Governor's Office of Planning & Research

May 26 2021

STATE CLEARINGHOUSE

San Francisco Bay Regional Water Quality Control Board

May 25, 2021

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San Jose, Planning, Building, and Code Enforcement Department
ATTN: Sanhita Ghosal (sanhita.ghosal@sanjoseca.gov)
200 E. Santa Clara Street
San José, California 95113

Subject: San Francisco Bay Regional Water Quality Control Board Comments on the *Initial Study / Mitigated Negative Declaration, Newby Island Sanitary Landfill Coyote Creek Bank Repair Project*
SCH No. 2021040759

Dear Ms. Ghosal:

San Francisco Bay Regional Water Quality Control Board (Water Board) staff appreciates the opportunity to review the *Initial Study / Mitigated Negative Declaration, Newby Island Sanitary Landfill Coyote Creek Bank Repair Project* (ISMND). The ISMND evaluates the potential environmental impacts associated with implementing the Newby Island Sanitary Landfill Coyote Creek Bank Repair Project (Project).

Project Summary. The Project will repair an eroding, 140-foot long of section of the bank of Coyote Creek on the northeasterly side of the Newby Island Sanitary Landfill facility. The Project will reconstruct the bank slope and extend an existing rock revetment through an outside bend in the creek. Above the extended rock revetment, the stabilized bank will be seeded with species appropriate to the upper creek bank. The Project also proposes to incorporate a small planting bench on the rock revetement that will be vegetated with alkali bulrush (*Bolboschoenus maritimus*).

Summary. As is discussed below, the ISMND does not identify the full extent of waters of the State that will be impacted by the Project. In addition, the mitigation presented in the ISMND lacks sufficient detail to demonstrate that impacts to waters of the State can be mitigated to less than significant levels.

Comment 1. The ISMND does not correctly identify the full extent of waters of the State along the bank of Coyote Creek.

In Section IV, *Biological Resources*, of the ISMND, the discussion of jurisdictional waters on page 53 contains the following erroneous text:

> Coyote Creek is a known water of the U.S. that is tributary to the San Francisco Bay, a traditional navigable water of the United States. The limit of

USACE jurisdiction, as well as that of the RWQCB, over the creek is the ordinary high water mark.

The ordinary high water mark is the upper limit of federal jurisdiction. The upper limit of Water Board jurisdiction at the Project reach of Coyote Creek extends at least to the top of bank.

The Water Board has regulatory authority over wetlands and waterways under both the federal Clean Water Act (CWA) and the State of California's Porter-Cologne Water Quality Control Act. Under the CWA, the Water Board has regulatory authority over actions in waters of the United States, through the issuance of water quality certifications (Certifications) under Section 401 of the CWA, which are issued in conjunction with permits issued by the Army Corps of Engineers (Corps), under Section 404 of the CWA. When the Water Board issues Section 401 certifications, it simultaneously issues general Waste Discharge Requirements for the project, under the Porter-Cologne Water Quality Control Act. Activities in areas that are outside of the jurisdiction of the Corps (e.g., isolated wetlands, vernal pools, seasonal streams, intermittent streams, channels that lack a nexus to navigable waters, or stream banks above the ordinary high water mark) are regulated by the Water Board, under the authority of the Porter-Cologne Water Quality Control Act. Activities that lie outside of Corps jurisdiction may require the issuance of either individual or general waste discharge requirements (WDRs).

The Project applied for Certification and/or WDRs in 2018. Permitting was not completed at that time because the Project had not yet been reviewed in conformance with the requirements of CEQA. In an October 2018 email from Water Board staff to the Project proponent, Water Board staff informed the Project proponent that waters of the State at the Project site extended to the top of bank. Water Board staff have also clarified the full extent of waters of the State along creek channels in multiple CEQA comment letters on CEQA documents circulated by the City of San Jose for at least 20 years. It is our hope that this information will be incorporated in the City's institutional knowledge.

Please revise the ISMND to correctly identify the full extent of permanent and temporary impacts to waters of the State.

