

5. PERMIT REQUIREMENTS

This report describes the planning effort involved in developing recommendations for feasible demonstration projects in San Francisquito Creek. Planning does not require initiation of the environmental compliance process. However, this section is provided to describe the process the lead agency would follow to implement the recommended concepts described in this report.

Permit requirements for each of the demonstration project areas would vary on a site-by-site basis, and will depend upon the complexity and scale of the proposed demonstration project site. Typical permits and compliance requirements for bank stabilization and restoration projects include:

- Clean Water Act Sections 401 and 404
- River and Harbors Act Section 10
- California Department of Fish and Game Code, Section 1600
- California Environmental Quality Act
- National Environmental Policy Act
- National Historic Preservation Act
- Local Planning, Public Works, and Water Management Agencies

More detailed information on these permit and compliance requirements is provided below.

5.1 Clean Water Act Section 401

Clean Water Act (CWA) Section 401 compliance will be required for any project that will directly affect a waterway and that is carried out or funded by a federal agency or requires authorization from the U.S. Army Corps of Engineers (USACE) (e.g., approval under Section 404 of the CWA or Section 10 of the Rivers and Harbors Act of 1899).

Generally, the applicant must provide the following information to obtain a permit:

- a full, technically accurate description of the entire proposed activity, including:
 - the purpose and final goal,
 - the project location,
 - affected water bodies,
 - the total area of waters of the United States that will be directly affected, and
 - any proposed mitigation of adverse impacts;
- an alternatives analysis;
- copies of any draft or final federal, state, and local licenses, permits, and agreements required for actions associated with the proposed activity (e.g., California Department of Fish and Game Streambed Alteration Agreement);
- a copy of the California Environmental Quality Act (CEQA) document and notice of determination, if applicable; and

- a list of agencies that participated in the CEQA process as lead or responsible agencies.

Depending on the complexity of the issues involved, certification typically takes 3–6 months.

5.2 Clean Water Act Section 404 & River and Harbors Act Section 10

Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act requirements apply to any person or public agency proposing to work in, over, or under navigable waters of the United States (Section 10), or proposing to dump or place dredged or fill material in waters of the United States (Section 404). Actions typically subject to Section 404 requirements are those that would take place in wetlands or stream channels that convey natural runoff, including intermittent streams, even if they have been realigned. Within stream channels, a permit under Section 404 would be needed for any discharge activity below the ordinary high-water mark, which is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, and the presence of litter or debris. The applicant may obtain either an individual permit or a nationwide permit, depending on whether the proposed actions fall under an existing nationwide permit. Consultation with the U.S. Army Corps of Engineers, once the project details have been determined, will determine the necessary permit requirements.

The application for a standard permit (ENG Form 4345, Application for a Department of the Army Permit) requests the following information:

- a detailed description of the proposed activity, including the purpose, use, type of structures, composition and quantity of dredged or fill material, and location of the disposal site;
- names and addresses of adjoining property owners, others on the opposite side of streams or lakes, or those who may have a direct interest because they could be affected by the project;
- enough detail about the location—street number, tax assessor’s description, political jurisdiction, and name of waterway—to allow the site to be easily located during a field visit;
- a list of the status of all approvals and certifications required by federal, state, and local governmental agencies;
- an explanation of any approvals or certifications denied by other governmental agencies; and
- names and addresses of the applicant, and dates when the project will begin and end.

The applicant must also submit one set of 8-1/2-inch by 11-inch original drawings, or clear copies of the original drawings, that show the location and character of the proposed activity. In addition, three types of additional drawings are required: a vicinity map, plan view, and elevation and/or cross section view. Information regarding the presence of species that are

federally listed as threatened or endangered and cultural resources at or near the project site should accompany the permit application.

For nationwide and general permit pre-construction notifications (PCNs), the following information is required:

- the name, address, and telephone numbers of the prospective permittee;
- the location of the proposed project;
- a brief description of the proposed project, the project's purpose, and direct and indirect adverse environmental effects the project would cause; and
- any other nationwide permits, regional general permits, or individual permits used or intended to be used to authorize any part of the proposed project or any related activity.

Specific nationwide permits have additional requirements, such as a wetland delineation or restoration plan for temporary wetland impacts. ENG Form 4345 may be used for a nationwide permit pre-construction notification. However, the application must clearly state that it is a pre-construction notification and must include all information required under the nationwide permit general condition.

Typical processing time for individual permits is 90-180 days unless a public hearing is required or an EIS must be prepared. For nationwide permits where a pre-construction notification is required, the U.S. Army Corps of Engineers (USACE) has 30 days to determine whether a pre-construction notification package has been submitted with all required information. Once the package has been determined to be complete, USACE has 45 days (from application submittal) to either authorize the project under the applicable nationwide permit, or require that the project proceed under an individual permitting process.

