



DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, U.S. ARMY CORPS OF ENGINEERS
450 GOLDEN GATE AVE.
SAN FRANCISCO, CA 94102

Aug 26, 2020

Nanci Klein
Director of Real Estate, Assistant Director, OED
Jennifer Voccola-Brown
Interim Sustainability and Compliance Division Manager
City of San José
200 E. Santa Clara St.
San Jose, CA 95113

Dear Ms. Klein and Ms. Voccola-Brown

The U.S. Army Corps of Engineers (USACE) appreciates the City of San José (CSJ) and the San José-Santa Clara Regional Wastewater Facility's (RWF) coordination with us and our local sponsors, Valley Water (VW) and the State Coastal Conservancy (SCC), regarding the South San Francisco Bay Shoreline Phase I Project (project) throughout the previous decade's planning effort. Although this has previously been discussed, per our call last Friday, this letter responds to your request that we "put it in writing."

Now that we are ready to proceed with project construction, I request your help to quickly resolve some key issues that have been under discussion for some time. Without resolution by 11 September 2020, USACE and the project sponsors will revert to the originally proposed alignment, excluding tidal marsh restoration of the biosolids legacy lagoons L16-L19.

The project is currently receiving emergency supplemental funding under the 2018 Bipartisan Budget Act. Many projects across the nation are competing for these limited funds and there is a high risk of the project losing this funding source if we incur additional delays. We cannot jeopardize implementation of this important project that will reduce flood risk to approximately 5,550 people who live and work in the vicinity of the Alviso neighborhood and approximately 1,100 structures (including the RWF), restore approximately 2,900 acres of tidal marsh and provide improved recreation opportunities.

We are currently designing the Reaches 4-5 levee, including realignment of segments 9-10, which would restore the current area of RWF's biosolids legacy lagoons L16-L19 to tidal marsh. As described in the San Francisco Bay Regional Water Quality Control Board's (RWQCB) letter to RWF dated 23 April 2020, this realignment would significantly reduce RWF's off-site mitigation costs associated with the required biosolids legacy lagoons clean-up under RWQCB's Order No. R2-2019-0026. Per RWQCB's estimate, RWF would save approximately \$25 million in off-site mitigation costs by providing cleaned up biosolids legacy lagoons L16-L19 to the project for restoration. We appreciate RWF's efforts to implement the clean-up of biosolids legacy lagoons L16-L19 and my Regulatory Branch has maximized flexibility regarding RWF's

404 permit, likely also reducing off-site mitigation requirements. However, without final resolution of the issues below, USACE will revert to the original alignment for segments 9-10 which will prevent the use of the federal project as mitigation.

USACE, VW, and SCC have actively sought and received RWF and CSJ's input on the Artesian Slough Closure Structure during both the planning and design phase for the project. The 2015 Final EIS/EIR and preceding Draft EIS/EIR included a design concept for the closure structure that was a straight crossing through Artesian Slough. With either this straight crossing closure or without our project, RWF would not be able to discharge effluent in the future as sea levels rise. RWF is currently beginning to face these challenges during king tide events. In their letter to USACE dated 13 April 2017, CSJ confirmed that their preferred alignment is a straight crossing through Artesian Slough.

On 14 May 2020, RWF presented a preferred "betterment" for the Artesian Slough Closure Structure that would improve RWF's operations by allowing them to discharge effluent during high tide events. This solution would maintain hydraulic separation between Artesian Slough and New Chicago Marsh, incorporate an Ogee Spillway or similar feature, and construct tie-ins for RWF use for their future flood wall construction. As my staff has previously communicated to RWF and CSJ, the flood wall solution around Artesian Slough that RWF subsequently proposed on 17 June 2020 does not appear feasible due to a variety of USACE policy constraints and other factors.

We are currently obtaining proposals from our A/E firm to establish the design cost for the baseline cost for the 2017 straight crossing and the "14 May 2020 betterment" solution. We expect to identify the increased design cost for the "betterment" by October 2020. We will not know the increased construction cost for the "betterment" until we proceed with the design work. In order to continue with design and construction of the "betterment", RWF needs to commit paying the increased "betterment" cost for both design and construction. Without that commitment, USACE will revert to the baseline design for the Artesian Slough Closure Structure. If we implement the baseline design and construction, it will almost certainly cost more for RWF to subsequently implement a different solution in the future. This will also require RWF to seek a 408 permit--required for modifications to Federal infrastructure--at a later date.

USACE is aware that RWF and CSJ have requested that the project pay for the following items in ongoing real estate-focused meetings with VW.

- 1) The Artesian Slough Closure Structure "betterment" costs and RWF's subsequent construction of floodwall and pump station.
- 2) Increased costs associated with 2-phase clean-up vs. a single-phase clean-up of the biosolids legacy lagoons.
- 3) Compensation for already incurred costs for repairing road access gates at Pond A18.

- 4) Installation of perimeter fence that would separate the new recreation trail on top of the Reach 4-5 levee from the RWF property.