Comment 2. Please provide more information about the apparent intent to conduct work within the wetted stream channel at the Project site.

Text on page 56 of Section IV discusses using a turbidity curtain in Coyote Creek to prevent sediments dislodged by Project construction from being carried into the creek. It appears that the Project proponent is proposing to install new rock revetment in the wetted channel of the creek. The Corps, CDFW, and the Water Board do not usually allow construction work to be implemented within the wetted channel. Work areas must be dewatered to isolate construction activities from flowing water. The proposed use of a turbidity curtain in the creek channel would not be effective in preventing the discharge of construction-generated sediments into the creek. Sediments that contact the curtain are likely to settle to the bottom of the creek; these sediments will then be mobilized when the curtain is removed. Please revise the Project description to include the installation of a coffer dam to isolate the work area from active flow in the creek.

Comment 3. The mitigation measures proposed for impacts to waters of the State lack sufficient detail for CEQA review of their effectiveness.

Mitigation Measure BR-1 in Section IV of the ISMND proposes the following mitigation measures:

> **Mitigation Measure BR-1: Obtainment of and compliance with regulatory approval from resource agencies as required:** The project proponent shall obtain permits and approvals from US Army Corp of Engineers (USACE), Regional Water Quality Control Board (RWQCB), and/or California Department of Fish and Wildlife (CDFW) and/or anyother agency, as applicable.
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> If necessary, in order to ensure that the Project results in no net loss of habitat functions and values, Project Proponent shall compensate for the loss of resources or habitat through on-site restoration/creation, off-site protection and enhancement of habitat, and/or purchase of mitigation credits consistent with the terms and conditions of permits and approvals from the resource agencies (such as, USACE, RWQCB, and CDFW, and as applicable). On-site or-off-site habitat restoration/creation and/or purchase of mitigation credits consistent with the terms and conditions of the resource agency permits shall be determined in consultation with the resource agencies, as applicable.
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> Prior to the issuance of any Grading Permit or any site disturbance, the Project proponent shall prepare and submit to the City's Environmental Supervising Planner, a letter report identifying the compliance process with all agency permits; including copies of all permits obtained from these resource agencies. Within three months of the completion of the Project construction, the Project proponent shall prepare and submit to the Supervising Environmental Planner of the City of San José Department of Planning, Building and Code Enforcement another letter report identifying the compliance process with all agency permits; including any compliance or closure documents obtained from the resource agencies. These plans and reports shall be prepared to the satisfaction of the Supervising Environmental Planner of the City of SanJosé Department of Planning, Building and Code Enforcement.

Mitigation Measure BR-1 does not contain sufficient detail to demonstrate that the proposed mitigation will be sufficient to offset the Project's impacts to waters of the State. Proposed mitigation measures should be presented in sufficient detail for readers of the CEQA document to evaluate the likelihood that the proposed remedy will actually reduce impacts to a less than significant level. CEQA requires that mitigation measures for each significant environmental effect be adequate, timely, and resolved by the lead agency. In an adequate CEQA document, mitigation measures must be feasible and fully enforceable through permit conditions, agreements, or other legally binding

instruments (CEQA Guidelines Section 15126.4). Mitigation measures to be identified at some future time are not acceptable. It has been determined by court ruling that such mitigation measures would be improperly exempted from the process of public and governmental scrutiny which is required under the California Environmental Quality Act. As is discussed above, the current text of the ISMND does not accurately quantify all impacts to waters of the State. Therefore, the extent of the impacts to waters of the State that require mitigation has not yet been established.

One potential mitigation measure that is mentioned in Mitigation Measure BR-1 is "off-site protection and enhancement of habitat". However, Mitigation Measure BR-1 does not identify any off-site areas that could be used to provide mitigation for Project impacts to waters of the State. Another potential mitigation measure in Mitigation Measure BR-1 is "purchase of mitigation credits consistent with the terms and conditions of permits and approvals from the resource agencies". The ISMND should identify mitigation banks that include the Project site in their service area and have appropriate mitigation credits available for purchase. The ISMND should contain sufficient information to demonstrate that these proposed mitigation measures are feasible. Please revise Mitigation Measure BR-1 to document that these mitigation measures are available to provide sufficient mitigation for the Project's impacts.

