

San Francisco Bay Regional Water Quality Control Board

May 2, 2023

Sent via electronic mail: No hardcopy to follow

City of Hayward Planning Division
ATTN: Steve Kowalski, Associate Planner (Steve.Kowalski@hayward-ca.gov)
777 B Street, 1st Floor
Hayward, CA 94541



Subject: San Francisco Bay Regional Water Quality Control Board Comments on the *Initial Study / Mitigated Negative Declaration, Tolari Residence on Santos Road*
SCH No. 2023040145

Dear Mr. Kowalski:

San Francisco Bay Regional Water Quality Control Board (Water Board) staff appreciates the opportunity to review the *Initial Study / Mitigated Negative Declaration for the Tolari Residence on Santos Ranch Road* (ISMND). The ISMND evaluates the potential environmental impacts associated with constructing the Tolari Residence on Santos Road (Project).

Project Summary. The proposed Project consists of the construction of an approximately 6,700-square-foot, three-story single-family residence with a 918-square-foot attached garage and a 433-square-foot workshop. An approximately 1,000-foot-long, 20-foot-wide gated private driveway would be constructed at the south end of the Project site that would lead from Santos Ranch Road to the residence near the center of the site. The proposed project includes the installation of a new on-site well for water service and a septic system for wastewater. Three 5,000-gallon water tanks and a 1,200-square-foot leach field would also be installed on the Project site.

Summary. As is discussed below, the ISMND does not include necessary mitigation for the Project's impacts to waters of the State. Without a proposal for mitigation, the ISMND does not demonstrate that impacts to waters of the State can be mitigated to a less than significant level.

Comment 1. The ISMND does not include proposed mitigation measures for the Project's impacts to waters of the State.

The Project's impacts to waters of the State are discussed on pages 3-24 and 3-25 of Section 3.4, *Biological Resources*, of the ISMND.

JAYNE BATTEY, CHAIR | EILEEN WHITE, EXECUTIVE OFFICER

Construction of the proposed driveway requires the installation of a culvert to cross a roadway ditch, and riprap placement in the ditch to abate erosion. Culvert and riprap placement in the ditch would be permanent features, but these impacts would not be considered significant due to the poor habitat value and eroding character of the earthen ditch that would be subject to construction disturbance. However, placement of the culvert and riprap would require the discharge of fill material in what may be regarded as Waters of the State, potentially requiring authorization from the California Department of Fish and Wildlife (CDFW) pursuant to Section 1602 of the California Fish and Game Code and the Regional Water Quality Control Board (RWQCB) pursuant to the Porter-Cologne Water Quality Control Act and California Water Code Sections 13000–14920. The roadside ditch appears to have been excavated or developed as an erosional feature in uplands and is likely exempt from United States Army Corps of Engineers (Corps) jurisdiction as a Water of the U.S. Therefore, mitigation is not warranted and this impact would be **less than significant**. The City may require the project applicant to submit applications for authorization to the CDFW and RWQCB and provide documentation that the work is authorized or that authorization by those agencies is not required.

Even if the ditch was historically excavated in uplands, it is likely to represent a realignment of a seasonal channel that was impacted by the construction of Santos Ranch Road. Any channel that is supported by a local watershed is regulated as a water of the State. Therefore, the placement of fill (e.g., a culvert and riprap) will require a permit from the Water Board and is likely to require a permit from the CDFW. The statement in the ISMND that “mitigation is not warranted” is incorrect. The Water Board requires mitigation for all projects that place fill in waters of the State.

Without a description of a viable mitigation project, the ISMND 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 ISMND 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, because the ISMND does not propose any mitigation for the Project’s placement of fill in waters of the State. 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 the Project's proposed impacts to waters of the State.

Conclusion

The ISMND does not provide sufficient detail with respect to mitigation for Project impacts to waters of the State. The ISMND 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 mitigation waters will be geomorphically stable and able to support vegetation without human intervention after the mitigation waters have attained their performance criteria. A proposed program for monitoring the success of the mitigation features should also be included with the mitigation proposal(s).

If the ISMND is adopted without providing concrete mitigation proposals for impacts to waters of the State, it is likely that the ISMND 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,



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

cc: State Clearinghouse (state.clearinghouse@opr.ca.gov)
CDFW, Marcia Grefsrud (marcia.grefsrud@wildlife.ca.gov)