



US Army Corps
of Engineers®
San Francisco District

SAN FRANCISCO DISTRICT

Regulatory Division
1455 Market Street, 16th Floor
San Francisco, CA 94103-1398

PUBLIC NOTICE

PROJECT: East Bay Regional Park District Routine Maintenance
Re-issuance of Regional General Permit

PUBLIC NOTICE NUMBER: 2003-28902S

PUBLIC NOTICE DATE: September 1, 2010
COMMENTS DUE DATE: September 15, 2010

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1. **INTRODUCTION:** East Bay Regional Park District (EBRPD), 2950 Peralta Oaks Court, P.O. Box 5381, Oakland, California, 94605-0381 (Contact Steven Bobzien (510) 544-2347), has applied for reauthorization of their U.S. Army, Corps of Engineers (Corps) Regional General Permit (RGP) which allows for routine maintenance activities within EBRPD-managed lands within Alameda and Contra Costa Counties. The original RGP was authorized in August of 1998 and reissued in 2005. This reauthorization would permit activities for five construction seasons from fall of 2010 through fall of 2015. This application is being processed pursuant to the provisions of Section 404 of the Clean Water Act (33 U.S.C. Section 1344) and Section 10 of the Rivers and Harbors Act (33 U.S.C. Section 403).

2. **PROPOSED PROJECT:**

Project Site Location: The RGP would authorize the continuance of maintenance projects within various waterways and wetlands in EBRPD lands within Contra Costa and Alameda Counties (see attached figure).

Purpose and Need: The basic purpose of this project is maintenance. The overall purpose of this project is to provide safe public, emergency and employee access to, and maintain the natural resources within EBRPD lands.

Project Alternatives: The maintenance projects to be conducted under the terms of the Regional General Permit are considered to be minimal. The Federal Register states that “where a category of 404 discharges is so minimal in its effects that it has been placed under a general permit, there is no need to perform a case-by-case alternatives analysis” (40 CFR 230.2). Therefore, no alternatives analysis will be required for the individual designs of

specific projects authorized under the Regional General Permit.

Project Description: EBRPD manages over 100,000 acres of open space and park lands within Contra Costa and Alameda Counties. On these lands, EBRPD performs various maintenance activities designed to improve watersheds and maintain existing structures. These activities include: maintenance of road crossings, culvert replacement and maintenance, bank stabilization, maintenance dredging, maintenance of other existing structures (wells, levees, swim dams, etc.) and other minor discharges of fill material for new structures as necessary (Attachments A and B). The number of projects performed under this RGP would vary by year. Routine maintenance projects involving streams, creeks, lakes, wetlands, bay shorelines or ponds would be annually identified in the field by park operations staff and/or EBRPD management who are intimately familiar with their park’s infrastructure. EBRPD would submit a detailed list of proposed projects to the Corps at least 30 days prior to the start of construction season for review and approval. Construction season would correspond to the portion of the year when the potential for aquatic and aquatic species impacts would be minimal, normally from May 15 through October 15. At the conclusion of the construction season, EBRPD would submit a second report documenting which projects were actually constructed and the impacts associated with each, including the area and volume of permanent fill in waters of the U.S.

A copy of a summary of work performed under the first RGP has been attached. This document exemplifies the extent of likely maintenance work for the reauthorized RGP, as well as documenting the minimal environmental impacts of previously authorized activities.

Impact: From the initial authorization of the RGP in 1998 to the most recent expiration in 2009, EBRPD has completed a total of 247 routine maintenance projects in a variety of water bodies throughout the parklands. Within this eleven-year period, most of the projects had no permanent impacts or wetlands loss. Projects with impacts ranged from less than 0.0001 to 0.09 acre per project, averaging 0.092 acre of permanent impacts per year, for an overall cumulative total of 1.016 acres of permanent of jurisdictional waters of the U.S. Impacts under the reauthorized RGP are not expected to significantly deviate from this amount. The exact amount of fill from future maintenance projects cannot be identified; however, EBRPD has estimated the effects of routine maintenance activities for the next five years to total approximately 0.761 acre of temporary impacts and 0.757 acre of permanent impacts to jurisdictional waters of the U.S.

