County, California, General Reevaluation Study (GRS) Final General Reevaluation Report and Environmental Impact Statement/Environmental Impact Report* contained the following statement regarding sedimentation issues within the project area:

*"Although the report presents overwhelming evidence of sedimentation issues within the project area, neither the impact of sedimentation issues on the channel design nor details on the maintenance activities with relation to sedimentation have been presented. In addition, there are insufficient details on the maintenance activities with relation to sedimentation. The Panel has expressed significant concern about the lack of details on the operation and maintenance (O&M) plan and has identified the need for a detailed O&M plan to ensure the design assumptions concerning sedimentation are valid."*

This issue has not been addressed in the tentative order. This is especially troubling as the Tentative Order indicates the O&M plan will not be completed until after the project is completed.

Furthermore, the RWQCB Staff Memo dated April 16, 2016, entitled *Geomorphic Indications For Long-Term Depositional Environment On Berryessa Creek In The Upper Berryessa Creek Flood Risk Management Project*, also outlines the following sedimentation concerns, which have not been addressed:

RCD-07

*Meetings with the Corps and District later clarified that the Upper Berryessa Creek Flood Control project will not be influenced by any upstream changes in maintenance activities or new bypass or other additional project features. The new explanation for the assertion of reduced sediment loading to the Project reach was that the Project will reduce channel bed and bank erosion. According to their modeling assumptions, this is responsible for a sediment load reduction of approximately 50 percent. In an interagency meeting on January 4, 2016, the design consultants and Water Board staff clarified that the HEC-RAS model used in Project design does not model channel bank erosion and therefore does not provide outputs on the stability of channel banks. Therefore this assumption was not based on either empirical or analytical information that is defensible."*

*"Moreover, the Corps' response to the peer reviewer's concerns about sediment maintenance is that the future sediment maintenance needs would be addressed in the Operations, Maintenance, Repair, Rehabilitation, and Replacement Manual (O&M Manual) the Corps would prepare during the preconstruction and project design phase (Revised Final EIS, March 2014). We note, however, that the Corps has stipulated the O&M Manual will not be completed until after the project is constructed (Interagency meeting of January 4, 2016), suggesting that the Corps has not fully addressed sediment maintenance needs in the Project design."*

4. The SCVWD existing Stream Maintenance Program (SMP) – intended to be used by the Corps to replace the required O&M Manual and to guide an Adaptive Management Plan– is

RCD-08

in the process of being updated, and in its current or future form, may not address the issues needed for this project.

GCRC D has already raised concerns that SCVWD's implementation of its existing program is not in compliance with the approved EIR and mitigation requirements – particularly in the area of herbicide application. The program is due for a renewal and future conditions are unknown. In light of that, and the concerns outlined in Item 3 above, reliance on this plan for the stated purposes is concerning.

RCD-08

5. Insufficient detail has been provided to evaluate the adequacy of the adaptive management plan.

Details are important. For example, there is a requirement for the geomorphology report to be prepared after 5 measurable flood events, but as has been discussed with the Guadalupe River Flood Control Project AMT, details such as which gage is used and what period of record is used, are important to decision-making and determination of whether objectives have been met.

RCD-09

6. The Mitigation and Monitoring Plan has not been developed.

It is hard to justify moving the project forward without clarity on what that mitigation will be required. We do not understand how the RWQCB can make a finding regarding the adequacy of mitigation in the absence of a mitigation and monitoring plan. A 2:1 mitigation of stream length or vegetation may or may not provide adequacy dependent on the specifics of the proposed mitigation site.

RCD-10

Furthermore, the monitoring should be developed in sync with the Santa Clara Valley Habitat Plan (HP), pursuant to the following excerpt:

*“The Implementing Entity will also coordinate and share monitoring and other experimental results with other regional restoration and management programs. A well-coordinated and scalable monitoring program design will enable the Implementing Entity and others to measure and evaluate change in resources and threats in individual reserves, across the entire Plan area, and within the ecoregion. Such coordination requires standardization of protocols, sampling design, and training of personnel, as well as integrative data analyses.”*

RCD-11

7. The project is not in compliance with the Santa Clara Valley Habitat Plan, even though it falls within its regional planning area.

Berryessa Creek is repeatedly mentioned with the HP; the following are several examples from Volume 2 (pages 2-45, 2-47). Additionally, the HP represents that Berryessa Creek flood control projects will be built within HP-recommended design elements.

RCD-12

*Examples of projects partially funded through the Coyote Watershed Stream Stewardship Plan include the Berryessa Creek Project and the Lower Silver Creek between Interstate 680 (I-680) and Lake Cunningham. In designing projects through both programs, SCVWD uses methods that balance flood protection with protection of streams and natural resources. Examples of these methods include expanding the inchannel flood plain in areas where the existing channel is highly constrained, and installing bypass*

channels to reduce the quantity of water flowing through natural streams during high flows, thus reducing flooding and scouring potential. These flood-protection technologies help keep streams as natural as possible.

RCD-12

*Berryessa Creek—I-680 to Old Piedmont Road. Berryessa Creek is a tributary of Coyote Creek located in San José. The project extends approximately 2 miles between I-680 and just upstream of Old Piedmont Road. Currently the creek has sections that are natural, a section that is a trapezoidal concrete channel, and a concrete lined in-stream sediment basin. Specific design details for this project area have not been developed at this time; however, they will be consistent with the design elements described above.*

8. The project is not in conformance with the voter-approved purpose of Santa Clara Valley Water District's (SCVWD) Safe, Clean Water & Natural Flood Protection Program.

This project has been funded in part by this SCVWD program, which was approved in 2012 by two-thirds of voters. The project does not meet the community's needs and values, as stated on the SCVWD's website:

RCD-13

*"In November 2012 the voters of Santa Clara County overwhelmingly supported Measure B, the Safe, Clean Water and Natural Flood Protection Program. Developed with input from more than 16,000 residents and stakeholders, this 15-year program was created to match the community's needs and values."*

*"The voters of Santa Clara County clearly recognize the importance of a safe, reliable water supply. They value wildlife habitat, creek restoration and open space. They want to protect our water supply and local dams from the impacts of earthquakes and natural disasters."*

Summary:

Overall, it would appear that Berryessa Creek is being relegated to an armored flood control channel, and any ecological improvements to it – or any other creek – are left unspecified, other than the mitigation ratios. GCRCRD requests that the RQOCB delay order adoption until the outstanding questions have been answered and the missing plans, manuals, etc. have been developed and circulated for public review. Please do not hesitate to contact us if you have any questions regarding the issues raised in this letter.

RCD-14

Sincerely,

Stephanie Moreno  
Executive Director  
[smoreno@gcrcd.org](mailto:smoreno@gcrcd.org)



DEPARTMENT OF THE ARMY  
 SAN FRANCISCO DISTRICT, U.S. ARMY CORPS OF ENGINEERS  
 1455 MARKET STREET  
 SAN FRANCISCO, CALIFORNIA 94103-1398

December 2, 2016

Executive Office

Mr. Bruce H. Wolfe  
 Executive Director  
 San Francisco Regional Water Quality Control Board  
 1515 Clay Street, Suite 1400  
 Oakland, California 94612-1413

Dear Mr. Wolfe:

The United States Army Corps of Engineers, San Francisco District (Corps) appreciates the Regional Water Quality Control Board's (RWQCB) efforts to address the concerns as enumerated in our September 19, 2016 response to the original Tentative Order published on August 18, 2016. However, while the November 2, 2016 Revised Tentative Order (TO) for waste discharge requirements (WDR) and water quality certification (WQC) for the Berryessa Flood Risk Management Project (Project) addresses many of the technical comments provided by the Corps, it also proposes to rescind and reissue the valid WQC, previously issued on March 14, 2016.

