



US Army Corps  
of Engineers®  
San Francisco District

Regulatory Division  
450 Golden Gate Ave., 4<sup>th</sup> Floor  
San Francisco, CA 94102-3406

SAN FRANCISCO DISTRICT

# PUBLIC NOTICE

PROJECT: Legacy Biosolids Lagoons Cleanup Project

PUBLIC NOTICE NUMBER: 2019-00387S  
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COMMENTS DUE DATE: February 17, 2020

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1. **INTRODUCTION:** The City of San Jose (POC: Jessica Donald 408-975-2620), 200 East Santa Clara St, 10<sup>th</sup> Floor, San Jose, CA 95113, has applied to the U.S. Army Corps of Engineers (USACE), San Francisco District, for a Department of the Army Permit to conduct cleanup activities at the San Jose-Santa Clara Regional Wastewater Facility Legacy Biosolids Lagoons. 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 project area is located in the legacy biosolids lagoons immediately north of the San Jose-Santa Clara Regional Wastewater Facility, at 700 Los Esteros Road in the City of San Jose, Santa Clara County, California (figures 1-2). The project area is located in Township 6 South, Range 1 West, Section 2, on the Milpitas, CA, USGS 7.5-minute topographic quadrangle (37.441566°N, -121.942004°W). The project area is bordered on the north by former salt pond A18, on the west by the Zanker Road landfill, and on the east by active biosolids lagoons. California State Route 237 is approximately 1 mile to the south and Interstate 880 approximately 0.9-mile to the east. Coyote Creek is approximately 0.6-mile east of the project site.

**Project Site Description:** The proposed project is located among other diked baylands along the southern end of San Francisco Bay, between urban areas of San Jose and former salt evaporation ponds. Land uses adjacent to the project site consist of industrial uses, including active biosolids lagoons, landfills, a bomb disposal facility, and other operational areas of the Regional Wastewater Facility.

Pond A18 is north of the project site and separated from the project site by an earthen levee. The project site consists of 23 rectangular lagoons totaling approximately 168 acres, which were constructed and used to collect and store industrial biosolids between 1962 and 1974. Although the lagoons have not been used since 1974, material in the lagoons was graded into windrows in 1998 leaving a series of linear mounds dominated by ruderal upland vegetation, interspersed with low areas within each lagoon. Low areas between the windrows and perimeter dikes of each lagoon contain a total of 39.49 acres of unvegetated seasonally ponded waters (salt pannes), and 19.83 acres of nontidal saline wetlands dominated by pickleweed (*Salicornia pacifica*) and salt grass (*Distichlis spicata*), as shown in figure 8.

**Project Description:** The City's proposed project would remediate the inactive biosolids lagoons in compliance with Site Cleanup Requirements (SCR) Order Number R2-2019-0026 issued by the San Francisco Bay Regional Water Quality Control Board (RWQCB). Pursuant to the SCR, there is an opportunity to coordinate this project with the adjacent South San Francisco Bay Shoreline Project (Shoreline Project). This project is being implemented by the USACE Civil Works Division with local (non-federal) sponsors the Santa Clara Valley Water District (Valley Water) and the California Coastal Conservancy. To comply with Shoreline Project timelines, the lagoon remediation would proceed in two phases. Phase 1 would prioritize the City's clean-up of lagoons L-16 to L-19 in 2020, in time to transfer these lagoons from the City to Valley Water by January 1, 2021. Advanced design for Phase 1 is being completed concurrently with permit application and processing in order to facilitate incorporation into the Shoreline Project. Phase 1 plans would include the relocation of the materials excavated from lagoons L-16 to L-19 (the shoreline lagoons) into

lagoons L-13 to L-15 (figure 3) for interim stockpiling pending completion of Phase 2 planning, design and implementation. Once remediated, lagoons L-16 to L-19 would be included in a Shoreline Project alternate levee alignment that combines lagoons L-16 to L-19 with Pond A18 (figure 4).

Phase 2 would complete the cleanup of the remaining lagoons (L 1-3, 5-7, 9-15, 20-24, and a portion of L-25). All the excavated materials (including those excavated during Phase 1) would be consolidated within a portion of the project site where they would be permanently contained and capped. Current alternatives being considered for final consolidation are shown in figure 3. Phase 2 is scheduled for implementation in 2021-2022. Because of the advanced timeline for completing Phase 1 design, Phase 2 design is currently conceptual in nature, and advanced design for Phase 2 would be completed in late 2020.

**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 complete site cleanup of the legacy biosolids lagoons.

**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 remediate contaminants within the legacy biosolids lagoons onsite and in compliance with the RWQCB's SCR Order, while also delivering the remediated shoreline lagoons (L-16 to L-19) by January 1, 2021 in time to integrate into the Shoreline Project's restoration activities.

