



US Army Corps
of Engineers®
San Francisco District

SAN FRANCISCO DISTRICT

Regulatory Division
450 Golden Gate Ave., 4th Floor
San Francisco, CA 94102-3404

PUBLIC NOTICE

PROJECT: Lower Alameda Creek Maintenance and Restoration

PUBLIC NOTICE NUMBER: SPN-2011-00420; 408-SPN-2021-00013

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COMMENTS DUE DATE: December 18, 2021

REGULATORY PERMIT MANAGER: Gregory Brown

TELEPHONE: 415-503-6791

E-MAIL: Gregory.G.Brown@usace.army.mil

408 PROJECT MANAGER: Jessica Vargas

TELEPHONE: 415-503-2936

E-MAIL: SPN.OperationsDivision@usace.army.mil

1. **INTRODUCTION:** The Alameda County Flood Control District (ACFCD) (POC: Jim Browne, 510-670-5480, 399 Elmhurst Street, Hayward, California, 95105, has applied to the U.S. Army Corps of Engineers (USACE), San Francisco District, for a Department of the Army Permit to conduct work and place fill/structures into waters of the United States associated with channel maintenance and restoration on a 5.6-mile reach of the Alameda Creek Flood Control Channel. 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 City has also requested permission from the Corps to alter the Alameda Creek federal flood risk management project, pursuant to Section 14 of the Rivers and Harbors Act of 1899, as amended (33 U.S.C. § 408 *et seq.*). This notice is to inform interested parties of the proposed activity and to solicit comments.

2. PROPOSED PROJECT:

Project Site Location: The project is located along the Alameda Creek Flood Control Channel, from the BART weir at the upstream end (37.5684°N, -121.9888 °W) to the UPRR bridge at the downstream end (37.5725 °N, -122.0614 °W) in the City of Fremont, Alameda County, California (Figure 1).

Project Site Description: The Alameda Creek Flood Control Channel, constructed by USACE starting in the 1960's, consists of a trapezoidal earthen channel with levees on both sides. Since construction of the channel, a meandering low-flow channel (active channel) has naturally established and persists between sediment-

removal episodes. It is generally located towards the center of the 170 to 310 ft-wide flat-bottom channel, except at some locations where the active channel hugs the toe of the levee's slopes. The 15-25 ft-wide active channel persists throughout the entire reach below the BART weir into the stable tidal zone downstream of the proposed project limit. Other infrastructure within the project reach includes several bridge crossings, constructed grade control weirs, rubber dam (RD) foundations, and the recently constructed BART weir fish ladder at the at the upstream end of the project.

Project Description: As shown in the attached drawings, the proposed project would widen and deepen the existing low flow channel to enhance sediment transport and fish passage, and install engineered log structures in the low flow channel to promote formation of scour pools and sediment bars for aquatic habitat complexity. The sediment terraces bordering the low flow channel would be lowered and revegetated with native herbaceous wetland species. The project would also notch the existing RD2 concrete foundation/grade control structure and four existing grouted rock riprap grade control structures, and install a new grouted riprap grade control structure. The enlarged low flow channel would also be stabilized with riprap at bridge crossings and a PG&E gas main crossing to protect critical infrastructure. The proposed project is divided into multiple phases. Phases 1 and 2 from the BART weir downstream to the Dry Creek confluence would be covered by the current proposed permit. Phase 3, for the remainder of the reach downstream to the UPRR bridge, would be permitted and constructed separately (within the next 5-8 years) depending on funding. Phase 4, from Ardenwood Blvd. downstream to the Bay, is still in the conceptual planning stages and would also be subject to future

permitting, possibly in conjunction with South Bay Salt Pond Restoration efforts.

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 flood risk management.

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 maintenance of flood capacity and enhancement of riverine functions including sediment transport and fish passage within the existing flood control channel.

Project Impacts: Channel improvements would permanently impact approximately 3.1 miles (34.3 acres) of jurisdictional waters in Phases 1 and 2, including approximately 6.2 acres of in-channel wetlands. Phase 3 work, to be permitted separately, would impact an additional 1.9 miles (37.9 acres, including 8.5 acres of wetlands).

Proposed Mitigation: The applicant proposes numerous avoidance and minimization measures to reduce impacts to aquatic resources and listed species. No compensatory mitigation is proposed.

Project Alternatives: An analysis of alternatives will be required, as outlined in the U.S. Environmental Protection Agency's Section 404(b)(1) Guidelines (40 C.F.R. § 230.10).

