



US Army Corps
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San Francisco District

Regulatory Division
450 Golden Gate Avenue
San Francisco, CA 94102

SAN FRANCISCO DISTRICT

PUBLIC NOTICE

PROJECT: Santa Clara Valley Habitat Conservation Plan, Regional General Permit 18

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COMMENTS DUE DATE: June 21, 2020

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1. **INTRODUCTION:** The Santa Clara Valley Habitat Agency (Edmund Sullivan, 535 Alkire St., Ste. 100, Morgan Hill, CA 95037-4728), on behalf of the City of San José, City of Morgan Hill, City of Gilroy, County of Santa Clara, Santa Clara Valley Water District, and Santa Clara Valley Transportation Authority, has applied to the United States Army Corps of Engineers (USACE), San Francisco District, for the re-issuance of Department of the Army Regional General Permit (RGP) 18 for the Santa Clara Valley Habitat Conservation Plan (SCVHCP). RGP 18 authorizes the Santa Clara Valley Habitat Agency (Habitat Agency) and any designated co-permittees to complete activities covered by the Santa Clara Valley Habitat Conservation Plan (HCP)/Natural Community Conservation Plan (NCCP; called *SCVHCP*) that have minimal impacts on waters of the United States. 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.*).

The current RGP 18 for the SCVHCP was issued on January 15, 2016, and expires on January 15, 2021. To date, seven projects have been authorized using RGP 18. Please see our webpage for further information regarding the current RGP 18:

https://www.spn.usace.army.mil/Portals/68/docs/regulator/RGP/RGP18_2016.pdf

2. PROPOSED PROJECT:

Project Site Location: The SCVHCP covers 460,205 acres of land located entirely within Santa Clara County (Figure 1). The RGP 18 area is equal to the SCVHCP study area, less state parks lands in Henry W. Coe and Pacheco

State Parks and the extended study area for burrowing owl conservation. The RGP area also includes almost all of the City of San José (less San Francisco Baylands habitats), all of the City of Morgan Hill, and all of the City of Gilroy. Land uses in the RGP area include urban, rural residential, agriculture, public open space, and rangelands (see Figure 2). The entire RGP area resides within the regulatory boundary of the San Francisco District of the USACE. The RGP area is defined as the area in which all RGP covered activities would occur, impacts would be evaluated, and RGP compensatory mitigation activities would be implemented. The boundary of the RGP area is based on political, ecological, and hydrologic factors. The RGP area includes all of the Llagas/Uvas/Pajaro watersheds within Santa Clara County and the entire Coyote Creek watershed except for the Baylands. A large portion of the Guadalupe watershed is also within the RGP area. The RGP area also encompasses small areas outside these watersheds.

Project Site Description: The Santa Clara Valley (Valley) runs the entire length of the County from north to south, bordered by the Diablo Range on the east and the Santa Cruz Mountains on the west. Salt marshes, tidal wetlands, and mostly abandoned salt ponds lie in the northern part of the County, adjacent to San Francisco Bay. The Valley is generally split into two geographic regions, the North Valley and the South Valley. The North Valley is extensively urbanized and houses approximately 90% of the County's residents. Thirteen (13) of the County's 15 cities are located in the North Valley, while the remaining two cities, Gilroy and Morgan Hill, are located in the South Valley. The South Valley remains predominantly rural, with the exception of urban centers in Gilroy and Morgan Hill. Low-density rural residential developments are scattered along the Valley floor and foothill areas.

Project Description: RGP 18 authorizes public and private entities to implement projects that fall under the following 17 general categories of activities:

- 1) Bridge removal and repair
- 2) Bridge replacement, widening, and installation
- 3) Culvert repair, replacement, and removal
- 4) Culvert installation
- 5) Outfall repair, replacement, removal, and installation
- 6) Water intake structure repair, replacement, and installation
- 7) Sediment removal
- 8) Removal of vegetation and storm debris involving soil disturbance
- 9) Temporary construction access and dewatering
- 10) Recreational facility construction, reconstruction, and maintenance
- 11) Restoration, establishment, enhancement activities involving soil disturbance, including removal and modification of fish passage impediments.
- 12) Installation of fish screens when such installation involves soil disturbance
- 13) Bank stabilization
- 14) Minor maintenance of levees, canals and ditches
- 15) Surveying activities, including installation and maintenance of scientific measurement devices
- 16) Utility repair, removal, replacement, and installation
- 17) Discharges associated with development

The description of each covered activity and the project-and program-level impact limits for each activity can be found in the above-referenced RGP 18 document posted on our webpage.