**Project Impacts:** A total of approximately 570,000 cubic yards of legacy biosolids would be excavated from the lagoons, and placed within a portion of the site for permanent consolidation, containment, and capping. Phase 1 activities would include excavation and/or grading of approximately 5.99 acres of wetlands and 6.79 acres of other waters in the shoreline lagoons (L-16 to L-19), and filling approximately 3.54 acres of wetlands and 5.68 acres of other waters in lagoons L-13 to L-15. Phase 2 would include excavation and/or grading approximately 10.29 acres of wetlands and 27.03 acres of other waters in the

remaining lagoons, with a portion of these to be permanently filled by the consolidated biosolids (figure 10).

**Proposed Mitigation:** Because the legacy biosolids requiring cleanup are interspersed with existing aquatic resources throughout the lagoons, all lagoons would be impacted by excavation/removal of the biosolids and therefore complete avoidance of impacts to these aquatic resources would not be possible. No minimization of impacts has been proposed, either through selection of lagoons with fewer aquatic resources for temporary/permanent placement of excavated biosolids, or restoration of remaining lagoons once biosolids have been removed.

The City's application includes a preliminary assessment of compensatory mitigation for unavoidable impacts to aquatic resources. Because remediation of ponds L-16 to L-19 would allow the Shoreline Project to increase the potential enhancement area of pond A18 by approximately 35 acres, the City has requested consideration of this factor in their mitigation requirement. The City's proposed compensatory mitigation would either take the form of creation/restoration activities on Facility lands (likely to be focused on seasonal wetlands habitats), or the purchase of in-kind mitigation credits at an agency-approved mitigation bank within the region. The City will develop and submit conceptual mitigation alternatives for consideration and input by the USACE and RWQCB during the processing of this permit application.

**Project Alternatives:** Alternative approaches to meet SCR requirements have been analyzed in a *Closure Alternatives Analysis Plan* by Cornerstone Earth Group, dated September 25, 2019, including a variety of onsite and offsite treatment and disposal options. Of these, the currently proposed approach of consolidating and capping legacy biosolids within the existing Area of Contamination (AOC) was found to be the only feasible alternative in light of current regulatory, time, and cost constraints.

These and other alternatives will need to be further detailed by the applicant in a 404(b)(1) alternatives analysis. USACE has not endorsed any submitted alternatives at this time, and will conduct an independent review of the project alternatives prior to reaching a final permit decision.

### 3. STATE AND LOCAL APPROVALS:

**Water Quality Certification:** State water quality certification or a waiver thereof 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 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. A *preliminary* review by USACE indicates that the project is not likely to 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.

**Other Local Approvals:** The applicant will be applying for the following additional governmental authorizations for the project: California Department of Fish and Wildlife (CDFW) Section 2080/2081 Consultation (Informal Concurrence with Avoidance Measures and a No Take Determination) under the California Endangered Species Act, and potentially a Section 1600 Lake and Streambed Alteration Agreement (LSAA) for Phase 2.

### 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. § 1500-1508, and USACE regulations at 33 C.F.R. § 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 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 Federally-listed fish species and designated critical habitat subject to NMFS oversight are not present at the project location or in its vicinity and that consultation with this agency will not be required. USACE will render a final determination on the need for consultation with NMFS at the close of the comment period, taking into account any comments provided by NMFS.

As the Federal lead agency for the related Shoreline Project, USACE Civil Works has determined that the following Federally-listed species are present in the project vicinity and may be affected by project implementation: Salt-marsh harvest mouse (*Reithrodontomys raviventris*), California Least Tern (*Sternula antillarum browni*), Ridgway's rail/California clapper rail (*Rallus longirostris obsoletus*), and Western snowy plover (*Charadrius nivosus nivosus*). To address project related impacts to these species, USACE Civil Works had previously completed formal consultation with USFWS for the Shoreline Project, and has re-initiated formal consultation to incorporate potential effects from Phase 1 and 2 of the remediation project. 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*, or 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 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 any required certification or permit. The project does not occur in sanctuary waters, and a *preliminary* review by USACE indicates the project is not likely to 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 the 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 may be present near the permit area, but would not be adversely affected by the project. To address potential project related impacts to historic or archaeological resources, USACE will initiate consultation with the State Historic Preservation Officer or the Tribal Historic Preservation Officer, pursuant to Section 106 of the Act. Any required consultation must be concluded prior to the issuance of a Department of the Army Permit for the project.

**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 impacts to the aquatic ecosystem while not causing other major adverse environmental consequences. The applicant has been informed to submit an analysis of project alternatives to be reviewed for compliance with the Guidelines.

**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 in the project.

**8. SUBMITTING COMMENTS:** During the specified comment period, interested parties may submit written comments to Greg Brown, San Francisco District, Regulatory Division, 450 Golden Gate Avenue, 4<sup>th</sup> Floor, Suite 1111, San Francisco, California 94102-3404; 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>.