5.3 California Department of Fish and Game Code, Section 1600

Actions that would alter the flow or bed of a water body or occur within its annual high-water mark, as described above, may require a Streambed Alteration Agreement. Examples of such actions that may be involved in the demonstration projects are:

- restoring riparian habitat,
- replacing in-stream gravel,
- setting back stream banks, and,
- replacing water control structures.

In order to comply with the requirements of a Streambed Alteration Agreement the applicant must complete a Notification of Streambed Alteration form and a project questionnaire. The forms ask for information about the following:

- the applicant and the applicant’s agents;
- the property owner;
- the location of the property where the project would take place, the affected water body, and any water body to which it is a tributary;
- project description, including:
 - estimated dates of project initiation and completion;
 - estimated project cost;
 - number of stream encroachments;
 - methods of construction;
 - types of equipment that will be used;
 - anticipated impacts on wetland and/or riparian vegetation, and on fish and wildlife resources; and
 - pre- and post-project site conditions.

The application package also must include:

- a map that shows the location of the proposed project, with distances from the nearest city or town, known landmarks, access roads, and other information that identifies the location of the project site;
- construction plans for the proposed project;
- any completed CEQA documents;
- copies and descriptions of any local, state, or federal permits, agreements, or other authorizations that apply to the project.

DFG issues a Streambed Alteration Agreement for most projects within 2 months after it receives the required information.

5.4 California Environmental Quality Act

A public agency must comply with the California Environmental Quality Act (CEQA) when it undertakes an activity defined by CEQA as a “project”. A project is an activity undertaken by a public agency or an activity undertaken by a private entity that:

- must receive some discretionary approval from a government agency (meaning that the agency has the authority to deny the requested permit or approval), and
- may cause either a direct physical change in the environment or a reasonably foreseeable indirect change in the environment.

Generally, there are three phases for implementation of CEQA. During the first phase, the lead agency must conduct a preliminary review to determine whether the project is subject to CEQA. If the action is not exempted, the lead agency prepares an initial study during the next phase to determine whether the project may have a significant environmental effect.

During the third phase of the CEQA process, the lead agency prepares either an EIR or a negative declaration. An EIR is prepared if the agency determines that the project may have a significant environmental effect; a negative declaration is prepared if the agency determines that no significant effects will occur. The CEQA compliance document may be prepared by lead agency staff members, another public or private entity, the project applicant, or the project applicant's consultant. The lead agency, however, is ultimately responsible for the scope, contents, and legal adequacy of the document.

Although there is not an exact timeline associated with CEQA compliance, generally an initial study can be completed in 3-6 months, and, depending on the complexity of the proposed project, an EIR can be completed in 9 months to a year.

5.5 National Environmental Policy Act

If the project involves funding from a federal agency, then compliance with the National Environmental Policy Act (NEPA) will be required. NEPA requires that a federal agency assess the effects of a proposed action on the human environment. This requirement applies to actions that the federal agency would:

- undertake directly,
- approve by issuing a permit or other authorization, or
- fund wholly or in part.

State or private actions may therefore be considered federal agency actions under NEPA if they are funded, financed, aided, controlled, permitted, licensed, enabled, caused, or approved by the federal government.

Depending on the potential impacts of a proposed project, the environmental information for compliance with NEPA is presented in one of three documents: a categorical exclusion or other exemption, an environmental assessment (EA) supporting a finding of no significant impact (FONSI), or an environmental impact statement (EIS).

Generally, there are three phases for implementation of NEPA. During the first phase, the lead agency must determine whether NEPA applies to the proposed action by deciding whether the action is “categorically excluded” or otherwise exempt from NEPA. If the action is not categorically excluded or exempt, the lead agency must determine during the next phase whether the proposed action may “significantly affect the quality of the human environment”. This generally involves preparing an EA to determine whether the proposed action would result in any significant environmental effects. However, an agency may bypass the preparation of an EA for certain projects that normally require an EIS.

During the third phase of the NEPA process, the federal agency prepares either a FONSI or an EIS. A FONSI is prepared if the agency determines that no significant effects would occur as a result of the proposed action; an EIS is prepared if the agency determines that the proposed action may have significant effects on the quality of the human environment. The NEPA compliance document may be prepared by lead agency staff members or by a contractor (consultant selected by the lead agency). The lead agency is ultimately responsible for the scope, contents, and legal adequacy of the document. The following discussions provide additional details about these documents.