Mitigation: The maintenance projects proposed under the reauthorized RGP would have minimal environmental impacts to aquatic resources. Most projects would benefit aquatic systems by reducing sedimentation or restoring flows thereby allowing for a more natural flow regime. Minor short term impacts to aquatic resources may occur but EBRPD has proposed standard best management practices to reduce and rectify these impacts (Attachment C). To compensate for loss of waters of the U.S. under the previous RGP authorization, EBRPD created and/or restored approximately 2.58 acres of lentic water habitat for California red-legged frog, California tiger salamander, and other aquatic species, for an overall net increase of 1.57 acres of perennial wetlands.

To compensate for impacts to waters of the U.S. associated with routine maintenance activities proposed over the next five years, EBRPD has identified 17 potential restoration projects which would create and or enhance approximately 35 acres of tidal wetlands, 8.11 acres of lentic water bodies, and 0.88 acre of stream habitat (Attachment D).

3. STATE AND LOCAL APPROVALS:

Water Quality Certification: State water quality certification or a waiver is a prerequisite for the issuance of a Department of the Army Permit to conduct any activity which may result in a fill or pollutant discharge into waters of the United States, pursuant to Section 401 of the Clean Water Act of 1972, as amended (33 U.S.C. § 1341 *et seq.*). The applicant has recently submitted an application to the California Regional Water Quality Control Board (RWQCB) to obtain water quality certification for the project. No Department of the Army

Permit will be issued until the applicant obtains the required certification or a waiver of certification. A waiver can be explicit, or it may be presumed, if the RWQCB fails or refuses to act on a complete application for water quality certification within 60 days of receipt, unless the District Engineer determines a shorter or longer period is a reasonable time for the RWQCB to act.

Water quality issues should be directed to the Executive Officer, California Regional Water Quality Control Board, San Francisco Bay Region, 1515 Clay Street, Suite 1400, Oakland, California 94612 by the close of the comment period.

Coastal Zone Management: Section 307(c) of the Coastal Zone Management Act of 1972, as amended (16 U.S.C. § 1456(c) *et seq.*), requires a non-Federal applicant seeking a federal license or permit to conduct any activity occurring in or affecting the coastal zone to obtain a Consistency Certification that indicates the activity conforms with the State's coastal zone management program. Generally, no federal license or permit will be granted until the appropriate State agency has issued a Consistency Certification or has waived its right to do so. Since the project occurs in the coastal zone or may affect coastal zone resources, the applicant has obtained a Consistency Determination from the San Francisco Bay Conservation and Development Commission to comply with this requirement (M85-83.04).

Coastal zone management issues should be directed to the Executive Director, San Francisco Bay Conservation and Development Commission, 50 California Street, Suite 2600, San Francisco, California 94111, by the close of the comment period

4. COMPLIANCE WITH VARIOUS FEDERAL LAWS:

National Environmental Policy Act (NEPA): Upon review of the Department of the Army permit application and other supporting documentation, USACE has made a *preliminary* determination that the project neither qualifies for a Categorical Exclusion nor requires the preparation of an Environmental Impact Statement for the purposes of NEPA. At the conclusion of the public comment period, USACE will assess the environmental impacts of the project in accordance with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321-4347), the Council on Environmental Quality's Regulations at 40 C.F.R. Parts 1500-1508, and USACE Regulations at 33 C.F.R. Part 325. The final NEPA

analysis will normally address the direct, indirect, and cumulative impacts that result from regulated activities within the jurisdiction of USACE and other non-regulated activities USACE determines to be within its purview of Federal control and responsibility to justify an expanded scope of analysis for NEPA purposes. The final NEPA analysis will be incorporated in the decision documentation that provides the rationale for issuing or denying a Department of the Army Permit for the project. The final NEPA analysis and supporting documentation will be on file with the San Francisco District, Regulatory Division.