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 authorize structures or work, including discharges of dredged or fill material, in waters of the United States.

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 purpose of the RGP is to simplify and expedite the permitting process for activities covered under the SCVHCP with minimal impacts to waters of the U.S. while ensuring mitigation is implemented on a watershed scale.

Project Impacts: The renewed RGP 18 would still authorize up to 65 acres of permanent and 36 acres of temporary impacts to aquatic resources, including wetlands, other waters, and riparian land cover types over the 5-year term of the RGP (Tables 2 and 3). These numbers are based on one-sixth of the estimated impacts of the 50-year SCVHCP. The upper impact limit for individual projects authorized by the RGP would continue to be 0.5 acre or 300 linear feet of permanent adverse effects to waters of the U.S.

Proposed Mitigation: Projects authorized under the RGP are required to incorporate measures to avoid and minimize adverse effects on waters of the U.S. Compensatory mitigation is required on a project-by-project basis in accordance with 33 C.F.R. Part 332 (2008 Mitigation Rule) when necessary to mitigate for unavoidable adverse effects to waters of the U.S.

The Habitat Agency continues to propose a compensatory mitigation strategy for impacts to aquatic resources that programmatically addresses compensatory mitigation requirements under the SCVHCP and 2008 Mitigation Rule. This strategy involves utilizing fees collected under the SCVHCP to restore and create wetlands and other waters to meet compensatory mitigation obligations for both protected species and federal and state jurisdictional waters. The Habitat Agency is currently in the process of establishing an In-Lieu Fee (ILF) Program to provide compensatory mitigation for activities impacting aquatic resources that are covered under the SCVHCP, including activities covered under RGP 18.

The existing RGP 18 includes an Interim Mitigation Strategy developed by USACE and the Habitat Agency to provide compensatory mitigation in compliance with the 2008 Mitigation Rule prior to the establishment of the ILF Program. Under the Interim Mitigation Strategy, the Habitat Agency can provide permittee-responsible mitigation or purchase credits at a mitigation bank to provide any compensatory mitigation required for RGP 18 projects. The Interim Mitigation Strategy would continue to be utilized in association with RGP 18 until an ILF Program is established.

3. STATE AND LOCAL APPROVALS:

Water Quality Certification: Applicants seeking coverage under the RGP must obtain State water quality certification or a waiver before they can 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.*). A programmatic water quality certification was not issued for the existing RGP; therefore, each project covered under the RGP is required to obtain an individual water quality certification or waiver. It is the intent of the Habitat Agency to work with the San Francisco Regional Board, which has jurisdiction over the Habitat Plan lands in the San Francisco Bay Watershed, and the Central Coast Regional Board, which has jurisdiction over the Habitat Plan lands in the Monterey Bay Watershed, to develop a general Clean Water Act Section 401 certification for the renewed RGP 18.

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) and/or Central Coast Region (895 Aerovista Place, Suite 101, San Luis Obispo, California 93401) 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.

The RGP area does not overlap the coastal zone, and a preliminary review by USACE indicates that project covered under the RGP would not likely affect coastal zone resources. This presumption of effect, however, remains subject to a final determination by the San Francisco Bay Conservation and Development Commission.

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.

Other Local Approvals: By definition, applicants to the RGP would also be seeking coverage under the SCVHCP.