Under USACE policy, the non-Federal cost share partner is required to provide any LERRDs (Land, Easements, Rights of Way, Relocations and Disposal) necessary for the project. Additionally, USACE cannot award construction contracts prior to resolving all real-estate issues. The cost of these items is likely much less than the cost of securing off-site mitigation that will result if biosolid ponds L16-L19 are not cleaned and title transferred to VW.

USACE also understands that CSJ wants all easements associated with Reach 4/5 and Artesian Slough to be identified prior to continuing coordination of the Pond A18 purchase. However, USACE will not have the final easement requirements identified until our design is completed. We request that CSJ separate the easement coordination from the Pond A18 coordination.

We received RWF comments on the Reach 4-5 30% design in early May 2020 and had a meeting on 18 May 2020 to discuss comments with RWF. One of the comments was to locate the project as to avoid the L-15 and L-16 lagoon pond boundary. Since that meeting, we have continued to request RWF's desired L-15 and L-16 boundary line to revise our project alignment if possible. Our Reach 4-5 design work is currently delayed pending this information from RWF.

In summary, we request the following from RWF and CSJ:

- 1) By 11 September 2020, commit to paying for the increased design and construction cost for the Artesian Slough Closure Structure "14 May 2020 betterment". Within 2 weeks of USACE identifying the increased design cost for the Artesian Slough Closure Structure "betterment", provide this funding to VW, who will subsequently provide it to USACE.
- 2) By 11 September 2020, agree to incur the other itemized costs listed above, which RWF and CSJ have previously requested VW to pay.
- 3) By 11 September 2020, agree to Pond A18 purchase terms, separate from coordination with VW regarding easements.
- 4) By 11 September 2020, provide RWF's desired operations boundary line for Reach 4-5 to USACE.

With RWF and CSJ's agreement to these four items that have been discussed numerous times in the past year, USACE, VW and the CCC can include ponds L16-L19 in the Shoreline project providing valuable ecosystem benefits to the South Bay, including the remarkable opportunity to be a partner in the restoration of 35 acres of San Francisco Bay, and substantially reduced wetland mitigation cost obligations to the RWF associated with the legacy lagoon cleanup. Without agreement, Shoreline project partners will move forward with the original design and the reduced mitigation requirements for the biosolids legacy lagoon cleanup will no longer be available to RWF.

Please contact my Deputy for Programs and Project Management, Stu Townsley, at (415) 503-6593 if you have any questions.

Sincerely,

John D. Cunningham
Lieutenant Colonel, U.S. Army
District Engineer

cc:

San Jose-Santa Clara Regional Wastewater Facility (RWF)

Mayor Sam Licardo, City of San Jose

Councilmember Debi Davis, City of Santa Clara

Councilmember Lan Diep, City of San Jose

Councilmember Dev Davis, City of San Jose

Davis Sykes, City Manager, City of San Jose

Councilmember Kathy Watanabe, City of Santa Clara

Director John Gotto, Cupertino Sanitary District

Councilmember Carmen Montaro, City of Milpitas

Councilmember Paul Resnikoff, City of Campbell

Jim Reed, Chief of Staff, City of San Jose

Mayor Lisa Gilmor, City of Santa Clara

Mayor Rich Tran, City of Milpitas

Steven McHarris, City Manager, City of Milpitas

Rachelle Currie, Executive Secretary, City of Milpitas

Michael Montgomery, Executive Officer, San Francisco Bay Regional Water Board

Chair Nai Hsueh, Valley Water

Rick Callender, CEO, Valley Water

Sam Schuchat, Executive Officer, Coastal Conservancy, State of California

September 4, 2020

John D. Cunningham
Stu Townsley
San Francisco District, U.S. Army Corps of Engineers
450 Golden Gate Ave.
San Francisco, CA 94102

Dear Mr. Cunningham and Mr. Townsley,

The San José-Santa Clara Regional Wastewater Facility (RWF) is in receipt of the U.S. Army Corps of Engineers' (USACE) letter to Ms. Klein and Ms. Voccola-Brown dated August 26, 2020. The RWF appreciates USACE's urgency to resolve real estate decision-making and proceed to project construction for the South San Francisco Bay Shoreline Phase I Project (Project). The RWF and the Cities of San José and Santa Clara are wholeheartedly committed to the success of the Project, including realignment of segments 9-10 to facilitate tidal marsh restoration of the biosolids legacy lagoons L16-L19.

The RWF, Water Board, and the USACE met on Friday, August 21, 2020. Your letter clarifies demands made of the RWF to resolve all outstanding real estate issues within three weeks of that meeting, or by September 11, 2020. Preliminarily, the RWF notes the September 11 deadline had not been previously communicated or agreed upon.