Endangered Species Act (ESA): Section 7(a)(2) of the ESA of 1973, as amended (16 U.S.C. § 1531 *et seq.*), requires Federal agencies to consult with either the U.S. Fish and Wildlife Service (USFWS) or the National Marine Fisheries Service (NMFS) to insure actions authorized, funded, or undertaken by the agency are not likely to jeopardize the continued existence of any Federally-listed species or result in the adverse modification of designated critical habitat. As the Federal lead agency for this project, USACE has conducted a review of the California Natural Diversity Data Base, digital maps prepared by USFWS and NMFS depicting critical habitat, and other information provided by the applicant, to determine the presence or absence of such species and critical habitat in the project area. Based on this review, USACE has made a preliminary determination that the following Federally-listed species and designated critical habitat are present at the project location or in its vicinity, and may be affected by project implementation:

Longhorn fairy shrimp (*Branchinecta longiantenna*),
Vernal pool fairy shrimp (*Branchinecta lynchi*), Vernal pool tadpole shrimp (*Lepidurus packardii*), Delta smelt (*Hypomesus transpacificus*),
Chinook salmon (*Oncorhynchus tshawytscha*),
Steel head (*Oncorhynchus mykiss*),
California tiger salamander (*Ambystoma californiense*),
California red-legged frog (*Rana draytonii*),
Giant garter snake (*Thamnophis gigas*),
California clapper rail (*Rallus longirostris obsoletus*), Salt marsh harvest mouse (*Reithrodontomys raviventris*),
Contra Costa goldfields (*Lasthenia conjugens*), and Soft bird-beak (*Cordylanthus mollis ssp. mollis*).

These thirteen covered species could potentially occur at various proposed routine maintenance project sites within the East Bay Regional Park District. To assess potential effects on federally listed species, EBRPD has provided a

quantitative and qualitative analysis of all routine maintenance projects conducted under the RGP to date. This includes evaluating potential impacts of routine maintenance projects to federally listed species and potential effects to critical habitat (Attachment E).

The proposed activities associated with EBRPD's routine maintenance activities appear to be covered under the U.S. Army Corps of Engineers Proposed Procedures for Permitting Projects that will Not Adversely Affect Selected Listed Species in California (NLAA) consultation with U.S. Fish and Wildlife Service and National Marine Fisheries Service (dated November 16, 2006). Proposed projects that do not fit the NLAA will require a separate Section 7 authorization before work may be performed on those sites.

Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA): Section 305(b)(2) of the MSFCMA of 1966, as amended (16 U.S.C. § 1801 *et seq.*), requires Federal agencies to consult with the National Marine Fisheries Service (NMFS) on all proposed actions authorized, funded, or undertaken by the agency that may adversely affect essential fish habitat (EFH). EFH is defined as those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity. EFH is designated only for those species managed under a Federal Fisheries Management Plan (FMP), such as the *Pacific Groundfish FMP*, the *Coastal Pelagics FMP*, and the *Pacific Coast Salmon FMP*. As the Federal lead agency for this project, USACE has conducted a review of digital maps prepared by NMFS depicting EFH to determine the presence or absence of EFH in the project area. Based on this review, USACE has made a *preliminary* determination that EFH is not present at the project location or in its vicinity, and that consultation will not be required. USACE will render a final determination on the need for consultation at the close of the comment period, taking into account any comments provided by NMFS

Marine Protection, Research, and Sanctuaries Act (MPRSA): Section 302 of the MPRS of 1972, as amended (16 U.S.C. § 1432 *et seq.*), authorizes the Secretary of Commerce, in part, to designate areas of ocean waters, such as the Cordell Bank, Gulf of the Farallones, and Monterey Bay, as National Marine Sanctuaries for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or aesthetic values. After such designation, activities in sanctuary waters authorized under other authorities are valid only if the Secretary of Commerce certifies that the

activities are consistent with Title III of the Act. No Department of the Army Permit will be issued until the applicant obtains the required certification or permit. The project does not occur in sanctuary waters, and a *preliminary* review by USACE indicates the project would not likely affect sanctuary resources. This presumption of effect, however, remains subject to a final determination by the Secretary of Commerce, or his designee.

