San Francisco Bay Regional Water Quality Control Board

July 14, 2023

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City of Milpitas, Planning Department
ATTN: Lillian VanHua, Senior Planner (planningdepartment@milpitas.gov)
455 East Calaveras Boulevard
Milpitas, CA 95035

Subject: San Francisco Bay Regional Water Quality Control Board Comments on the *Draft Environmental Impact Report for the Pulte Homes Residential Development at 1355 California Circle*, City of Milpitas Santa Clara County, California
SCH No. 2022110251

Dear Ms. VanHua:

San Francisco Bay Regional Water Quality Control Board (Water Board) staff appreciates the opportunity to review the *Draft Environmental Impact Report for the Pulte Homes Residential Development at 1355 California Circle* (DEIR). The DEIR evaluates the potential environmental impacts associated with implementing the Pulte Homes Residential Development at 1355 California Circle Project (Project). The Project Site is located at 1355 California Circle between Interstate 880 (I-880) and California Circle. The 6.69-acre Project Site is located in the northwestern portion of the City of Milpitas. The Project site is bound by commercial and industrial uses to the north, multi-family residential uses and a religious assembly use to the east, a vacant industrial parcel to the south, and I-880 to the west. A City-owned storm drain channel is also located immediately west, between the Project Site and I-880. The Project is comprised of five seven-plex townhomes, eight twelve-plex townhomes, and an apartment building. The Project would provide a total of 206 multi-family housing units. We have the following comments on the Project's potential impacts to waters of the State.

Summary

As is discussed below, the DEIR does not provide sufficient information to determine if the storm drain channel is a jurisdictional water of the State. If the channel is determined to be a water of the State, the DEIR should be revised to include an alternatives analysis for proposed impacts to the channel and specific mitigation measures for any unavoidable impacts to the channel.

Comment 1. The Project site may contain a jurisdictional water of the State.
The discussion of Biological Resources in Section 3.3 of the DEIR includes the following text in the discussion of Impact BIO-2:

> There are no natural hydrologic features that are present on-site. As mentioned above, there are no riparian habitats within the Project Site or in its immediate vicinity. There is an existing storm drain channel, located west of the Project Site. However, the storm drain channel is not an identifiable jurisdictional waters or wetlands. Rather, the channel is identified as a Riverine Habitat R4SBAx, which is characterized as a manmade storm channel that serves a larger deepwater system and contains surface water for brief periods of time.

The DEIR does not provide sufficient information to support the assertion that the storm drain channel is not a jurisdictional water of the State. Constructed storm channels may be regulated as waters of the State if they replace an impacted water of the State and/or they become a feature of the local watershed. If the storm channel has a bed and bank and receives runoff from a local watershed, it is likely to be regulated as a water of the State. In addition, it is possible that portions of the storm channel may have sufficient hydrology to be regulated as isolated wetlands. While isolated wetlands are not regulated as waters of the U.S., they are regulated as waters of the State. The DEIR should be revised to include more detailed information about the dimensions, vegetation, and hydrology of the storm channel. The DEIR should also include the dimensions of any proposed impacts to the storm channel.

Comment 2. If the storm channel is a water of the State, any impacts to the channel must be supported by an alternatives analysis.
As is noted above, even if the channel was created by excavation, if it has persisted for decades and is supported by a local watershed, it is regulated as a water of the State, pursuant to the State's Porter-Cologne Water Quality Act. If the channel is not subject to federal jurisdiction, fill of the channel 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 the *San Francisco Bay Basin Water Quality Control Plan* (Basin Plan), projects are required to avoid impacts to 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 residential 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 appears to propose the fill of all potential 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 storm channel and incorporates the channel into the Project's landscaping and open space areas.

Comment 3. The DEIR does not describe acceptable mitigation for the proposed fill of waters of the State at the Project site.
If the storm channel is determined to be a water of the State, the DEIR should be revised to provide mitigation for any impacts to the storm channel. 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 a channel consists of the creation of a new channel. 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, 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 channel 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 ten 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.

Comment 4, Hydrology and Water Quality, Mitigation Measure MM Hydro 2: NPDES Permit (pg. 118) and MM Hydro 3-3 (page 122).

Section 3.9.3 of the DEIR acknowledges that the Project must comply with the C.3 Provisions of the Municipal Regional Stormwater National Pollutant Discharge Elimination System (NPDES) Permit (MRP) (Water Board Order No. R2-2022-001874; NPDES Permit No. CAS612008). The MRP requires that stormwater treatment be provided through Low Impact Development (LID) measures. At the Project site, LID measures will consist of bioretention areas. Properly-sized bioretention areas require that sufficient surface area at the Project site be reserved for bioretention areas. The information provided in the DEIR is insufficient to determine if sufficient surface area has been set aside for MRP compliance. At sites that require WDRs from the Water Board, review of proposed stormwater treatment infrastructure is a component of preparing the WDRs for the Project. We encourage early coordination with the Water Board in the development of stormwater treatment measures to ensure that the proposed treatment is consistent with the requirements of the MRP.

Conclusion

The DEIR does not provide sufficient detail to establish the jurisdictional status of the storm channel at the Project site. If the storm channel is determined to be a water 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 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 waters of the State, 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 about this comment, please contact me at (510) 622-5680, or via e-mail at brian.wines@waterboards.ca.gov.

Sincerely,

Brian K. Wines

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

cc: State Clearinghouse (state.clearinghouse@opr.ca.gov)