

SECTION 7: THE REGULATORY ENVIRONMENT

7.0 INTRODUCTION

A complex array of state and federal regulatory guidelines directs how the jurisdictional boundaries of wetlands are identified, defined, and regulated. The U.S. Army Corps of Engineers (Corps) is the major agency involved in regulation of activities affecting wetland and other waters under Section 404 of the Clean Water Act. The California Department of Fish and Game (CDFG) has authority over streams under Sections 1600-1607 of the California Fish and Game Code. Other agencies that have jurisdiction, comment authority, or review over wetlands and other waters include the U.S. Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service (USFWS), National Marine Fisheries Service (NMFS), San Francisco Bay Regional Water Quality Control Board (RWQCB), the Bay Conservation and Development Commission (BCDC), and the Cities and Counties that border San Francisquito Creek. The statutory

Note: A checked box indicates that that agency should be contacted. It does not indicate that a permit will definitely be required.

Does Your Project:	City/Co. Ping & Bldg/CEQA Review	Calif. Dept. of Fish & Game	Army Corps of Engineers	Regional Water Qlty Cont. Board	County Environ. Health	Sta. Clara Valley Water District	SM County Flood Control District	State Water Resources Control Board	S.F. Bay Conservation & Dev. Comm.
Involve bank stabilization or erosion control?									
Require the removal of trees or riparian vegetation?									
Involve planting riparian vegetation?									
Affect native plants, wildlife or fisheries?									
Result in storm-water discharge into the creek?									
Divert or obstruct the natural flow; or change the natural bed or bank of the creek?									
Involve repair, rehabilitation or replacement of any structure or fill adjacent to the creek?									
Involve building any structure adjacent to the creek?									
Involve fish and wildlife enhancement, attraction or harvesting devices and activities?									
Use materials from a streambed (including but not limited to boulders, rocks, gravel, sand and woody debris)?									
Require the disposal of debris, waste, or any material containing crumbled, flaked, or ground pavement with a possibility that such material could pass into the stream?									
Involve the removal of any materials from a stream or add fill to the stream?									
Involve grading or fill near the creek?									
Involve a bridge or culvert?									
Involve utility pipelines?									
Involve a septic leach field near the creek?									
Require a water well near the creek?									
Remove water from creek for storage or direct use on non-riparian land?									

authorities are summarized below and in Table 7.1.

7.0.1 FEDERAL

7.0.1.1 Clean Water Act

Section 404 of the Clean Water Act (CWA) of 1972 regulates activities that result in the discharge of dredged or fill material into waters of the U.S., including wetlands. The CWA authorizes the Environmental Protection Agency (EPA) to regulate water quality through the restriction of pollution discharges. The Corps regulates discharges of dredged or fill material into waters of the U.S., while the EPA provides oversight and comments on Corps decisions. Projects that include the discharge of dredge or fill material into waters of the U.S., including wetlands, must be reviewed by the Corps. The Corps' permit process and the types of permits that may be applicable to the San Francisquito Creek project are discussed in Section 7.2 below.

7.0.1.2 Federal Endangered Species Act

The USFWS comments on Corps permit applications where the proposed work may affect an endangered species that uses a wetland or creek as habitat. In addition, the NMFS acts in the same capacity with regard to species of marine habitats. For example, the steelhead trout, and possibly the red-legged frog, could be adversely affected by streambank stabilization work that changes the flow or water quality of a stream. While stabilization of the banks of a single property would not likely affect these species, the combined effects of many similar projects within a relatively concentrated part of watershed could. If many separate projects are proposed, USFWS and NMFS may require that the Corps evaluate the combined impact on endangered species as if they were a single project. The Corps will approve the use of a Nationwide Permit only after the determination has been made that the impacts to endangered species will be adequately avoided or mitigated.

7.0.2 STATE

7.0.2.1 California Fish and Game Code

The CDFG has jurisdictional authority over wetland resources associated with rivers, streams, and lakes under California Fish and Game Code Sections 1600 to 1607. The CDFG has the authority to regulate work that will substantially divert, obstruct, or change the natural flow of a river, stream, or lake; substantially change the bed, channel, or bank of a river, stream, or lake; or use material from a streambed. Typical activities regulated by CDFG under Sections 1600-1607 authority include re-channeling and diverting streams, stabilizing banks, implementing flood control projects, river and stream crossings, diverting water, damming streams, gravel mining, and logging operations.