Although there is not an exact timeline associated with NEPA compliance, generally an EA can be completed in 3-6 months, and an EIS can be completed in 9 months to a year. If an EIS is addressing large and complex issues, however, the NEPA process may take up to 3–5 years.

5.6 National Historic Preservation Act

Section 106 of the National Historic Preservation Act (NHPA) requires federal agencies to evaluate the effects of federal undertakings on historical, archaeological, and cultural resources. During the evaluation, an agency is required to coordinate with the State Historic Preservation Officer (SHPO).

NHPA requirements apply to all projects that:

- are located on federal land, sponsored by a federal agency, permitted by a federal agency, or funded with federal monies; and
- occur in an area where there exists or may exist properties that are listed or eligible for listing on the National Register of Historic Places (NRHP).

The responsible agency first determines whether it has an undertaking that could affect historic properties, which are properties that are included in or meet the criteria for the NRHP. If the agency’s undertaking could affect historic properties, there are four basic steps in the Section 106 process during which the federal agency works with the SHPO to assess the potential effects of proposed actions described below. First, the federal agency reviews all available information that could help determine whether the proposed activity may potentially cause effects on historic properties. If the project may affect historic properties, these properties are thoroughly documented through:

- Determining the Area of Potential Effects (APE).
- Reviewing existing information on historic properties within the APE.
- Seeking information from consulting parties or individuals likely to have information about historic properties in the APE.
- Gathering information from Native Americans about sites of religious or cultural significance to them.
- Making a good faith effort to identify historic properties in the APE. This typically includes, but is not necessarily limited to records searches, background research, interviews, and field surveys.
- Evaluating the significance of identified properties by applying the National Register criteria as defined in 36 California Federal Register (CFR) part 63.

Native Americans must be consulted to determine if sites of religious or cultural significance to them are present in the APE. In California, the Native American Heritage Commission maintains lists of Native Americans that should be contacted in any given geographical area. Typically, Native Americans are initially contacted by letter and a follow-up telephone call or a repeat letter and asked to identify any concerns they may have about the proposed undertaking. Additional consultation may be necessary, depending on the outcome of the initial contacts. Documentation of this consultation is included in the inventory report.

Once historic properties have been identified and found to meet NRHP criteria, the federal agency shall determine if the proposed undertaking will adversely affect the historic properties by applying the criteria of adverse effect (36 CFR 800.5).

If the agency proposes a finding of no adverse effect, the agency shall notify all consulting parties. If the SHPO agrees with the finding, the undertaking may proceed. If any consulting parties disagree with the finding, additional consultation shall be initiated between the parties or the Advisory Council on Historic Preservation (ACHP) shall be requested to review the finding.

If the agency proposes a finding of adverse effect, the agency shall consult further to resolve the adverse effect pursuant to 36 CFR 800.6 and shall notify the ACHP of the finding of adverse effects. The agency shall then develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties. Once agreement is reached on ways to avoid, minimize, or mitigate adverse effects on historic properties, a Memorandum of Agreement (MOA) shall be executed which evidences the agency's compliance with Section 106 of the NHPA. The agency shall ensure that the undertaking is carried out in accordance with the MOA.

There are no specific time restrictions to complete this process. Once an agency completes the appropriate documentation and submits this to the SHPO, the SHPO has 30 days to review and

comment. If the ACHP is consulted, they have an additional 15 days to review and comment. Comments from SHPO and the ACHP, however, may result in a determination that additional documentation or other requirements should be completed.

5.7 Local Agency Coordination

Construction activities, such as excavation and grading, proposed as part of the demonstration projects will be subject to local ordinances and general plan policies, and will require consultation with local government planning and public works departments (e.g., Cities of Palo Alto and Menlo Park, Santa Clara and San Mateo Counties), the Santa Clara Valley Water District, and the San Mateo County Flood Control District to determine the appropriate local permits and project details that will be required to comply with local ordinances and policies.

For each demonstration project, a grading permit would be required prior to project implementation. City or county public works departments require permits for cut-and-fill activities that exceed minimum thresholds set by local grading ordinances. Grading permits can be obtained from the public works department of the city or county where the project site is located.

Generally, the project proponent should provide grading plans that describe existing conditions and the proposed work. Cities or counties will most likely require a project proponent to submit information about the property's location, utility easements, topography, soils, existing structures, waterways, and other details. Some jurisdictions also may require the project proponent to submit environmental information on a questionnaire or checklist.

Review of grading plans may also lead to other permit requirements that will be determined by the applicable local agency. In addition, other applicable local agencies shall be coordinated with to ensure that additional local permits are not required for project implementation.

Although there is not an exact timeline associated with obtaining local permits, the timeline generally varies from between 3 to 6 months, depending on the complexity of the project and number of permits that must be obtained.