The RWQCB lacks authority to rescind the WQC. The Clean Water Act (CWA), 33 U.S.C. § 1341(a)(3), limits the RWQCB's ability to revoke a WQC to circumstances where "there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title" because of specific changes to the project since the WQC was issued. These specific changes are enumerated in the same provision as changes to "(A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements." Even then, the RWQCB must notify the Corps of the invalidity of the WQC within 60 days of discovering the change. The RWQCB has failed to meet any of the requirements of this provision. Therefore, the Corps cannot legally recognize the TO. *Keating v. FERC*, 927 F.2d 616, 624 (D.C. Cir. 1991).

Even if this TO were legally valid, the Corps continues to contest the ability of the RWQCB to impose WDR requirements on a federal entity. Congress has only provided a limited waiver of sovereign immunity under the CWA. This limited waiver does not provide authority for the RWQCB to issue this TO. Further, as documented in the Corps September 19, 2016 letter, the WDR requirements are plainly unnecessary.

The Corps continues to question the RWQCB's stance that the Project endangers the beneficial uses of Berryessa Creek. As explained in our letter, the Project portion of the Creek is a mostly dry, artificial creek with no special status species and no documented, public recreation uses. Whatever beneficial uses that are currently supported by the Creek will continue to be

Revised TO  
 C-01

See  
 C-12-a  
 C-14  
 C-16  
 in Initial TO

supported by the Creek, since the habitat is being returned to its current condition. No mitigation is necessary for habitat that is not being lost or degraded beyond its current condition.

The Corps does not dispute the RWQCB's position that the Project will not greatly enhance the environment. It was not designed, nor authorized by Congress, for that purpose. However, the Corps does strongly disagree with any implication from the RWQCB that the design of the Project will cause the Project to fail. Specifically, the Corps disagrees with the RWQCB's sedimentation analysis. The RWQCB asserts the Corps failed to consider the sediment supply upstream of the Project reach; however, the upstream area is currently being maintained by the Santa Clara Valley Water District. That maintenance, permitted by the RWQCB, manages the upstream sediment, preventing impact to the Project reach. If for some unforeseen reason, more sedimentation does occur, we do expect the Water District to appropriately maintain the Project with sediment removal. For all those reasons, Findings 16 and 17 are inapplicable to the Corps and unnecessary, among other conditions and findings detailed in previous correspondences. The O&M manual is solely a Corps product and the Corps is not creating an adaptive management plan.

See  
C-32  
C-36  
C-37  
C-38  
in Initial TO

Finally, the Corps incorporates all its previous comments not already addressed by the TO. Construction has begun and is currently on schedule. We hope the RWQCB will continue to work with us to ensure the Project's successful completion so it can provide the necessary flood risk protection to such an important public investment. The Corps is always eager to pursue and support congressionally authorized projects to restore and improve habitat; unfortunately, this particular project was never identified as such, and lacks a defensible basis to support Federal environmental enhancement or mitigation funding. It is the hope of the Corps that the constraints being brought to light in this Project do not jeopardize future opportunities to work with RWQCB and the public in preserving our natural resources.

At the RWQCB's request, the Corps would be willing to host a meeting to address any remaining questions or concerns about the Project. Please contact Benjamin Smalley at 415-503-6864 or [Benjamin.Smalley@usace.army.mil](mailto:Benjamin.Smalley@usace.army.mil) with any questions or if you wish to request such a meeting.

Sincerely,



John C. Morrow  
Lieutenant Colonel, US Army  
District Engineer



Sent via email to [susan.glendening@waterboards.ca.gov](mailto:susan.glendening@waterboards.ca.gov) on 12/5/16

Susan Glendening  
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Oakland, CA 94612  
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RE: Revised Tentative Order - Waste Discharge Requirements and Water Quality Certification for the Santa Clara Valley Water District and U.S. Army Corps of Engineers to implement, Upper Berryessa Creek Flood Risk Management Project, Santa Clara County

Dear Ms. Glendening,

The Citizens Committee to Complete the Refuge (CCCR), the Santa Clara Valley Audubon Society (SCVAS), and San Francisco Baykeeper (Baykeeper) thanks you for the opportunity to provide comments on the Revised Tentative Order (Revised TO) - Waste Discharge Requirements, and Water Quality Certification 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 (Corps).

We must reiterate our concerns that the Project perpetuates a dated approach towards flood control of nearly over two miles of creek, and fails to embrace the growing trend towards urban stream revitalization. Just a little over a mile upstream of the Project, in the vicinity of Berryessa Creek Park, the creek is lined with native and non-native trees, and has been incorporated as a community open space amenity and local residents can regularly be seen walking on the trail adjacent to the creek. Approximately one half mile to the west of the terminus of the Project, a restoration of "creek" habitat exists just south of where E Calaveras Boulevard crosses the railroad tracks. The area is labeled an "Environmentally Sensitive Area" with the request the public "Please help restore this protected ecological habitat by" and the sign states there shall be "no cutting, picking or destroying of plants." It is ironic the Project that is the subject of this Revised TO will, by design, result in limited development of woody vegetation along the two mile stretch of the Project and could require recurring removal of sediment and vegetation within, and immediately adjacent to the channel to maintain design criteria.

We note that the Revised TO states that Project construction "began in early October 2016 and is scheduled to be completed in early December 2017." We assume the work that has begun is all occurring outside the creek and no work will be conducted in the creek during the rainy season. In general, the California Department of Fish and Wildlife (CDFW) prohibits construction work in streams from October 31<sup>st</sup> through the end of May.

We commend the San Francisco Bay Regional Water Quality Control Board (Water Board) on the protections for beneficial uses that it has attempted to put into place in the language of the TO, WDRs and WQC, and we generally support the proposed compensatory mitigation requirements, however it is preferable that any mitigation and monitoring plan is approved by the Board *prior* to the issuance of any approvals and *prior* to the initiation of any construction.

In a letter sent September 19, 2016, we had mentioned four main concerns with the initial TO:

Revised TO CAB-01

See CAB-03 in Initial TO

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.

We find the Revised TO is mostly responsive to the concerns we elaborated for each of the items, and offer the following comments to the Revised TO.

**Findings #7 - Coverage of this Order:**

The Revised TO added language stating the channel bed and banks armored with rock riprap will be covered with 4 inches of soil that will be hydroseeded. How was a depth of 4 inches determined to be adequate to support target native plants? [Please refer to the comments regarding Findings #20 below.] Will the banks be hydroseeded well before the rainy season to ensure adequate cover and root development to ensure erosion of bank slopes will not occur? If not, how will the soil be stabilized on the banks during the rainy season?

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**Findings #9 – Reuse or Dispose of Exported Material:**

The Revised TO states that the Corps is implementing the soil reuse and disposal tasks relevant to this finding, but is silent regarding how quickly materials to be disposed of will be removed from the site, or how long material will be stockpiled.

