



San Francisco Bay Regional Water Quality Control Board

Date

Governor's Office of Planning & Research

August 30, 2022

Aug 31 2022

STATE CLEARINGHOUSE

Sent via electronic mail: No hardcopy to follow

City of San Jose, Department of Planning, Building and Code Enforcement
ATTN: Tina Garg (Tina.Garg@sanjoseca.gov)
200 East Santa Clara St., 3rd Floor
San José, CA 95113

Subject: San Francisco Bay Regional Water Quality Control Board Comments on the Draft Environmental Impact Report for the Berryessa Mixed Use Project, City of San Jose, Santa Clara County, California
File Nos.: PDC18-036/PD21-009/PT21-030/ER20-260
SCH No. 2021070467

Dear Ms. Garg:

San Francisco Bay Regional Water Quality Control Board (Water Board) staff appreciates the opportunity to review the *Draft Environmental Impact Report for the Berryessa Mixed Use Project* (DEIR). The DEIR evaluates the potential environmental impacts associated with implementing the Berryessa Mixed Use Project (Project). The 13-acre Project site is located at 1655 Berryessa Road in the City of San José. The Project's applicant seeks to rezone the project site from the LI - Light Industrial Zoning District to a PD - Planned Development Zoning District. In addition, the Project's applicant is seeking approval of a Planned Development Permit to develop up to 850 residential units and up to 480,000 square feet of commercial space, and to create an approximately 0.9-acre open space area. A Vesting Tentative Map to merge three parcels into one; and re-subdivide the merged parcel into 35 lots; and create up to 590 condominium units and new streets is also included in the project. Under the Project, the three existing industrial buildings and ancillary structures and parking lot would be demolished. Trees on the site would be removed and replaced.

Summary

As is discussed below, the proposed fill of a 0.34-acre pond is a relatively large impact to waters of the State for a single project, and the Project applicant should not assume that the Water Board will issue a permit for the fill of the pond present at the Project site.

JIM McGRATH, CHAIR | EILEEN WHITE, EXECUTIVE OFFICER

In addition, the DEIR does not provide an adequate discussion of potential mitigation measures for Project impacts to waters of the State.

Comment 1. The Project applicant should not assume that the Water Board will approve the fill of the 0.34-acre pond at the Project site.

Section 3.4, *Biological Resources*, includes a discussion of existing conditions in Section 3.4.1.2. A 0.34-acre pond with a depth of 10 feet and a wetland fringe is located on the Project site. Arroyo willow and Fremont cottonwood grow around the pond. This pond was constructed between 1968 and 1981. The U.S. Army Corps of Engineers determined that the pond was not a water of the U.S in a jurisdictional determination dated August 23, 2022 (SPN-2022-00077S). However, the jurisdictional determination noted that the pond may still be regulated as a water of the State. This pond is perennial and may intercept the local groundwater table. Regardless of its origin, the pond has been present at the site for half a century and is self-sustaining. Therefore, it is regulated as a water of the State pursuant to the State's Porter-Cologne Water Quality Act. As the DEIR correctly notes, the Water Board considers all areas below the top of bank to be waters of the State. The DEIR should clarify if the complete area below top of bank is greater than 0.34 acres. Since the pond is not subject to federal jurisdiction, fill of the pond will require the issuance of Waste Discharge Requirements (WDRs) from the Water Board. Issuance of WDRs will require public noticing of the proposed WDRs and approval by a vote of the Board at one of our monthly Board meetings.

When the Water Board receives an application for certification and/or WDRs, staff reviews the project to verify that the project proponent has taken all feasible measures to avoid impacts to waters of the State (these impacts usually consist of the placement of fill in waters of the State). Where impacts to waters of the State cannot be avoided, projects are required to minimize impacts to waters of the State to the maximum extent practicable (i.e., the footprint of the project in waters of the state is reduced as much as possible). Compensatory mitigation is then required for those impacts to waters of the state that cannot be avoided or minimized. Avoidance and minimization of impacts is a prerequisite to developing an acceptable project and identifying appropriate compensatory mitigation for an approved project's impacts. Avoidance and minimization cannot be used as compensatory mitigation. After avoidance and minimization of direct impacts to waters of the State have been maximized for the proposed project, the necessary type and quantity of compensatory mitigation for the remaining impacts to waters of the State are assessed on a case-by-case basis.

Under both the Clean Water Act and the *San Francisco Bay Basin Water Quality Control Plan* (Basin Plan), projects are required to avoid impacts to waters of the U.S. and waters of the State, in conformance with U.S. Environmental Protection Agency's CWA 404(b)(1) Guidelines (Guidelines). The Guidelines provide guidance in evaluating the circumstances under which the fill of jurisdictional waters may be permitted. Projects must first exhaust all opportunities, to the maximum extent practicable, to avoid, and then to minimize impacts to jurisdictional waters. Only after all options for avoidance and minimization of impacts have been exhausted, is it appropriate to

develop mitigation for adverse impacts to waters of State. Since mixed use development is not a water dependent project, it is assumed that impacts to waters of the State can be avoided.

