



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: Newark Slough Mitigation Bank

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COMMENTS DUE DATE: March 26, 2016

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1. **INTRODUCTION:** Wildlands Newark Slough, LLC (POC: Kim Fettke, 916-435-3555, 3855 Atherton Road, Rocklin, CA 95765) has applied to the U.S. Army Corps of Engineers (USACE), San Francisco District, for a Department of the Army Permit to establish a wetland mitigation bank and species conservation bank in a former salt pond adjacent to Newark Slough in the City of Newark, Alameda County, California. This Department of the Army permit application is being processed pursuant to the provisions of Section 404 of the Clean Water Act of 1972, as amended (33 U.S.C. § 1344 *et seq.*) and Section 10 of the Rivers and Harbors Act of 1899, as amended (33 U.S.C. § 403 *et seq.*).

2. PROPOSED PROJECT:

Project Site Location: The proposed bank property is located along the historic margin of San Francisco Bay, between developed areas of Newark to the north and east, and current and former salt ponds to the south and west (Figure 1: Regional Location Map). The property is bounded by the Don Edwards San Francisco Bay National Wildlife Refuge (Refuge) on the west; Thornton Avenue and the Refuge on the north; vacant and industrial land on the east; and a Union Sanitary District pump station, the Hetch Hetchy aqueduct, and Southern Pacific railroad tracks on the south. The property is located in Sections 2 and 3 of the Newark 7.5-minute quadrangle within Township 5 South, Range 2 West (Mount Diablo Meridian); Latitude 37.5246°N, Longitude -122.0601°W (Figure 2: USGS Topographic Map). The property includes Alameda County Assessor Parcel Numbers (APNs): 537-555-18, 537-555-19, 537-555-20, 537-555-6-2, 537-555-7-2, 537-555-8-2, and 537-555-28-2.

Project Site Description: The 59.2-acre property lies along the upstream end of Newark Slough and consists

primarily of former salt production (bittern) ponds (Figure 3: Aerial Photograph). Elevations at the property range from approximately 0 to 10 feet above sea level. The northern portion of the property includes approximately 1,400 linear feet (0.9 acre) of Newark Slough and 8 acres of adjacent tidal marsh. Approximately 50 acres of the property lie south of Newark Slough, and consist largely of salt flats that were used in the 1950's as bittern ponds to store the saline liquid by-product (bittern) generated during the salt production process. These salt flats are surrounded by constructed levees that isolate them from Newark Slough and tidal influence. The southern portion of the property includes approximately 22.8 acres of seasonal waters (consisting of salt flats that flood during winter precipitation and occasional tidal overtopping of the levees) and 8.1 acres of non-tidal saline wetlands scattered in patches around the salt flats. This area also contains a 5.8-acre remnant section of the historical alignment of Newark Slough that was cut off by levees from tidal influence. Additionally, there are approximately 13.7 acres of uplands along the levee tops and in a 2-acre area of higher ground along the southern boundary of the property.

Various easements (e.g., road way easements, pipeline and power line easements, access easements) exist around all sides of the property and these areas will be excluded from the proposed mitigation bank. The City of Newark previously anticipated the construction of a roadway that would traverse the western side of the property, and the City owned this land in fee title. However, in December 2012 the applicant acquired an option to purchase this land from the City for the purposes of this restoration project. One Pacific Gas & Electric (PG&E) easement transects the property from the southwest to the northeast. This is an unused easement to erect, construct, replace, remove, and maintain two tower lines for the transmission

of electricity and communication, as well as a right-of-way. This easement is the subject of continuing discussions between the applicant and PG&E with the goal of converting this ground easement into an aerial easement that will not restrict the restored habitat. Two polygons have been identified to demarcate the footprints of the possible future locations of two towers at the southwest and northeast edges of the property, and these areas have been excluded from the proposed mitigation bank (Figure 6a: Concept Plan).

Project Description: The applicant proposes to lower the levee that separates the former salt pond from Newark Slough, and reconnect the remnant portion of Newark Slough to the existing alignment, thus reintroducing tidal influence to the salt pond portion of the property. Restoring tidal flows to the property is expected to catalyze the natural colonization of tidal marsh plant species (e.g., pickleweed) from nearby marsh habitats; however, some native plant species (e.g., cordgrass) may be planted to assist in more rapid marsh colonization by desired species rather than nonnative species. Some of the existing seasonal wetland vegetation (e.g., pickleweed) will be preserved during construction and allowed to convert to tidal marsh habitat following the restoration of tidal flows to the property.

The levees separating the salt pond from Newark Slough and most of the upland berms that surround the remnant slough channel through the interior of the property will be lowered to elevations that will allow tidal influence and support tidal marsh vegetation. Several existing high points along these berms will be retained to serve as vegetated high-tide refugia for species such as salt marsh harvest mouse (*Reithrodontomys raviventris*) and Ridgway's rail (*Rallus obsoletus*). These refugia islands will be contoured as needed to reach elevations suitable for sustaining high marsh vegetation.

The 2-acre upland patch along the southern boundary may be contoured as needed to establish appropriate transitional habitat, and much of it will remain upland. Spoils generated by the lowering of the levee and berms will be used to recontour some lower-elevation portions of the property so that they reach elevations high enough to encourage tidal marsh establishment. Some portions of the property will remain at lower elevations to establish tidal mudflat habitat. Because the remnant slough follows the same alignment that it did when it contained Newark Slough, it will be kept in its current and historical alignment.