The CDFG encourages completion of a Streambed Alteration Agreement, which is not a permit, but rather a mutual agreement between the CDFG and the project proponent. The CDFG generally evaluates the information gathered during preparation of the environmental document and attempts to satisfy their resource concerns during the permitting process. In accordance with their policy of “no net loss” of wetland habitat, the Streambed Alteration Agreement can impose conditions on the proposed activity to ensure no net loss of wetlands values or acreage. Typically, a Streambed Alteration Agreement will also include a mitigation program for impacts to all wetlands, regardless of acreage. The CDFG also typically requires the establishment of a buffer zone immediately adjacent to creeks and wetlands. The buffer zone, measured from the upland edge of riparian vegetation might be as little as ten feet wide or as much as 100 feet wide.

The CDFG also administers the California Endangered Species Act. In cases where the USFWS is being consulted under the Federal ESA, then the State will review the Biological Opinion and issue a determination of consistency with the State ESA.

7.0.2.2 RWQCB

Under Section 401 of the Clean Water Act, any applicant for a federal permit to conduct any activity which may result in any discharge into navigable waters must obtain a certification (or a waiver from certification) from the Regional Water Quality Control Board (RWQCB) that such discharge will comply with the state water quality standards (Title 23, California Administrative Code, Section 3830 et. seq.). The RWQCB has a policy of no net loss of wetlands in effect and typically requires mitigation for all impacts to wetlands before it will issue a water quality certification. If the RWQCB issues a water quality certification that includes special conditions, the Corps will add these conditions to the Individual Permit

7.0.3 LOCAL AGENCIES

7.0.3.1 Bay Conservation and Development Commission

Public agencies or private individuals proposing to fill, extract materials, or change the use of water, land, or structures in or around San Francisco Bay must first obtain a Development Permit from the San Francisco Bay Conservation and Development Commission (BCDC), according to policies found in the San Francisco Bay Plan and the McAteer-Petris Act. BCDC’s permit jurisdiction includes San Francisco Bay, a 100-foot-wide shoreline band that extends 100 feet inland from the upland edge of the Commission’s Bay jurisdiction, which includes a small portion of downstream reach of San Francisquito Creek near Highway 101.

BCDC issues different types of permits for work within San Francisco Bay depending on size, location, and impacts of a project. The type of permit that is applied for affects the information that must be provided to complete a permit application, and whether the project must be reviewed before a public hearing of the Commission.

7.0.3.2 Santa Clara Valley Water District / San Mateo County Flood Control District

A permit is required for any work within 50' of top of creek bank in Santa Clara County.

7.0.4 CITIES AND COUNTIES

A grading permit is required for any excavation or fill that will encroach on or alter a natural drainage channel or water course.

7.0.5 ROLE OF CEQA

In addition to the permits and approvals listed above, several agencies require proof of compliance with the California Environmental Quality Act (CEQA). This may necessitate the preparation and circulation of a document that discloses and evaluates the effect of the proposed project on the environment. Depending on the magnitude of the project and its impact, the document may range from a relatively brief Initial Study / Negative Declaration to the more complex and time-consuming Environmental Impact Statement.

7.1 THE PERMIT PROCESS

The San Francisquito Creek Bank Stabilization and Revegetation Project area exists at the intersection of multiple agency jurisdictions, which will necessitate the coordination of an array of permit actions. The Corps' Section 404 regulatory program provides the process by which the other agencies become involved. For this reason, the following discussion emphasizes the role of the Corps permit process while indicating how other permits are related to it. This section describes the current situation, i.e. the "existing condition" of the permit process in the absence of a master plan. The implications of the plan on the permitting environment is discussed in section 7.3.