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TO  
CAB-03

**Findings #13 – Rain Event Action Plan:**

We assume this finding pertains to construction activities located outside of the creek as the CDFW generally prohibits work within creeks during the rainy season. We suggest that during the rainy season, the creek should be protected against any mobilization of soils from any areas of active construction or stockpiled materials on a daily basis at the end of each work day, rather than “within 48 hours prior to any likely precipitation event.”

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CAB-01

**Findings #14 – Dewatering:**

The finding notes that the consultant has submitted a Dewatering Plan to the Water Board on October 21, 2016, but that the plan does not address surface water flows. The language that has been added does not provide a time frame within which the required information must be submitted to the Executive Officer for review and approval. We suggest that the information identified should be provided 30 days prior to dewatering activities involving surface water flows.

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**Findings #16 – Maintenance:**

We support the concern expressed in the finding that the Project will result in a system that is more depositional than the existing conditions for the reasons expressed – the increase in the cross-sectional area of the creek leading to reduced sheer stresses during storm flows, the fact that the Project is in an alluvial fan, and the fact that there is ample sediment supply both from upstream and from the tributaries to Berryessa Creek.

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CAB-05

CAB-08

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One significant and negative impact of conventionally designed and constructed flood control channels is the recurring need for sediment and vegetation removal to maintain the design criteria for flood risk reduction. This recurring disturbance establishes a costly, never-ending cycle of habitat disruption and reduction in the function and values and beneficial uses creeks provide for wildlife, etc.

It is imperative that the development of the O & M Manual is accomplished through “collaboration with the Water Board, and appropriate regional, State and federal agencies,” including CDFW, the U.S. Environmental Protection Agency (EPA) and U.S. Fish and Wildlife Service (USFWS). Specific language should be added to emphasize the need to collaborate with the wildlife resource agencies.

We concur there should be an emphasis placed on minimizing environmental impacts while meeting flood risk objectives and that it is very important that longitudinal and cross-sectional data is required to calibrate the sediment transport model results and that such information can inform what are appropriate triggers for channel “maintenance.”

However, we would also expect the Adaptive Management Plan to address how adverse impacts to the creek environment will be minimized should sediment deposition exceed that predicted by the Corps' sediment transport model.

**Findings 20 – Impacts:**

As was mentioned previously, we are extremely concerned that the Project is inconsistent with the growing recognition of the many benefits provided by urban stream revitalization. The fact that rock revetment will be covered by only a very thin layer of soil for nearly two miles of creek will severely reduce the ability of this Project reach of the creek to provide beneficial uses. How was a soil depth of only 4 inches determined to be adequate? The Project proponents propose planting native vegetation, yet the Revised TO states, the minimum soil root depth requirements of the native plant species incorporated in the hydroseed mixes proposed for use are 5.1 to 20.5 inches. If this is the case, what is the likelihood that native plants are capable of becoming established rather than invasive non-native species? What are the success criteria, and what contingency measures have been proposed should native species fail to establish?

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CAB-05

We also are concerned that as the Revised TO states:

Further, the existing soft-earthen bed and banks being replaced by rock riprap will result in less habitat for the benthic and other lower-trophic organisms living in the creek, including, but not limited to, algae, worms, diatoms, micro- and macroinvertebrates, and fish larvae. The lack of lower trophic organisms will restrict the WARM and WILD beneficial uses, which will, in turn, adversely affect the REC-2 beneficial use.

Not only is the replacement of the soft-earthen bed and banks by rock riprap (with a very thin overlay of soil) have adverse impacts on the WARM, WILD, and REC-2 beneficial uses, but any habitat for benthic and lower-trophic organisms that become established as sediment is deposited, will be likely be removed through recurring maintenance activities. Thus the creek within the reach of the Project will be reset to lowered functions, values, and beneficial uses every time sediment and vegetation removal occurs.

**Finding 21 – Mitigation:**

The Discharger should be required not only to replace and maintain for five years, any native trees and shrubs that will be removed, the Discharger should be required to maintain the native trees and shrubs until they are capable of thriving with no supplemental maintenance, e.g. watering, etc.

We whole-heartedly support the requirement for additional mitigation to compensate for temporary and permanent losses of functions and values resulting from the Project design. The Mitigation and Monitoring Plan should have been required prior to issuance of the previous TO and prior to initiation of any construction rather than eight months after construction was initiated (i.e. June 30, 2017). The public must have the opportunity to provide comment as the MMP is crucial to any determination that the Project (and mitigation) is consistent with the California Wetlands Conservation Policy of "no net loss."

Based upon the information provided under the findings for "Impacts" and "Maintenance" and the fact that the Discharger has stated compensatory mitigation must occur at an off-site location, the Water Board must require much more than the proposed minimum mitigation-to-effect ratio of 2:1 for permanently-affected waters and to require more than the proposed minimum mitigation-to-effect ratio of 1.5:1 for temporarily-affected waters.

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CAB-06

The Revised TO stated that construction began in early October 2016. Has the 12-month clock begun for the requirement that "mitigation activity is completed within 12 months of the date when the associated impact first occurs"? If so, the Revised TO should state that mitigation must be completed by October 2017 or the penalty of an additional 10 percent mitigation per year, on an areal basis, will begin to be assessed.

**Finding 25 – California Environmental Quality Act**

The finding states the EIR identified the following mitigation measure for nesting birds, "Conducting pre-construction nesting bird surveys and establishing appropriate buffers, reducing impacts to nesting residential bird species;"

[emphasis added]. However, the 2013 Berryessa Creek Element Coyote and Berryessa Creek, California Flood Control Project Santa Clara County, California, Final Report, prepared by the U.S. Army Corps of Engineers, Sacramento District, states on page 7-11:

Pre-construction surveys are required for nesting birds. Migratory birds and their habitats are protected under the Migratory Bird Treaty Act, as amended (16 U.S.C.703 et seq.). The study area is of low habitat quality to migratory birds and lacks suitable nesting areas. However, *to ensure that there would be no effect to migratory birds, preconstruction surveys by a Corps biologist would be conducted within the study area and for a radius of at least 0.25 miles around the study area if construction is to begin before August 15th of any year. If any migratory birds are found, a protective buffer would be delineated, and USFWS and CDFW would be consulted for further actions.* In addition, focused bat surveys for *Myotis* or western big-eared bats should be completed prior to construction to see if these species are using the bridges for roosting. [emphasis added]

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CAB-06  
CAB-07  
CAB-08  
CAB-09  
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We urge the Water Board to add this language to the Revised TO.

We reiterate comments that were submitted in response to the DEIR for this Project:

If done during nesting season, then special precautions are necessary. Birds can build a nest, lay eggs, and start raising young within two weeks, and *an entire reproductive cycle may start and end within 30 days.*

...Mr. Johnston [Environmental Scientist, CDFW] also recommends a preliminary survey 30 days ahead of time to give the project proponent an idea of what to expect once they are ready to begin work. It is important too to survey for ground-nesting birds in addition to those that nest in shrubs and trees. Surveys for ground-nesting birds should be performed 24-hours prior to vegetation removal or disturbance. If nests are found, buffers would be set and work within the buffer areas should be postponed until the nestlings have fledged. If raptors or special status species nests are found, CDFW should be called on to set appropriate buffers.