When complete it is anticipated that the project will restore approximately 45.9 acres and preserve almost 7.9 acres of tidal marsh complex, and enhance and preserve approximately 3.1 acres of upland buffer and transitional habitat. The applicant has proposed a potential crediting ratio of 0.75 mitigation credits per acre of restored tidal marsh complex. However, a final crediting approach has not been determined, so the crediting ratio may change after further analysis.

The applicant has proposed a wetland mitigation service area consisting of the South San Francisco Bay area, bounded by the Bay Bridge/Hwy 80 on the north, Interstate 880 on the east, State Route 82 on the west, and the intersection of SR 82 and I-880 on the south, as depicted in Figure 9a. Projects impacting tidally influenced Waters (including wetlands), and non-tidal Waters (including wetlands) located on historical baylands within this boundary could be served by this proposed mitigation bank. This proposed service area boundary encompasses areas that may become tidally influenced with future sea level rise.

The applicant also proposes using the mitigation bank to develop conservation credits for two species listed under the Endangered Species Act, the salt marsh harvest mouse and Ridgway's rail. The proposed service area for the salt marsh harvest mouse is the Central/South San Francisco Bay recovery unit and the small portion of the San Pablo Bay recovery unit south of Point Pinole, as depicted in Figure 9b. The proposed service area for the Ridgway's rail is the Central/South San Francisco Bay, the San Pablo Bay, and the Suisun Bay recovery units, as depicted in Figure 9c.

Basic Project Purpose: The basic project purpose comprises the fundamental, essential, or irreducible purpose of the project, and is used by USACE to determine whether the project is water dependent. The basic project purpose is to establish a wetland mitigation bank and special-status species conservation bank.

Overall Project Purpose: The overall project purpose serves as the basis for the Section 404(b)(1) alternatives analysis, and is determined by further defining the basic project purpose in a manner that more specifically describes the applicant's goals for the project, while allowing a reasonable range of alternatives to be analyzed. The overall project purpose is to establish a wetland mitigation bank and species conservation bank serving the South San Francisco Bay Area.

Project Impacts: Construction activities, including grading and fill placement, will occur in wetlands and waters subject to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. A Nationwide Permit or Individual Permit will therefore be required prior to the start of any construction associated with mitigation bank establishment. Estimates of fill volume or impact area subject to Section 404 or Section 10 have not been provided.

Proposed Mitigation: The proposed project is a wetland conservation and mitigation bank and will likely not require compensatory impacts to offset impacts to jurisdictional waters.

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 is hereby notified that, unless USACE is provided documentation indicating a complete application for water quality certification has been submitted to the California Regional Water Quality Control Board (RWQCB) within 30 days of this Public Notice date, the District Engineer may consider the Department of the Army permit application to be withdrawn. 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 is hereby advised to apply for a Consistency Determination from the San Francisco Bay Conservation and Development Commission to comply with this requirement.

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 by the close of the comment period.

Other Local Approvals: It is anticipated the applicant will be applying for the following additional governmental authorizations for the project: Section 1602 Stream Bed Alteration Agreement from California Department of Fish and Wildlife; Grading Permit from the City of Newark; CEQA compliance.

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 ensure 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 are present at the project location or in its vicinity, and may be affected by project implementation. The saltmarsh harvest mouse and Ridgway's rail have been documented on the property in tidal marsh habitat along Newark Slough. Additionally, steelhead (*Oncorhynchus mykiss*) and green sturgeon (*Acipenser medirostris*) may occur in tidal waters including Newark Slough. No special-status species have been recorded in the salt flat portion of the property. To address project related impacts to these species, USACE will initiate formal consultation with USFWS and NMFS, pursuant to Section 7(a) of the Act. Any required consultation must be concluded prior to the issuance of a Department of the Army Permit for the project.

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 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 present at the project location or in its vicinity, and that the critical elements of EFH may be adversely affected by project implementation. To address project related

impacts to EFH, USACE will initiate consultation with NMFS, pursuant to Section 305(5)(b)(2) of the Act. Any required consultation must be concluded prior to the issuance of a Department of the Army Permit for the project.

Marine Protection, Research, and Sanctuaries Act (MPRSA): Section 302 of the MPRSA 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 conducted a review of latest published version of the *National Register of Historic Places*, survey information on file with various city and county municipalities, and other information provided by the applicant, to determine the presence or absence of historic and archaeological resources within the permit area. Based on this review, USACE has made a *preliminary* determination that historic or archaeological resources are not likely to be present in the permit area, and that the project either has no potential to cause effects to these resources or has no effect to these resources. 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 the State Historic Preservation Officer, the Tribal Historic Preservation Officer, the Advisory Council on Historic Preservation, and Native American Nations or other tribal governments. 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. This conclusion raises 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 Greg Brown, San Francisco District, Regulatory Division, 1455 Market Street, 16th Floor, San Francisco, California 94103-1398; 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 *Public Notices* tab on the USACE website: <http://www.spn.usace.army.mil/Missions/Regulatory>.