7.1.1 NATIONWIDE PERMITS

7.1.1.1 Nationwide Permit 13: Bank Stabilization

The ACOE issued NWP 13 authorizing discharge of fill for the purpose of bank stabilization and erosion prevention. For a project to be authorized under this permit, several conditions must be met

such as a maximum of 500 linear feet or one cubic yard of material per linear foot placed below the plane of the ordinary high water mark. In addition, the activity must be part of a single and complete project. In most cases, NWP 13 is coupled with other NWPs to completely authorize all components of the proposed activities (*i.e.*, NWP 33, see below).

7.1.1.2 Nationwide Permit 33: Temporary Access and De-watering

This NWP provides for use of temporary structures or discharges during otherwise authorized activities in wetlands and other waters of the U.S. During construction, measures must be taken to maintain downstream flows and minimize flooding, and all temporary fill must be moved to upland locations after completion. In addition, the project area must be restored to pre-project conditions according to an approved restoration plan that identifies reasonable measures to avoid and minimize adverse effects to aquatic resources.

7.1.1.3 Nationwide Permit 27: Wetland and Riparian Restoration and Creation Activities

This NWP authorizes activities in waters of the U.S. for the purpose of restoring, creating or enhancing non-tidal wetlands and riparian areas, such as small water control structures, removal of existing drainage structures, and preparation of sites for planting or seeding. The NWP applies to projects resulting restoration of natural wetland hydrology, vegetation, and functions to altered and degraded riparian areas.

7.1.2 INDIVIDUAL PERMITS

An Individual Permit may be required for any project that would result in cumulative impacts to more than 500 linear feet of a stream or for projects that run parallel to a stream. Additional regional requirements for maintaining upland buffer areas between authorized projects and open waters or streams may be conditions for granting any ACOE permit. Activities authorized under an Individual Permit require compliance with Corps Section 404 regulations, EPA Section 404(b)(1) Guidelines, NEPA, the Endangered Species Act, Section 106 of the National Historic Preservation Act, and Section 401 of the Clean Water Act (water quality certification).

7.1.3 EMERGENCY PERMITS

Periodically, the Corps issues Regional General Permits to address situations or conditions outside of the purview of the Nationwide and Individual Permit Programs. In January 1998, the Corps issued RGP 23081, which conditionally authorized emergency repair activities by public agencies made necessary by recent severe storm events. It was amended to include private individuals later that year. This RGP

expired on January 1, 1999. In addition, it authorized work intended to provide immediate, but not necessarily permanent relief from flood damage. By definition, emergency repairs include actions necessary to prevent imminent loss of or damage to life, health, property or essential public services. In cases where there appears to be ample time to address bank stabilization using other permits, such as the Nationwide Permit (NWP), then those other permits should be used. For these reasons, we feel that the RGP is not likely to be of use to the property owners.

7.1.4 TYPICAL SEQUENCE AND TIMELINE

Prior to authorization of projects by Nationwide Permits, applicants must submit to the Corps a jurisdictional delineation of wetlands and other waters of the U.S. This documents the limits of the Corps' jurisdiction within the proposed project area, and makes it possible to adjust project components to avoid or minimize impacts to wetlands. It also allows an estimate to be made of the area and volume of unavoidable discharge into the Corps' jurisdiction.

The Corps is allowed 30 days to respond to a formal request for authorization, or "Pre-Construction Notification" (PCN), after which the applicant may assume the project is authorized. Often, the Corps asks for additional clarification of project details, or forwards such requests from other agencies that comment on PCNs circulated by the Corps. For example, the RWQCB is allowed 60 days to return comments to the Corps regarding water quality concerns. Therefore, the typical timeline for conclusion of the NWP process is 3-6 months. This may be extended even further if local agency approvals such as a BCDC permit, are required before the Corps can act, or if endangered species consultations are required.

7.2 THE PERMIT PROCESS AND THE MASTER PLAN

The Master Plan does not describe the revegetation and stabilization of San Francisquito Creek in adequate detail for obtaining permits per se. It does, however, present a range of design criteria that can be refined further to address the particular types of disturbance that have occurred to the Creek in different areas. In addition, the recommendations were developed with the specific natural resource concerns of the various regulatory agencies in mind. The agencies will have the opportunity to become familiar with the range of options proposed here so that the permit process can be expedited when requests are made to implement portions of the Master Plan

7.2.1 MASTER PLAN PERMIT TYPES AND PROCESSES

The Master Plan assists landowners by defining different categories of bank instability (*i.e.*, type and severity) and prescribing a range of remedies (from revetments to biotechnical solutions), with the goal of streamlining project approval when actions are undertaken by private citizens. The Master Plan coordinates public and private actions, so that public or private entities carrying out stabilization would be linked with projects where the goal was to remove non-native vegetation and restore native habitat.