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 USC § 1531 *et seq.*), requires Federal agencies to consult with either the United States 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. In association with the previous issuance of RGP 18, USACE initiated consultation with the U.S. Fish and Wildlife Service to address project related impacts to threatened and endangered species and designated critical habitat, pursuant to Section 7(a) of the Endangered Species Act. California red-legged frog (*Rana draytonia*) and its designated critical habitat, threatened Central California Distinct Population Segment of the California tiger salamander (Central California tiger salamander) (*Ambystoma californiense*) and its designated critical habitat, endangered least Bell's vireo (*Vireo belli pusillus*),

threatened Bay checkerspot butterfly (*Euphydryas editha bayesis*) and its designated critical habitat, endangered San Joaquin kit fox (*Vulpes macrotis mutica*), endangered Tiburon Indian paintbrush (*Castilleja affinis ssp. neglecta*), endangered Coyote ceanothus (*Ceanothus ferisae*), endangered Santa Clara Valley dudleya (*Dudleya setchellii*), and endangered Metcalf Canyon jewelflower (*Streptanthus albidus ssp. albidus*) occur within the permit area. By letter of October 16, 2015, USFWS issued a Biological Opinion (USFWS file number 08ESMF00-2015-F-1169-2) that concluded projects covered under the RGP are not likely to jeopardize the continued existence of threatened and endangered species within the RGP area. The Biological Opinion contained an incidental take statement, with Terms and Conditions that must be implemented for the take exemption defined in Section 7(o)(2) of the ESA to remain in effect. USACE has made a preliminary determination that re-initiation of consultation with the USFWS is not required for the renewal of the RGP. Therefore, the mandatory Terms and Conditions in the USFWS Biological Opinion would continue to be incorporated as a Special Condition to the RGP to ensure compliance with ESA.

By letter dated December 7, 2015, USACE requested concurrence with a not likely to adversely affect determination for Central California Coast (CCC) steelhead (*Oncorhynchus mykiss*) DPS, South-Central California Coast (SCCC) steelhead (*O. mykiss*) DPS, and North American green sturgeon (*Acipenser medirostris*) southern DPS. In the *Endangered Species Act Section 7(a)(2) Concurrence Letter and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Response for the Santa Clara Valley Habitat Conservation Plan Regional General Permit [Corps File No. 2012-00302S] (NMFS file number WCR-2015-3821)*, dated December 23, 2015, NOAA NMFS concurred that the RGP is not likely to adversely affect the species provided the covered activities are in compliance with general and specific criteria in the January 2016 *Reporting Procedures, Procedural Overview and Minimization* for RGP 18.

USACE anticipates re-initiating consultation with the NMFS in association with the renewal of RGP 18, requesting formal consultation to allow for greater flexibility in implementing projects under the RGP. Consultation with the NMFS would be concluded prior to the re-issuance of RGP 18.

Magnuson-Stevens Fishery Conservation and

Management Act (MSFCMA): Section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act (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.

Consultation under MSFCMA was not previously required for issuance of RGP 18 since USACE determined covered activities would not adversely affect EFH. By letter of December 23, 2015, NOAA NMFS agreed with the Corps' determination that EFH would not be adversely affected. USACE has made a preliminary determination that EFH would not be adversely affected by projects covered under the renewed version RGP 18; therefore, consultation under MSFCMA is not required. USACE will render a final determination regarding 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. Federal action agencies (USFWS for the SCVHCP and USACE for the RGP) must comply with Section 106 of the National Historic Preservation Act (NHPA). The NHPA and the potential effects of the conservation strategy on resources subject to the NHPA are discussed in detail in the SCVHCP Environmental Impact Report/Environmental Impact Statement (EIR/EIS). However, the EIR/EIS may not fully evaluate all potential impacts on cultural resources beyond those actions of the Habitat Agency. Prior to authorizing any activities under the RGP, USACE would consult with the State Historic Preservation Officer or the Tribal Historic Preservation Officer to address any potential project-related impacts to historic or archaeological resources. Any required consultation must be conducted prior to authorization under the RGP. 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. USACE is preparing an analysis that considers alternatives to this proposed RGP; however, the preliminary alternatives analysis indicates that because the program is built on USACE's nationwide permitting process framework, it is likely the least environmentally damaging practicable alternative.

6. PUBLIC INTEREST EVALUATION: 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 Naomi Schowalter, San Francisco District, Regulatory Division, 450 Golden Gate Avenue, 4th Floor, San Francisco, California 94102; 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>.