The fact that an entire nesting cycle can be start and end within 30 days highlights the fact that preconstruction surveys for nesting birds must be conducted closer to the initiation of construction. As part of a mitigation measure to protect nesting birds, San Diego Gas & Electric required the following in their East County Substation Project Nesting Bird Management, Monitoring, and Reporting Plan (2013):

#### 5.1.0 Pre-Construction Surveys and Reporting

Pre-construction nesting bird surveys will be conducted by a CDFW-approved Avian Biologist no more than 10 days prior to planned construction in order to locate nests within and adjacent to the proposed work area. Results of nest surveys will be detailed in the Nest Survey Report (Attachment A: Nest Survey Report and Nest Notification Forms) and submitted to the CPUC and BLM no less than 72 hours prior to construction. An additional verification survey will be performed by a CDFW-approved Avian Biologist no more than 3 days prior to construction to assure discovery of any new nesting activity initiated since the original survey. If a nest is detected during the pre-construction nest survey, the Avian Biologist will include the details of each nest along with minimization and avoidance measures, and buffers implemented in the Nest Survey Report. If a nest is detected during a verification survey or during construction monitoring, the details of each nest along with minimization and avoidance measures, and buffers implemented will be included in a Nest Notification Form (Attachment A: Nest Survey Report and Nest Notification Forms). Details of each nest discovered during surveys or during monitoring will be included in the Nest Monitoring Log (NML).

We urge the Water Board to incorporate similar language into the Revised TO to ensure compliance with the Migratory Bird Act.

#### Finding 26 – Water Quality Control Plans:

The finding discusses naming conventions of the National Wetlands Inventory for mapping wetlands. The discussion mentions that significant portions of Upper Berryessa Creek are riverine wetlands, and lists features such as inset TO/WDR/WQC Upper

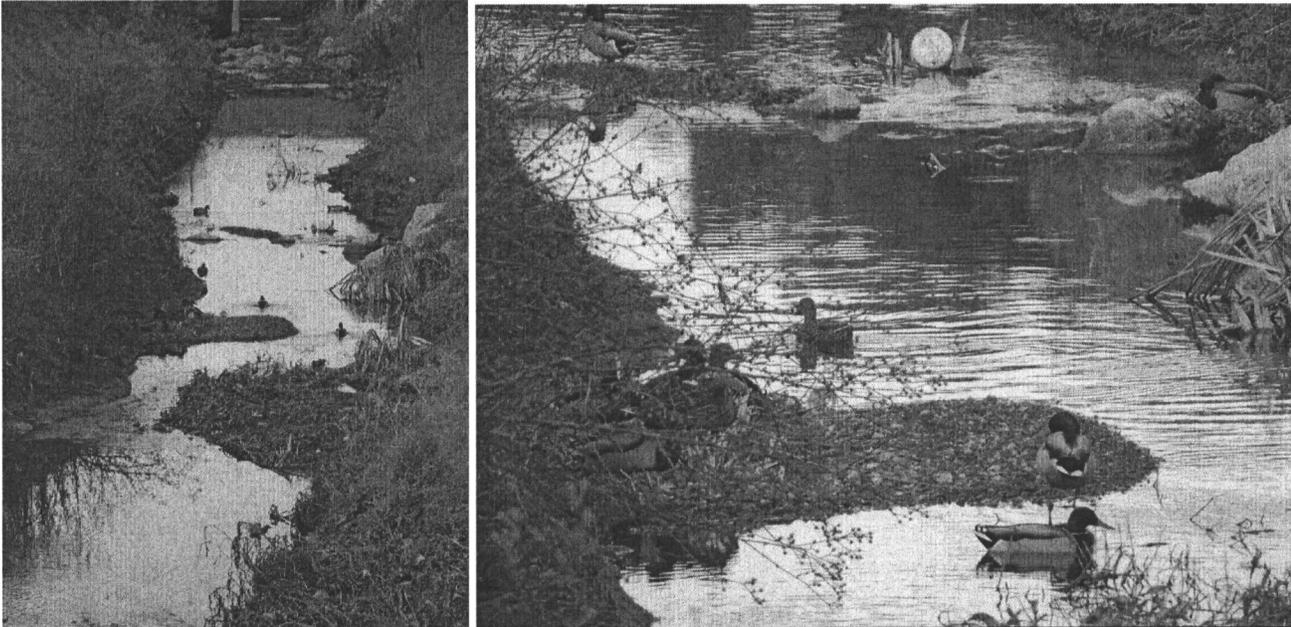
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floodplain within the current channel. The photos below, looking upstream and downstream from the creek crossing at Los Coches, December 4, 2016, show evidence of cattail growth in the creek, development of inset floodplains, and use of the creek by waterfowl.

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Upper Berryessa Creek looking downstream from the creek crossing at Los Coches



Upper Berryessa Creek looking upstream from creek crossing at Los Coches

**B. Provisions:**

**Provision 5:**

The Revised TO states, "The Discharger shall maintain trees and shrubs for five years as stated in the Application."

It appears this provision should be revised to be consistent with the requirement in Attachment B – Vegetation Performance and Success Criteria (c) that requires “The Discharger shall continue to water all plantings during all projected dry water years (defined as 75 percent of average annual rainfall) that occur during the first 10 years after construction.”

**Provision 11 – Rain Event Action Plan:**

Please refer to the comment above regarding suggested change.

**Dewatering Plan:**

The language that has been struck included a requirement that “not later than 30 days prior to the commencement of dewatering activities, the Discharger shall submit a Dewatering Plan, acceptable to the Executive Officer.” We recommend that this sentence be reinstated as the Discharger has not addressed how surface water flows will be handled.

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**Mitigation Requirements – Provision 18 – Mitigation and Monitoring Plan:**

c. The Provision should clarify that monitoring of vegetation shall continue until the plantings are thriving, have not received supplemental maintenance (e.g. watering) for at least two years, and the success criteria in the MMP are achieved.

d. We suggest “d” be reworded for purposes of clarification to read – “The Discharger shall ~~maintain~~ ensure invasive plant species in the Project site ~~at a maximum does not exceed~~ cover of ~~no more than~~ 10 percent based on the percent cover of...

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**Provision 19 – EIR Mitigation Measures:**

“Replacing any native trees and shrubs of certain size the Project will remove during construction.” Please clarify what this sentence is intended to mean.

We urge the Water Board to incorporate the suggested protections for nesting birds discussed under Findings 25 above, to bullet # 4 of this provision.

**Provision 25 – Mitigation Monitoring Reports:**

“The reports shall summarize each year’s monitoring results, including the need for any remedial actions (e.g., re-planting or bank stabilization).” We suggest that supplemental watering also be considered a remedial action. If a planting achieves targets for percent cover, etc. but only with supplemental watering, this should not be considered successfully achievement of mitigation goals.

We suggest the following modification for purposes of clarification – “Success of the mitigation program shall be determined by the Executive Officer after all the ~~minimum~~ interim and final success criteria in the MMP are achieved.”

**Provision 28 – Notice of Mitigation Completion:**

We urge the Water Board to require a final site inspection prior to the Executive Officer’s acceptance of notice of mitigation completion in writing.

**Attachment B – Vegetative Performance and Success Criteria:**

As part of the final success criteria for all plantings, it should be explicitly stated, unless supplemental watering is going to be part of a long-term management plan that all plantings must have gone at least two years with no supplemental watering. Achieving the success criteria is meaningless if the plantings only achieved the targeted percent cover or are determined to be vigorous because they are receiving supplemental watering.

In Table 1, we suggest that language pertaining to invasive plant species criteria be reworded as suggested above.