For agencies to adequately review a project and issue permits, the project must be developed adequately to determine if significant impacts to biological resources would result, whether mitigation measures are required or adequate as proposed, and what the net effects would be after completion. For an individual landowner, the number of agency approvals and their interactions may appear quite complicated. In contrast, a coordinated project design and permitting effort sponsored by a public entity is likely to result in a more environmentally sensitive project than could be achieved by multiple independent projects implemented by individual landowners. Thus, permitting would be streamlined if the individual proposals followed the Master Plan recommendations for treatment of specific reaches. Uncoordinated creek restoration and bank stabilization efforts run the risk of departing from the Master Plan concept and losing the economy of scale gained from a coordinated effort.

7.2.1.1 Joint Aquatic Resources Permit Application (JARPA)

JARPA (Joint Aquatic Resources Permit Application) currently being developed by the Association of Bay Area Governments (with funding from EPA) would replace the multitude of application forms currently required for submittals to each resource agency (the Corps, Regional Water Quality Control Board, BCDC, etc.) with a single application submitted to all agencies. Currently, the different applications request much of the same information but have slightly different ways of reporting it. By virtue of the JARPA form's organization, the information required by each agency would be included in an easily accessible format. The JARPA is in early stages of development and a draft application form has been developed. Some agencies have indicated they are not yet ready to accept the JARPA form, but there is interest in using the San Francisquito Creek project as a "test case".

7.2.1.2 Early Agency Involvement

Successful master plan permitting depends on providing information to resource agency staff at an early stage of project development. When the project has evolved beyond the conceptual stage and preliminary design drawings and plans, including areas to be treated,

construction methods, types of equipment, estimated area of impact and resulting area of restored habitat, then an Interagency Meeting is appropriate. The Corps sponsors Interagency Meetings each month in San Francisco. An agenda of projects to be presented is circulated to agencies with regulatory oversight in wetlands and riparian habitats, such as the EPA, USFWS Wetlands Branch, the CDFG, the RWQCB, BCDC, and many others. The meetings provide an opportunity for applicants to present the project and receive guidance from each agency on their specific requirements or concerns. The purpose is to prevent applicants from submitting “final” permit applications for projects with serious oversights with regard to biological resources, forcing the additional time and expense of revisions and re-submittal. Interagency Meetings also help to personalize the relationship between applicants, the regulators, and the agencies they represent.

7.2.2 CEQA COMPLIANCE

CEQA compliance is a condition of approval for several permit discussed here. The RWQCB, BCDC, and CDFG all require *proof of compliance* with CEQA before final issuance of Waivers, permits and Streambed Alteration Agreements. Compliance may take the form of an approved Environmental Impact Report or a finding by the lead agency that the project is Categorical Exempt. For the purposes of San Francisquito Creek, the JPA or one of its member organizations would need to act in the capacity of lead agency in the preparation of an environmental document analyzing the actions recommended in the Master Plan.

7.3 SUMMARY

A considerable body of knowledge of the hydrology, geomorphology, vegetation and wildlife resources of San Francisquito Creek was assembled in support of this Master Plan. The result in the Master Plan is a series of recommendations that establish a framework of acceptable revegetation and bank stabilization treatments within the creek. Bank stabilization and revegetation treatments were combined into site-specific prescriptions that comply with the overall concept presented in the Master Plan. The goal is to earn preliminary approval of the agencies for the types of activities that would result from implementation of the prescriptions. In this way, an applicant, whether public or private, would know that the agencies had agreed *in concept* with the proposed improvements. By limiting the work to the treatments prescribed for a particular set of site conditions, the applicant also could anticipate a more expedited permit review process.