San Francisco Bay Regional Water Quality Control Board

Date

March 10, 2024

Governor's Office of Planning & Research

Mar 11 2024

STATE CLEARINGHOUSE

Sent via electronic mail: No hardcopy to follow

East Palo Alto Sanitary District
ATTN: Akin Okupe, General Manager/District Engineer (aokupe@epasd.com)
901 Weeks Street
East Palo Alto, CA 94303

Subject: San Francisco Bay Regional Water Quality Control Board Comments on the Initial Study / Mitigated Negative Declaration for the Sanitary Sewer Parallel Trunk Line (Manhole T-0 to T-32) Project
SCH No. 2024020354

Dear Akin Okupe:

San Francisco Bay Regional Water Quality Control Board (Water Board) staff appreciates the opportunity to review the *Initial Study / Mitigated Negative Declaration* (ISMND) for the *Sanitary Sewer Parallel Trunk Line (Manhole T-0 to T-32) Project* (Project). The ISMND evaluates the potential environmental impacts associated with implementing the Project. The East Palo Alto Sanitary District (District) will construct a new, 18-inch diameter sanitary sewer line, parallel to an existing 24- to 30-inch diameter sanitary sewer line, from manhole T-0 within the Palo Alto Regional Water Quality Control Plant, running north/northwest through the Palo Alto Airport site to manhole T-32, just east of San Francisquito Creek bridge. The total length is approximately 6,000 linear feet. The proposed improvements are located outside of the district service boundaries and within the City of Palo Alto. The new sanitary sewer line route would begin at manhole T-0 and proceed across Embarcadero Road north through the airport outdoor airplane parking area to manhole T-4 where the route turns northwest and parallels the runway along the east side of the adjacent golf course. At manhole T-10, the route turns southwest and runs between the golf course and the San Francisquito Creek Trail. The route ends at manhole T-32.

Summary

As is discussed below, the assessment of potential impacts to salt marsh wetlands at the Palo Alto Golf Course and the mitigation proposed for impacts to those wetlands in the ISMND is currently insufficient to support the issuance of a permit from the Water

Board authorizing impacts to those wetlands. The District should not assume that the Water Board will issue a permit for a Project design that impacts wetlands, when an alternative that avoids impacts to wetlands appears to be feasible. In addition, the ISMND 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 impacts to the wetlands in the salt marsh that is present on the Palo Alto Golf Course.

Text on page 48 of Section 4, *Biological Resources*, describes proposed impacts to a wetland at the Palo Alto Golf Course consisting of northern coastal salt marsh. The wetland is described as about 960 feet long by 40 feet wide and the excavation for the pipeline is proposed to travel down the center of this 0.9-acre wetland. This wetland may be subject to federal jurisdiction under Section 404 of the Clean Water Act (CWA). If the wetland is subject to federal jurisdiction, impacts to the wetland would require a CWA Section 401 Certification from the Water Board. However, if the Corps does not assert jurisdiction over the wetland, the wetland is subject to the jurisdiction of the Water Board, pursuant to the Porter-Cologne Water Quality Control Act. Impacts to this wetland would 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. 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 CWA 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 the installation of a pipeline 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 trench through the middle of the wetland. Since the wetland can be avoided by a modest realignment of the route of the pipeline, the Water Board is not likely to authorize impacts to the wetland. The District is encouraged to revise the sewer line alignment to avoid all impacts to wetlands.

Comment 2. The extent of wetlands has not been confirmed prior to circulating the ISMND.
Text on page 48 acknowledges that extent of wetlands along the proposed alignment is based on a reconnaissance biological survey. An actual wetland delineation is only proposed to be conducted prior to ground disturbance at the Project site (Mitigation Measure BIO-7). Impacts to wetlands will have a significant impact on the cost of the Project and the resource agencies may require that the Project be redesigned to avoid impacts to wetlands. At this stage in Project development, the District should have already conducted a formal delineation of wetlands along the alignment of the pipeline and submitted the delineation to the Corps for verification.

Under the 2023/2024 Dredge & Fill Fee Calculator, the permit fee for temporary impacts to a 0.9-acre wetland is $23,947. In addition to that cost, the District would be responsible for restoring impacted wetlands and confirming the success of restoration by monitoring the restored wetlands for a minimum monitoring and maintenance period of five years. To avoid these costs, the Project should be redesigned to avoid all direct impacts to waters of the State. To confirm that all waters of the State can be avoided, the District should have a formal wetland delineation of the Project’s alignment conducted immediately following the end of the 2023/2024 wet season. Delineations conducted too far into the dry season may not detect the full extent of seasonal wetland along the Project’s alignment.