**Conclusions:**

With the exceptions that have been noted above, we are in support of the language proposed in the Revised TO. It is unfortunate a more environmentally sustainable approach to managing flood risk in Upper Berryessa Creek has not been proposed. It is crucial the Water Board require more than the proposed minimum mitigation ratios of 2:1 and 1.5:1 for the lost functions, values and beneficial uses that will result from implementation of the Project. We thank you for the opportunity to provide comments and request that we be kept informed of any future opportunities to provide public comments.

Sincerely,

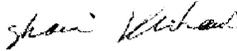


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December 5, 2016

Via email and U.S. Mail

Ms. Susan Glendening, Environmental Specialist  
Regional Water Quality Control Board  
1515 Clay Street, Suite 1400  
Oakland, CA 94612

Dear Ms. Glendening:

The Santa Clara Valley Water District (District) submits this letter to provide additional comments on the revised tentative order (RTO) for the Upper Berryessa Creek Flood Risk Management Project (Project). In general, the District continues to urge the Regional Water Quality Control Board (Regional Board) NOT to adopt the RTO. The District incorporates the comments it and the U.S. Army Corps of Engineers (USACE) previously submitted to the extent those comments have not been fully resolved by the RTO.

The District is disappointed that the RTO does not recognize that this Project will be good for the environment and continues to insist that a large mitigation project—which the RTO does not acknowledge that the Regional Board will be financially responsible for—is necessary. The District is also disappointed that Regional Board staff have prepared the RTO without responding to the comments previously submitted by the District and the USACE, including those comments showing that the Regional Board lacks authority to issue such an order and those inquiring about how the Regional Board intends to comply with the requirements of Due Process. Rather than resolving the issues raised by those comments, the RTO adds serious new legal concerns with this proposed action, and continues to make numerous technical errors.

District staff would appreciate the opportunity to meet with Regional Board staff to discuss, and hopefully resolve, these issues. To make that meeting most productive, District staff would request to receive written responses to the comments in this letter, and the District's September letter, at least five days in advance of a meeting.

#### **I. The Project Will Be Good For The Environment**

As the District pointed out in its letter of September 19, 2016, construction of the Project will benefit the environment. It will replace a significantly degraded creek bed with an environmentally enhanced creek bed, including a net increase of 3.18 acres in waters of the United States, replacement of non-native and invasive vegetation with native wetland plant species and important grassland habitat, preservation of existing trees and shrubs whenever possible, and replacement of removed trees and shrubs with native plantings at a 2:1 ratio.

It should not be surprising, then, that the District—being the lead agency for this project—certified a final EIR which found that impacts to water quality, biological resources, hydrology, and soils (among other issues) would be less-than-significant.

#### **II. The Regional Board May Not Impose New Mitigation Measures**

As the District explained in its letter, the Regional Board has no authority under CEQA to second-guess those findings from the EIR, and to impose new mitigation for impacts that the EIR found to be less than significant. Yet the RTO would find significant impacts where the EIR did not. (See Findings 19 (supposed new impacts to "potential habitat" for listed species), 20 (supposed new impacts to waters of the State and United States), and 21 (supposed new impacts to "functions and values").) And the RTO

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would impose additional mitigation for impacts the EIR found to be less than significant. (See any Provision related to construction, particularly Provisions 18 and 20 (new requirements for "Mitigation and Monitoring Plan"), and 19 (new requirements for pre-construction aquatic life and wildlife surveys).) Regional Board's approval of these new findings and mitigation measures without first following the required CEQA procedures would violate CEQA.<sup>1</sup>

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The Regional Board should recognize that this project would be good for the environment, and decline to find new impacts, or impose new mitigation measures, beyond those contained in the EIR.

### III. The Regional Board Would Be Financially Responsible For New Mitigation

As the District noted in its September letter, the California Supreme Court recently made clear that the Regional Board would be financially responsible for any new mitigation measures, because those measures could only be products of state, rather than federal, law. (See *Dep't of Fin. v. Comm'n on State Mandates* (2016) 1 Cal.5th 749, 754, *reh'g denied* (requirements on local water agencies in waste discharge requirements are state-law mandates for which Regional Board would be financially responsible).) These mitigation measures, which contemplate acquisition and construction of more than 20 new acres of waters in Santa Clara County, are likely to cost many millions of dollars. The Regional Board, through its Executive Director, previously certified, pursuant to Section 401 of the Clean Water Act, that construction of the Project would comply with all federal laws. Because construction of the Project has already been certified to comply with all federal laws, any new conditions that might be imposed now could only be products of state, rather than federal, laws—especially any mitigation requirements associated with supposed impacts to "waters of the State" (a concept that exists only under State law). Because these mitigation requirements supposedly derive solely from state law, the RTO would leave the Regional Board financially responsible.

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S-12  
S-13  
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The District has not agreed, whether in the Project Partnership Agreement or anywhere else, to be responsible for these mitigation costs.

### IV. The RTO Ignores Watershed-Wide Planning

The District's September letter also explained that the Water Code, sections 13263(a) and 13241, requires the Regional Board to consider an array of regional concerns before adopting this kind of order. The RTO still does not consider any of the regional factors the District identified.

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S-11  
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### V. The Section 401 Certification Cannot Now Be Rescinded or Modified

The RTO would rescind the Section 401 water quality certification previously issued by the Executive Director, and supersede that certification with a "reissued water quality certification" with additional conditions. Once the Executive Director issued the original Section 401 certification in March 2016, the Clean Water Act gave the Regional Board only 60 days to modify or rescind that certification, and only if there was some change in circumstances. (See *Keating v. Federal Energy Regulatory Comm'n* (D.C. Cir. 1991) 927 F.2d 616, 624 ("[i]f either of these conditions is not met--if the state's decision comes too late or if it is not pursuant to changed circumstances--then the attempted revocation is invalid as a matter of federal law and no further inquiry is needed"); *City of Shoreacres v. Tex. Comm'n on Env'tl. Quality* (Tex. App. 2005) 166 S.W.3d 825, 834-35 (noting that "[t]he Clean Water Act allows a state to revoke a

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<sup>1</sup> The District also explained in its September letter that the proposed new mitigation measures would constitute a new "project", or at a minimum a substantial project modification, under CEQA, for which further environmental review by the Regional Board would be required. The RTO does not address this point. The Regional Board would be violating CEQA if it imposes new mitigation without first preparing the appropriate CEQA document.

prior certification only within this specified time limit and only pursuant to these defined circumstances”).) The previous certification, in condition 27, reserved whatever rights the Regional Board might have to cancel or reissue the certification to cases where conditions were violated or new or revised water quality standards and implementation plans were adopted or approved. (See *a/so* Water Code § 13381 (permits may be modified only “for cause”).) Because those 60 days have long since run, and there has been no change in circumstances, standards, or plans, the RTO’s attempt to rescind the prior certification and reissue a new and revised certification would be a nullity and invalid.

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#### **VI. The Section 401 Certification Cannot Apply To the District**

The RTO would issue a Section 401 certification to both the Corps and the District. But Section 401 applies only to an “applicant for a federal license or permit”. (33 U.S.C. § 1341(a).) The District has not applied for a federal license or permit in relation to this project. The Regional Board has no authority to subject the District to a Section 401 certification related to this project.