Text on page 61 attempts to establish that mitigation proposed in the ISMND is adequate:

> **Impact Significance After Mitigation**
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> These mitigations would reduce direct impacts to special-status species as well as indirect impacts due to impaired water quality from Project construction to a less-than-significant level. This finding is consistent with CEQA Guidelines Section 15126.4 (a)(1) (B) that states: Compliance with a regulatory permit or other similar process may be identified as mitigation if compliance would result in implementation of measures that would be reasonably expected, based on ***substantial evidence in the record*** [emphasis added], to reduce the significant impact to the specified performance standards. ***CDFW is the State agency responsible for protection of biological resources*** [emphasis added]. CDFW finds that their SAA conditions would reduce biological impacts to a less-than-significant level, which conforms to the conclusions reached in this Initial Study's Biological Evaluation.

As was noted above, the extent of the Project's impacts to waters of the State is not correctly quantified in the ISMND and the proposed mitigation measures lack sufficient detail to demonstrate that they will be sufficient to mitigate the Project's impacts to waters of the State to less than significant levels. Therefore, the record currently lacks substantial evidence that impacts will be reduced to less than significant levels.

The text "CDFW is ***the*** State agency responsible for protection of biological resources" should be replaced with "CDFW is ***a*** State agency responsible for protection of biological resources". The Water Board also has regulatory authority to protect biological resources. The San Francisco Bay Basin Water Quality Control Plan (Basin Plan) defines the beneficial uses of waters of the State. The Project will affect Coyote Creek.

The following beneficial uses are listed in the Basin Plan for Coyote Creek: groundwater recharge, commercial and sport fishing, cold freshwater habitat, fish migration, preservation of rare and endangered species, fish spawning, warm freshwater habitat, wildlife habitat, water contact recreation, and noncontact water recreation. Several of these beneficial uses are directly related to biological resources.

Proposed mitigation is described in greater detail on page 62 and 63:

> As described in Section 6.0, the Project includes many measures to protect biological and other resources, including natural habitat on the site. The Project includes a replanting plan to establish a new stand of bulrush on an approximately 5-foot-wide planting bench located just below the MHHW elevation. This bench and planting will beconstructed during the construction phase. Other proposed Project measures include planting the regraded bank uphill of the planting bench with native plants and installing large woody debris bundles at the toe of the slope. Other measures prevent contaminants or debris from entering the stream channel; removal of vegetation only with hand labor; revegetation of all disturbed areas with native grasses; and implementation of erosion control measures.
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> This includes installing an approximately 400-square foot planting bench of alkali bulrush within the planned revetment area as well as placement of five woody debris clusters near the toe of the revetment to increase the diversity of the available marsh and aquatic habitat types. It isexpected that the alkali bulrush will colonize areas of the revetment above and below the planting bench, eventually blending with the existing vegetation up- and downstream from the site. Above the revetment area, the reconstructed bank slope will be planted with native seed appropriate to the transitional zone between marsh and upland habitats. It is expected that the Project will improve the ecological value of the site habitat.

The ISMND does not yet establish that 400 square feet of a planting bench will provide sufficient mitigation for the Project's expansion of hardscape along the creek bank. And the ISMND does not explain how the Project plans to confirm that the that the bullrush has colonized areas of the revetment above and below the planting bench.

Conclusion. The ISMND does not yet support the conclusion that the Project's impacts to waters of the State will be mitigated to less than significant levels.

We also encourage the Project proponent to revise the ISMND to properly quantify all impacts to water of the State and their beneficial uses and to provide sufficiently detailed mitigation measures to demonstrate that the Project's impacts to waters of the State can be mitigated to less than significant levels. Also, the Project description should be revised to include a dewatering plan for the Project site.

If you have any questions, please contact me via e-mail at brian.wines@waterboards.ca.gov.

Sincerely,

Brian Wines
Water Resource Control Engineer
South and East Bay Watershed Section

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