Comment 3. Mitigation Measure BIO-7 does not include sufficient detail to confirm that mitigation of impacts to wetlands is feasible.
Mitigation Measure BIO-7 includes two options for avoiding or minimizing impacts to wetlands.

> *Option 1: Avoid direct impacts to wetlands by rerouting the sewer line outside of the wetland area or by horizontal drilling under the wetland area identified.*
> *Option 2: Assume impacts to wetlands and obtain necessary permits.*

As was noted above, we recommend using Option 1. If Option 1 is feasible, then the Water Board is not likely to issue permits that would result in avoidable impacts to waters of the State.

If the District intends to pursue Option 2, obtaining permits is a legal requirement, but is not itself a mitigation measure. The text for Option 2 refers to the future development of a mitigation and monitoring plan to provide mitigation for temporary impacts to wetlands along the Project alignment.

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. 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. It is possible that impacts to the wetlands along the Project alignment may not be temporary.
The ISMND refers to impacts associated with trenching through wetlands as temporary impacts. Impacts to the wetlands will be considered temporary if the vegetation and hydrology at the impacted wetlands can be returned to pre-Project vegetation and hydrology within one year of the first impact to the wetlands.

The ISMND notes that Project implementation may last 12 months, but does not describe how long excavation may take place within wetlands. To promote recovery of the wetlands, the vegetation-supporting topsoil should be removed first and stockpiled separately. When the trench is backfilled, the topsoil should be used to restore the pre-impact elevation of the wetland surface. However, proper management of topsoil may not be sufficient to restore the wetland if trenching permanently impacts the permeability of the soils at the impacted wetland. Wetlands develop over soils that are relatively impermeable and hold water long enough to establish soil saturation over a significant portion of the growing season. If trenching increases the local permeability of the soils, water may no longer persist on the site surface long enough to support wetland hydrology. Restored wetlands must be monitored for at least five years to confirm that self-sustaining wetlands have recovered at the site. If the wetlands do not recover, the District will be required to provide mitigation for the lost acreage of wetlands.

If the trench extends below the local groundwater table, dewatering of the trench will be necessary to maintain a dry excavation. Dewatering of the trench will impact local groundwater levels, which may result in additional impacts to the hydrology of the wetlands at the Project site. After dewatering of excavations, wetlands in the vicinity of the trench must be monitored to ensure that the dewatering has not had a permanent impact on the hydrology of restored or preserved wetlands.

Also, due to the large size of the predicted impacts to wetlands, an additional 10 percent surface area of wetlands must be provided as part of the Project's mitigation for trenching through the wetlands. The District will be responsible for finding viable opportunities for permittee-responsible wetland mitigation.

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 impacts to wetlands consists of the creation of new wetlands. If the mitigation consists of restoration or enhancement of existing wetlands, the amount of mitigation will be greater than if the mitigation consists of the creation of wetlands. If there are uncertainties with respect to the availability of sufficient water to support a mitigation wetland or sufficiently impermeable soils to sustain wetland hydrology, 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 1.1:1 may be acceptable if a mitigation wetland 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 District will need to acquire fee title to a property with the proper hydrology to support an appropriately-sized mitigation wetland. In addition, the District will need to monitor and maintain the mitigation wetland for at least five years, until final performance criteria are attained. The District 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 wetland. 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.

Comment 5. The JARPA application form is out-of-date and is not accepted by some resource agencies.

Mitigation Measure BIO-8 refers to the possible use of a San Francisco Bay Joint Aquatic Resource Permit Application (JARPA) to apply for permits from the Water Board, Corps, CDFW, USFWS, and BCDC. The JARPA form is out-of-date and is no longer accepted by some of the resource agencies.

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 waters will have sufficient hydrology to sustain wetland 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 impacts to 0.9 acres of wetlands, we must be provided with an alternatives analysis that demonstrates that avoidance of the wetlands at the Project site is infeasible.

If the ISMND is adopted without providing concrete mitigation proposals for impacts to waters of the State, the ISMND may not be adequate to support the issuance of a CWA Section 401 Certification and/or 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 K. Wines

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

cc: State Clearinghouse (state.clearinghouse@opr.ca.gov)
Corps (CESPN-RG-info@usace.army.mil)