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S-02

#### **VII. The District Did Not Agree In the Project Partnership Agreement to the Additional Plans or Requirements**

The RTO states, in Finding 3, that the District and the Corps are “dividing ... responsibilities” in accordance with the Project Partnership Agreement (PPA), and that “the District will be responsible” for the adaptive management plan, the mitigation and monitoring plan, and the post-construction stormwater management plan required by the RTO. Finding 4 states that the District “has agreed to be responsible for certain requirements”. But the PPA says nothing about those plans or any requirements that might be imposed by the RTO, and the District did not agree, in the PPA or anywhere else, to be responsible for those plans or requirements.

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The requirement to develop a post-construction stormwater plan is especially problematic. Such a plan likely would require revision of the project design to include stormwater management facilities, and in-channel construction, which may be subject to other agencies’ permitting, to install the facilities.

#### **VIII. Non-Wetland Areas Above The Ordinary High Water Mark Are Not Waters Of The State**

The RTO would require significant compensatory mitigation for impacts to alleged waters of the State. The RTO, in Finding 20 and elsewhere, acknowledges that no wetlands, under the federal definition, will be impacted. Instead, most of the alleged waters of the State are areas above the ordinary high water mark to the top of bank. The RTO labels these non-federal wetland areas above ordinary high water as “riverine wetlands”. These areas are not riverine wetlands, and they are not waters of the State.

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Finding 26 explains that “Section 2.2.3 of the Basin Plan indicates that the Water Board will rely on naming conventions of the National Wetlands Inventory for mapping wetlands”, and that “[u]nder these naming conventions”, these non-federal areas above ordinary high water are “riverine wetlands”. This is wrong on three levels.

First, “naming conventions” are not a substitute for actual identification of waters. The Water Code defines “waters of the State” as “any surface water or groundwater”. (Water Code § 13050(e).) If an area is not surface water or groundwater, it is not waters of the State, regardless of what it is named.

Second, the classification system used by the National Wetlands Inventory makes clear that it is “neither designed, nor intended, to support legal, regulatory, or jurisdictional analyses”.<sup>2</sup> The Regional Board should not be using naming conventions that are not intended for legal, regulatory, or jurisdictional analysis for legal, regulatory, and jurisdictional purposes.

Third, even if the National Wetlands Inventory classification system were an appropriate reference, it makes clear that areas above the high-water mark are uplands, *not* riverine or wetlands:

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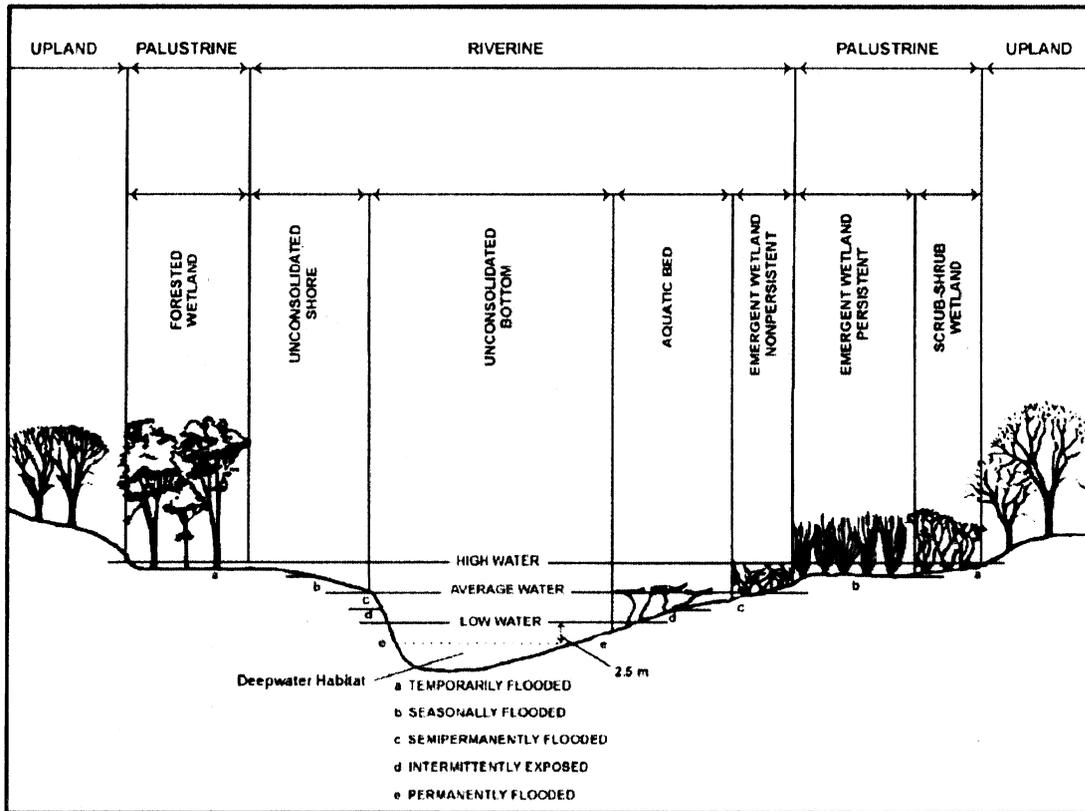


Figure 4. Distinguishing features and examples of habitats in the Riverine System.

If the riverine zone is below the high-water mark, then the areas above that mark cannot be named as riverine wetlands.

The RTO, in Finding 26, also states that Section 2.2.3 of the Basin Plan “provides a list of aquatic features that the Water Board recognizes as wetlands”, including “unvegetated ponded areas, the inset floodplain within the current channel, and riparian habitat”. But this is not what the Basin Plan actually says. The Basin Plan provides an illustrative list of features that are “frequently”—though not always—

<sup>2</sup> Federal Geographic Data Committee (2d ed., 2013) *Classification Of Wetlands And Deepwater Habitats Of The United States*, p. 3, available at <https://www.fws.gov/wetlands/Documents/Classification-of-Wetlands-and-Deepwater-Habitats-of-the-United-States-2013.pdf>.

wetlands. The Basin Plan does not deem every feature on that list to always be wetlands; the feature still must actually be a wetland for it to be a wetland. The non-wetland areas above the high-water mark are not wetlands, and are not waters of the State.

Even if these non-wetland areas above the high-water mark could be considered waters of the State, the previous comments by the USACE make clear that construction of the project—which involves the installation of environmentally, socially, and economically beneficial structures and materials—is not a discharge of “waste” that might be regulated by the Porter-Cologne Act.<sup>3</sup>

### IX. The RTO’s Sedimentation Analysis Remains Flawed

Although the EIR and the District have repeatedly shown that the project will bring sedimentation in the creek closer to equilibrium, Regional Board staff continue to maintain (in Finding 16) that “the Project reach will continue to be depositional”. This proposed finding is based on a flawed analysis, as shown in the attached memorandum on sedimentation.

### X. The RTO Contains Numerous Technical Errors

Finding 6 states that the project has a “planned completion date of October 2018”. The planned completion month is October 2017.

Finding 7.e states that one concrete access ramp will be located “just” downstream of I-680. That ramp will be located about 900 feet downstream of I-680.

Finding 18 refers to impacts to 4.18 acres of waters of the United States, and to 5.63 acres of waters of the State, for a total of 10.1 acres. As explained above, these alleged waters of the State are not actually waters of the State. It is also inaccurate to suggest that these areas will be negatively impacted, as they will actually be enhanced. Even if they were waters of the State, and even if they were negatively impacted, 4.18 acres of waters of the United States plus 5.63 acres of waters of the State does not equal 10.1 acres of total waters.