National Historic Preservation Act (NHPA): Section 106 of the NHPA of 1966, as amended (16 U.S.C. § 470 *et seq.*), requires Federal agencies to consult with the appropriate State Historic Preservation Officer to take into account the effects of their undertakings on historic properties listed in or eligible for listing in the *National Register of Historic Places*. Section 106 of the Act further requires Federal agencies to consult with the appropriate Tribal Historic Preservation Officer or any Indian tribe to take into account the effects of their undertakings on historic properties, including traditional cultural properties, trust resources, and sacred sites, to which Indian tribes attach historic, religious, and cultural significance. As the Federal lead agency for this undertaking, USACE has made a *preliminary* determination that historic or archaeological resources are present in EBRPD lands, and that such resources may be affected by the maintenance activities. The East Bay Regional Park District contains potentially important archeological sites. The proposed list of projects to be performed each year under the Regional General Permit will be evaluated by Corps archeologists. Any projects which may adversely affect cultural resources shall be referred to the State Historic Preservation Office, for review, before work may be performed at that site. If unrecorded archaeological resources are discovered during project implementation, those operations affecting such resources will be temporarily suspended until USACE concludes Section 106 consultation with the State Historic Preservation Officer or the Tribal Historic Preservation Officer to take into account any project related impacts to those resources.

5. COMPLIANCE WITH THE SECTION 404(b)(1) GUIDELINES: Projects resulting in discharges of dredged or fill material into waters of the United States must comply with the Guidelines promulgated by the Administrator of the Environmental Protection Agency under Section 404(b) of the Clean Water Act (33 U.S.C. § 1344(b)). An evaluation pursuant to the Guidelines indicates the project is dependent on location in or proximity to waters of the United States to achieve the basic project purpose, because the structures that EBRPD

proposes to maintain are already within waters of the U.S., therefore their maintenance must occur within waters of the U.S. This conclusion lowers the (rebuttable) presumption of the availability of a practicable alternative to the project that would result in less adverse impact to the aquatic ecosystem, while not causing other major adverse environmental consequences.

6. PUBLIC INTEREST EVALUTION: The decision on whether to issue a Department of the Army Permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the project and its intended use on the public interest. Evaluation of the probable impacts requires a careful weighing of the public interest factors relevant in each particular case. The benefits that may accrue from the project must be balanced against any reasonably foreseeable detriments of project implementation. The decision on permit issuance will, therefore, reflect the national concern for both protection and utilization of important resources. Public interest factors which may be relevant to the decision process include conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership, and, in general, the needs and welfare of the people.

7. CONSIDERATION OF COMMENTS: USACE is soliciting comments from the public; Federal, State and local agencies and officials; Native American Nations or other tribal governments; and other interested parties in order to consider and evaluate the impacts of the project. All comments received by USACE will be considered in the decision on whether to issue, modify, condition, or deny a Department of the Army Permit for the project. To make this decision, comments are used to assess impacts on endangered species, historic properties, water quality, and other environmental or public interest factors addressed in a final environmental assessment or environmental impact statement. Comments are also used to determine the need for a public hearing and to determine the overall public interest of the project.

8. SUBMITTING COMMENTS: During the specified comment period, interested parties may submit written comments to Holly Costa, San Francisco District, Regulatory Division, 1455 Market Street, 16th Floor, San Francisco, California 94103-13978; comment letters should cite the project name, applicant name, and public

notice number to facilitate review by the Regulatory Permit Manager. Comments may include a request for a public hearing on the project prior to a determination on the Department of the Army permit application; such requests shall state, with particularity, the reasons for holding a public hearing. All substantive comments will be forwarded to the applicant for resolution or rebuttal. Additional project information or details on any subsequent project modifications of a minor nature may be obtained from the applicant and/or agent, or by contacting the Regulatory Permit Manager by telephone or e-mail cited in the public notice letterhead. An electronic version of this public notice may be viewed under the *Current Public Notices* tab on the USACE website: <http://www.spn.usace.army.mil/regulatory/>.