3. SECTION 408 PERMISSION

Authority: The project is being reviewed under the authority to grant permission for temporary or permanent use, occupation or alteration of any Corps civil works project as contained in Section 14 of the Rivers and Harbors Act of 1899, as amended, codified at 33 U.S.C. 408 ("Section 408"). Section 408 authorizes the Secretary of the Army, on the recommendation of the Chief of Engineers, to grant permission for the alteration or occupation or use of a Corps project if the Secretary determines that the activity will not be injurious to the public interest and will not

impair the usefulness of the project. The Secretary of Army's authority under Section 408 has been delegated to the Corps, Chief of Engineers. The Corps Chief of Engineers has further delegated the authority to the Corps, Directorate of Civil Works and Division and District Engineers, depending upon the nature of the activity. A requester or applicant has the responsibility to acquire all other permissions or authorizations required by federal, state, and local laws or regulations, including any other required permits. In addition, an approval from the Corps does not grant any property rights or exclusive privileges nor does it authorize any injury to the property or rights of others.

Evaluation Factors for 408: The decision whether to grant the requested permission for project alteration under Section 408 will be based on several factors. That decision will reflect the national concern for both protection and utilization of important resources. Review of requests for alteration will be reviewed by a Corps technical review team considering the following factors:

1) Impair the Usefulness of the Project Determination. The review team will determine if the proposed alteration would limit the ability of the Corps project to function as authorized, or would compromise or change any authorized project conditions, purposes or outputs. In order for an alteration to be approved, the requester must demonstrate that the alteration does not impair the usefulness of the federally authorized project.

2) Injurious to the Public Interest Determination. Proposed alterations will be reviewed to determine the probable impacts, including cumulative impacts, on the public interest. Factors that may be relevant to the public interest evaluation depend upon the type of Corps project being altered and the nature of the proposed alteration and may include, but are not limited to, such things as conservation, economic development, historic properties, cultural resources, environmental impacts, water supply, water quality, flood hazards, floodplains, residual risk, induced damages, navigation, shore erosion or accretion, and recreation. This evaluation will consider information received from the interested parties, including tribes, agencies, and the public. The benefits that reasonably may be expected to accrue from the proposal must be compared against its reasonably foreseeable detriments. The decision whether to approve an alteration will be determined by the consideration of whether benefits are commensurate with

risks and by the net impact of the alteration on the public interest using the public interest factors.

3) Environmental Compliance. A decision on a Section 408 request is a federal action, and therefore subject to the National Environmental Policy Act (NEPA) and other environmental compliance requirements. While the Corps is responsible for ensuring environmental compliance, the requester is responsible for providing all information that the district identifies as necessary to satisfy all applicable federal laws, executive orders, regulations, policies, and procedures. NEPA and other analysis completed to comply with other environmental statutes (e.g., Endangered Species Act) should be commensurate with the scale and potential effects of the activity that would alter the Corps project. The San Francisco District will work with the requester to determine the requirements, which will be scaled to the likely impacts of the proposed alteration and should convey the relevant considerations and impacts in a concise and effective manner.

4. 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 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 90 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, 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 project does not occur in the coastal zone, and a *preliminary* review by USACE indicates 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, 375 Beale St., Suite 510, San Francisco, CA 94105, by the close of the comment period.

Other Local Approvals: The applicant has applied for a Streambed Alteration Agreement from the California Department of Fish and Wildlife.

5. 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 and/or a Department of the Army 408 Permission 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 and/or designated critical habitat may be present at the project location or in its vicinity and may be affected by project implementation: Central California Coast (CCC) steelhead (*Oncorhynchus mykiss*), North American Green Sturgeon (*Acipenser medirostris*), California red-legged frog (*Rana draytonii*), California clapper/Ridgways rail (*Rallus longirostris obsoletus*), and salt marsh harvest mouse (*Reithrodontomys raviventris*). To address potential project-related impacts to these species and/or designated critical habitat, USACE has initiated formal consultation with USFWS and NMFS, pursuant to Section 7(a) of the ESA. 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 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 has initiated 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 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 their 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 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.

6. 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.

7. 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.

8. 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 and/or a 408 Permission 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.

9. SUBMITTING COMMENTS: During the specified comment period, interested parties may submit written comments to Gregory Brown or Jessica Vargas, San Francisco District, Regulatory Division, 450 Golden Gate Avenue, 4th Floor, 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 San Francisco District website: <https://www.spn.usace.army.mil/Missions/Regulatory>.