Finding 18 also refers to 0.39 acres of “fringing vegetation”, which, “[f]or purposes of this Order”, is treated as “about 0.45 acres of fringing vegetation”. 0.39 acres is not the same as 0.45 acres.

Finding 20 states that efforts to establish native vegetation will be “severely restricted” because of buried riprap. But the upper portion of the creek banks throughout the project area and creek bed between Calaveras Blvd and The Piedmont Creek confluence will not be underlain by rock riprap and revegetation of those areas will not be compromised. In the limited areas where rock riprap will be placed and covered by native soil, USACE will hydroseed native grasses, forbs, and wetlands plants. This herbaceous vegetation does not require deep soil to establish. Additionally, the rock riprap to be used will consist of large rocks, resulting in large interstitial voids which will be filled with native soil during installation. Plant roots will be able to grow into the soil-filled voids, extending the rooting depth well below the upper 4 inches of soil. Therefore, native vegetation should be expected to establish and thrive in the reconstructed channel.

Finding 20 also refers to beneficial use impacts to WILD, WARM, and REC-2. These impacts were all discussed in the responses to comments on the EIR. The Regional Board does not have authority to second-guess the EIR now.

Revised  
TO  
S-04

Revised  
TO  
S-05

Revised  
TO  
S-06

See  
S-29  
in  
Initial TO

Revised  
TO  
S-07

See  
S-23  
in  
Initial  
TO

Revised  
TO  
S-08

See  
S-41  
in  
Initial  
TO

<sup>3</sup> [http://www.waterboards.ca.gov/water\\_issues/programs/cwa401/docs/comments\\_081916/edwin\\_townsley.pdf](http://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/comments_081916/edwin_townsley.pdf) (“The definition of waste does not include discharges of dredge or fill material”).

Finding 21 refers to "temporary and permanent losses of functions and values" from the project. But the EIR found impacts to be less than significant for this environmentally beneficial project. The Regional Board does not have authority to second-guess the EIR now.

See  
S-23  
in  
Initial  
TO

Finding 21 also refers to a mitigation and monitoring plan "consistent with the District's schedule to adopt its 5-year capital improvements projects." The District is not planning to include a mitigation and monitoring plan for this project in its capital improvement projects plan.

Revised  
TO  
S-09

Finding 21 also refers to notification to the public, and consideration of public comment, on the mitigation and monitoring plan before it could be accepted. The District continues to assert that there is no authority to require mitigation and thus a mitigation and monitoring plan for the project. Even if such a plan could be required, the requirement for consideration of public comments before acceptance does not provide sufficient objective criteria such that the District could reasonably know in advance what would be required to satisfy this condition. (As the District explained in its September letter, the lack of such criteria is a Due Process violation.)

See  
S-30  
S-25  
in  
Initial  
TO

Finding 25 refers to the removal of hazardous materials and wastes from the creek channel prior to substantial rain, during construction, as an EIR mitigation measure. This is not an accurate characterization of the EIR mitigation measure (WAQ-C).

See  
S-42  
in  
Initial  
TO

Finding 26 incorrectly states that the EIR "states that there is in-channel wetland vegetation and riparian habitat on site and acknowledges that the riparian habitat is waters of the State". The EIR acknowledges no such thing.

Revised  
TO  
S-10

Condition 17 refers to "velocities" in the recordings. Velocity recordings can only be done in-person with a 2-3 person crew during a storm, and there is no guarantee this can be done with the District's staffing.

Revised  
TO  
S-11

### **XI. None of the Conditions Are Justified**

The Conditions of the RTO all depend upon the validity of the findings and of the authority of the Regional Board. As the key findings are invalid, and the Regional Board does not have authority to issue the RTO, the Conditions are also all invalid.

I may be reached at 408-630-2035. District staff looks forward to your response.

Cordially,

*Sue Tippetts*

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

Exhibit 1: Response to RWQCB memo 2

c: N. Camacho, S. Tippetts, C. Hakes, B. Wolfe (RWQCB)



# TECHNICAL MEMORANDUM

## EXHIBIT 1

**PROJECT:** Upper Berryessa Flood Protection Project      **DATE:** December 2<sup>nd</sup>, 2016  
**SUBJECT:** Responses to RWQCB Memo #2 for Project Team  
**PREPARED:** Jack Xu, PE, CFM

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### PURPOSE

The Upper Berryessa project team has asked the Hydraulics Unit to review the second Regional Water Quality Control Board (RWQCB) document<sup>1</sup> and to provide input and responses on the RWQCB's reasoning and conclusion. This document will attempt to address the comments raised by the RWQCB one at a time.

### COMMENT RESPONSES

1. ***Upper Berryessa Creek lies in an alluvial fan and therefore is depositional.***

While alluvial fans are often depositional, the actual site-specific data for the project area shows that, overall, the creek in this reach is erosional. The District's first memorandum documented, with photographs, significant erosion in the creek throughout the project area<sup>2</sup>. The Regional Board should be relying on the actual data for the project area, rather than general statements about other alluvial fan areas.

There are several reasons why there is overall erosion, rather than deposition, in the project area. First, the project is only a segment of the greater Berryessa Creek system, which extends toward the foothills to the east and flows downstream into Lower Penitencia Creek, and eventually Coyote Creek. Sediment loads and transport capacity varies throughout the system. The Environmental Impact Statement (EIS), cited by the Water Board, acknowledges the fact that coarse sediment will be deposited *at some point* between the apex of the fan and the Bay, and not necessarily within the project reach. As the Regional Board's second point acknowledges (citing data from the EIS), and as explained more fully below, less than 5 percent of the sediment removed from the Berryessa Creek system since the 1980s was removed from the project area. The data shows that sediment deposition is not a significant issue in the project area.

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<sup>1</sup> Frucht, Setenay Bozkurt. San Francisco Bay Regional Water Quality Control Board. Response to Santa Clara Valley Water District Comments on the Upper Berryessa Creek Flood Protection Project Tentative Order. October 21, 2016.

<sup>2</sup> Xu, Jack. SCVWD. Upper Berryessa Project – Channel Stability Tech Memo. July 20<sup>th</sup>, 2016.

Second, this argument fails to consider the urbanized landscape in which the Upper Berryessa Creek Project lies. Since the 1800s, the Coyote Creek drainage basin, which includes Berryessa Creek, has seen a tenfold increase in drainage density, resulting in reduced infiltration and more rapid delivery of storm water<sup>3</sup>. Such a dramatic increase in urbanization would subject the creek to more frequent high flows that would otherwise not be delivered into the channel, and move the creek towards a degradational trend. In addition, historical natural channels that would normally meander were straightened due to agriculture and urbanization, reducing the horizontal length of the creek, and thereby increasing the slope. This would increase velocity and promote degradation. Another factor is the existence of a debris basin just downstream of Piedmont Road (but upstream of the project area), which would trap large sediment, also promoting degradation downstream due to sediment starvation. The effects of urbanization and human modifications to the creek can very well alter the historical depositional nature of an alluvial fan, and the actual data supports this in the project area.