The Water Boards only allow compensatory mitigation to be implemented for those impacts to waters of the State that cannot be avoided and/or minimized; “avoidance and minimization” in the context of reviewing applications for WDRs refers to minimizing the proposed project’s footprint in waters of the State. The current Project proposes to fill all waters of the State that are present at the Project site. It is unusual for the Water Board to issue permits for projects that include no avoidance or minimization of impacts to waters of the State. The Project applicant is encouraged to revise the DEIR to fully explore an alternative that completely avoids fill of the pond and incorporates it into the Project’s landscaping and open space.

Comment 2. The DEIR does not describe acceptable mitigation for the proposed fill of 0.34 acres of waters of the State at the Project site.

Section 3.4.2.1, Project Impacts, states that the 0.34-acre pond on the Project site is proposed to be filled by the Project. The discussion of impacts states that:

The project would comply with all applicable conditions of the Habitat Plan, including measures to protect water quality and payment of land cover and wetland specialty fees for pond impacts. As described in the response to checklist question b), payment of land cover and specialty wetland impact fees for the pond will reduce the project’s impact to on-site pond habitat to a less than significant level by contributing to the Habitat Plan’s conservation program, which includes creation, maintenance, and management of pond habitats. The San Francisco Bay RWQCB or USACE could impose additional requirements as part of Section 404/401 permits that goes beyond what the City as the Lead Agency would require as mitigation under CEQA (i.e., payment of Habitat Plan fees) to off-set impacts from filling the pond under the State of California Porter-Cologne Water Quality Control Act.

(Less than Significant Impact)

The Habitat Plan does not currently provide mitigation for impacts to waters of the State that satisfies the requirements of the State’s no net loss policy. At this time, there are also no mitigation banks with service areas that include the Project site that provide mitigation for the fill of open waters or wetlands. Therefore, if the Water Board determines that it is appropriate to approve the fill of the 0.34-acre pond, the Project’s applicant will be required to provide permittee-responsible mitigation. The DEIR’s conclusion that fill of the pond will be a less than significant impact is not supported by the information provided in the DEIR.

Please note that the required amount of mitigation will depend on the similarity of the impacted water of the state to the provided mitigation water of the State, the uncertainty associated with successful implementation of the mitigation project, and the distance

between the site of the impact and the site of the mitigation water. In-kind mitigation for the fill of open waters consists of the creation of new open waters. If the mitigation consists of restoration or enhancement of open waters, the amount of mitigation will be greater than if the mitigation consists of the creation of open waters. If there are uncertainties with respect to the availability of sufficient water to support a mitigation water or sufficiently impermeable soils to sustain ponding, then the amount of mitigation would also have to be greater. Finally, the amount of required mitigation increases as the distance between the impact site and the mitigation site increases.

A mitigation ratio of 1:1 may be acceptable if a mitigation pond is established on the Project site. For mitigation projects that are offsite and/or out-of-kind, the required mitigation ratio will increase with distance from the Project site and any differences between the type of water body that is impacted and the type of water body that is provide at the mitigation site. For an off-site mitigation project, the applicant will need to acquire fee title to a property with the proper hydrology to support an appropriately-sized mitigation feature. In addition, the applicant will need to monitor and maintain the mitigation feature for at least five years, until final performance criteria are attained. The applicant will also need to place a conservation easement or deed restriction over the property and establish an endowment for the long-term maintenance of the mitigation feature.

Without a description of a viable mitigation project, the DEIR does not demonstrate that the Project's impacts to waters of the State can be mitigated to a less than significant level.

In a CEQA document, a project's potential impacts and 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. The current text of the DEIR does not demonstrate that it is feasible to mitigate all potentially significant impacts to waters of the State that may result from project implementation to a less than significant level. Impacts to the jurisdictional waters at the project site, as well as proposed mitigation measures for such impacts, will require review under CEQA before the Water Board can issue permits for those proposed impacts.

Conclusion

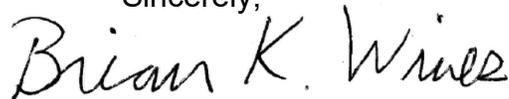
The DEIR does not provide sufficient detail with respect to mitigation for Project impacts to waters of the State. The DEIR should be revised to provide specific mitigation measures for all impacts to waters of the State. These mitigation measures should be

in-kind and on-site mitigation measures to the maximum extent possible. The amount of proposed mitigation should include mitigation for temporal losses of any impacted waters of the State. If mitigation is out-of-kind and/or off-site, then the amount of the proposed mitigation should be increased. Proposed mitigation measures should include designs with sufficient detail to show that any created waters will have sufficient hydrology to sustain pond hydrology and vegetation without human intervention. A proposed program for monitoring the success of the mitigation features should also be included with the mitigation proposal(s). In addition, before the Water Board issues a permit that authorizes the fill of the 0.34-acre pond, we must be provided with an alternatives analysis that demonstrates that avoidance of some or all of the waters of the State at the Project site is infeasible.

If the DEIR is adopted without providing concrete mitigation proposals for impacts to waters of the State, it is likely that the DEIR will not be adequate to support the issuance of Waste Discharge Requirements for the Project.

If you have any questions, please contact me at (510) 622-5680, or via e-mail at brian.wines@waterboards.ca.gov.

Sincerely,

A handwritten signature in black ink that reads "Brian K. Wines". The signature is written in a cursive, slightly slanted style.

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

cc: State Clearinghouse (state.clearinghouse@opr.ca.gov)
CDFW, Attn: Kristin Garrison (kristin.garrison@wildlife.ca.gov)