The experience of District staff would also disagree with a blanket statement that describes all urban alluvial fans as depositional. Over the years, the District has completed many projects that have addressed both aggradation and degradation issues, and it would be incorrect to assume that all alluvial fans within the District's jurisdiction are aggradational. For example, a study<sup>4</sup> done in 2006 for Calabazas Creek, a river with its headwaters in the Santa Cruz Mountains that flows to the bay, and which lies in an alluvial fan, concluded a degradational trend between 1993 and 2006 for a particular reach in the urban valley. Calabazas Creek does not even have a debris basin, and therefore would have a full, unaltered sediment input load, and yet it still degraded. Using the arguments presented by the Water Board, this reach Calabazas Creek would be depositional, but the reality and evidence showed a degradational channel.

**2. Long term maintenance records from the District show that sediment deposition is a regular and persistent management issue.**

The Water Board itself states that only 21,400 cubic yards (cy) of sediment removal was performed over 40 years in the project reach, which is less than 10% of the 250,000cy of sediment removal performed upstream of Calaveras Blvd on Berryessa Creek (the downstream limits of the project). Additionally, the Water Board states that 193,227cy of sediment was removed downstream of Calaveras Blvd on Berryessa Creek. If the sediment removal numbers are summed to represent the entire Berryessa Creek system, the 21,400cy of removal from the project reach constitutes less than 5% of the total sediment removed from Berryessa Creek.

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<sup>3</sup> Grossinger, RM, Raaskevold, CJ Striplen, E Brewster, S Pearce, KN Larned, LJ McKee, and JN Collins, 2006. Coyote Creek Watershed Historical Ecology Study: Historical Condition, Landscape Change, and Restoration Potential in the Eastern Santa Clara Valley, California. Prepared for the Santa Clara Valley Water District. A Report of SFEI's Historical Ecology, Watersheds, and Wetlands Science Programs, SFEI Publication 426, San Francisco Estuary Institute, Oakland, CA.

<sup>4</sup> L Xu, JM Lo, W Yuen. Santa Clara Valley Water District. HEC-6T Sediment Transport Study, Calabazas Creek, Miller Avenue to Padero Avenue, Project Number 26104001.

This suggests that the project reach does not experience significant sediment deposition, and that most the sediment deposition is occurring at different locations, such as the debris basin downstream of Piedmont Road. Historical profile comparisons and field observations<sup>5</sup> show a clear degradational trend over the long term, which would suggest that the need for sediment removal was most likely due to localized bank failures as a result of channel incision, and that sediment removal did not involve dredging the entire project reach. This is backed up by historical and field evidence that the channel has incised.

**3. *The tributaries also contribute sediment to Berryessa Creek.***

The sediment contributions from the tributaries are already included in all the analysis and data performed and discussed above; they should not be double-counted. Historical profile comparisons and field observations<sup>6</sup> show a degradational trend in the project reach even including the sediment input from the tributaries. Therefore, it can be deduced that the sediment input from the tributaries is transported downstream of the project reach. The District's position, based upon the available data, is not that all sediment originates from the banks, but rather in the past the sediment removal was performed to address local bank erosion. There is sediment input from the upstream reaches. However, evidence shows a clear degradational trend, which means that this sediment is easily moving through the project reach. So easily, in fact, that the creek is eating away at itself to move more sediment downstream.

**4. *District observations of erosion are localized, and the project reach is still depositional.***

In the District's field analysis of the project reach, the erosion observations were seen throughout the project reach and were not due to localized hydraulic forces. At the upstream end of the project reach near Montague Expressway, a channel head cut can be seen terminating at a concrete apron. Storm sewer outfalls located in the upstream end and middle of the project reach show clear indications of bank failure due to channel incision. At Los Coches Street, the channel has incised and cut around the concrete apron that was built to presumably the historical invert of the channel. All these are detailed in the District's previous memorandum<sup>7</sup>. In addition, a historical profile throughout most of the project reach show a channel that has incised. The Water Board also concedes that urbanization between the 1960's and 2000's has had hydrologic impacts which have caused erosion.

Sediment deposition will occur somewhere along the entire Berryessa Creek system, as articulated in the EIS, but all the evidence shows the project reach easily passing current sediment. Most of the deposition will probably occur at the upstream debris basin (a designed depositional area), and at downstream locations closer to the Bay (where channel slope decreases significantly and tidal effects take over).

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<sup>5</sup> Same as #2

<sup>6</sup> Same as #2

<sup>7</sup> Same as #2

**5. District interpretation of existing analyses is inconclusive and incompatible with EIR.**

The 'greenbelt' figure shown by the Water Board is from the Jordan 2009 report and is not in the project reach, as acknowledged by the Water Board. This figure was used in the District memorandum<sup>8</sup> to give proper background into the overall behavior of Berryessa Creek, and not intended to defend observations in the project reach. This District memorandum also states that there is a general degradational trend, which is true. Figure 1 in the Water Board's staff memorandum<sup>9</sup>, which is the same figure in the District memorandum, shows most the profile points degrading from 1967 to 2004. However, since the degradation amounts are generally much smaller than those observed in the project reach, the EIS considered this area relatively stable.

Figure 9 in the District's memorandum shows the historical longitudinal profile in the project reach, which show clear degradation. Any scouring or erosive activity upstream in the greenbelt area has passed through the project reach without any issues, since the project reach is incising. The statement in the Regional Board's memorandum that there has been "a significant amount of sediment scoured from the creek bed upstream of the Project reach and delivered to the Project reach in the last 40 years" is without basis and contradicted by the actual data showing the project reach to be degradational.

**6. The sediment transport model analysis done by Tetra Tech has discrepancies in the sediment input boundary condition. That, along with differing sediment transport equations, would result in different results. The District and consultant did not articulate their assumptions in the modeling and the WQB's review of the model show additional sediment being delivered downstream of Piedmont Road in the proposed conditions.**

The District cannot confirm the discrepancies in the input boundary conditions, as the model we have on file does not have the same problems. The District will coordinate with Tetra Tech to send the Water Board the correct modeling files.

That point aside, the Tetra Tech study clearly states that the sediment deposition and/or degradation in the project reach is not sensitive to either the input boundary condition or the sediment transport equations (Section 1-13, Table 1-4 to 1-6, Tetra Tech Sediment Model Report). The results were proven to be similar regardless of the input parameter and equations. The basis for modeling assumptions are detailed in a Tetra Tech Sediment Model Report that can be provided to the Water Board.

In the Water Board's staff memo, Table 1 shows that for the 100-yr Yang model, the input boundary condition is different by 20 tons (0.2%). However, in the comments section, 1,000 tons are delivered past Piedmont Road in the baseline condition, while 8,000 tons are delivered past Piedmont Road in the project condition, an 800% increase. Since Piedmont Road is far upstream of the project reach, where the geometry should not change, it does

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<sup>8</sup> Same as #2

<sup>9</sup> Same as #1

not seem likely that a 0.2% change in input parameters would cause an 800% change at Piedmont Road. There appears to be flaws in the Water Board's presentation of the sediment model.

**7. *The WQB would like to review historical cross section data.***

The District cannot locate any true as-built drawings. However, there are many design and planning drawings that were never constructed, which provide existing conditions profiles and typical sections used in the District's analysis. These would represent snapshots of the historical channel geometry in time. The District can share the data if the Water Board wants to look over it in more detail.

The 1973 design plans show an existing baseline conditions that show a channel with a 25' – 30' width from top of bank to top of bank, but a depth of about 5'. Current conditions have a similar width, but the depths have increased to over 10'. The District is not sure what the Water Board is suggesting in its assumption that the width-to-depth ratios are similar.