We thank the Water Board for providing clarification of the contingent mitigation requirements and for granting the RWF's four-year extension for the cleanup of remaining lagoons after L16-L19. However, the RWF is still awaiting clarification/commitment on the cost of the betterments. In order to resolve all Real Estate matters we will need, at a minimum, a "not to exceed" number for the cost of betterments. Agreeing to pay for the betterments without a not-to-exceed number would be a "blank check," which no local government is able to agree to. USACE agreed to provide betterments costs in writing during our August 21 meeting.

Resolution of this matter is critical to the pending real estate transaction between RWF and the Santa Clara Valley Water District (VW). Of equal importance, RWF reiterates its request that the Project's sponsors re-visit certain aspects of the Project's design that pose undue, and extremely costly, impacts to local facilities and resources. These design issues are discussed more fully below. With this, the RWF believes resolving the issues presented by the USACE's August 29 letter is achievable.

The Reach 4-5 30% design presented in May 2020 for the Artesian Slough Closure Structure has serious design failures that must be properly addressed. The Project's baseline assumption that closing the gate at 8.8 feet does not impact the RWF is incorrect; the Project disrupts the flow of effluent in current conditions that the RWF has proven the ability to continue discharging in, such as King Tide events up to 9 feet. Further, the RWF is capable of continued gravity discharge well over 9 feet with relatively minor

modifications. Also, breaching the inner levee separating the RWF outfall channel from the adjacent west channel would imperil the Don Edwards National Wildlife Refuge and the Alviso community in a manner that is not acceptable. The RWF should not be responsible for the cost of fixing these design failures.

The proposed Project would block the flow of effluent, which would trigger an immediate need to construct a new Final Effluent Pump Station (FEPS) at an estimated cost \$50,000,000. Current sea-level rise projections do not require the construction of the FEPS sooner than 2030. Thus, the Project requires construction of the FEPS at least a decade ahead of schedule, which inhibits the RWF's ability to plan for and secure the most cost-effective financing. The RWF's ratepayers, approximately 1,700,000 residents and businesses in San José, Santa Clara, Milpitas, Campbell, Los Gatos, Monte Sereno, Cupertino, and unincorporated Santa Clara County, many of whom are also VW ratepayers, will experience a massive and sudden increase in their sewer bills.

To avert this, RWF staff identified a flood wall design alternative (Preferred Alternative) that would accommodate the Project while allowing continued gravity feeding of effluent. When presented to USACE engineers, the feedback was that this alternative would be technically feasible. The RWF subsequently indicated to Valley Water (VW) that the majority of the RWF's capital impact cost-sharing request (\$6,700,000) in our March 24, 2020 counteroffer would be dropped in exchange for the substantial benefits achieved through the Preferred Alternative, and that the RWF would be open to contributing additional funding to the build out of the wall structure to provide a net savings to the Project.

The USACE's August 26, 2020 letter states that the Preferred Alternative is infeasible due to USACE policy constraints and other factors. It would be helpful for us to receive an explanation of these constraints and factors, given that it is at odds with the indications of USACE engineering staff. If there is a way to reconsider the Preferred Alternative, we are eager and open to discussing how the RWF can help make it a win-win scenario by contributing additional funding. Regardless, we propose below a way to move forward while working with this constraint.

The USACE's August 26 letter outlines four requests of the RWF. Our proposal below is responsive to these points. The proposal also reflects the directive to staff to protect RWF ratepayers. The RWF is committed to moving forward, but we require partnership and certainty in order to recommend this agreement to the City Councils of San José and Santa Clara.

- **The RWF agrees to sell Pond A18 to VW for Fair Market Value, as established by Walter Carney of Valbridge Property Advisors.** Mr. Carney is the foremost expert on the valuation of San Francisco bay wetlands. We expect Mr. Carney's appraisal to be completed in the month of September.
- **The RWF agrees to separate easements from the Pond A18 transaction, provided VW agrees to parameters that will apply to the final easements.** The RWF established our easement requirements in a tour of the RWF facility with USACE and VW staff on February 27, 2020, and again in a letter to VW dated May 27, 2020. The RWF needs to ensure certain requirements are met to facilitate its ongoing operation and compliance. Based on interagency discussion on the February tour, we do not expect our easement parameters to be a barrier to the success of the Project.
- **RWF will agree to pay betterment costs no greater than \$9,000,000, subject to a 50%-50% cost-sharing agreement with VW.** RWF cannot responsibly agree to a "blank check" for betterment costs, especially now with our budgets so severely impacted by the the Coronavirus emergency.

- **The RWF will forego recouping the \$3,700,000 non-betterment Capital Impacts requested in our counteroffer to VW dated March 24, 2020.** This includes cost inefficiencies that result from a two-phased cleanup of the legacy lagoons, a perimeter security fence, and mitigation cost-sharing. Foregoing the cost of security fencing is contingent on confirmation that the Project includes adequate fencing.
- **The RWF will transfer the legacy lagoons L16-L19 property to VW at no cost,** in recognition of the Water Board's roughly "1 to 1" compensatory mitigation standard and the mitigation credits achieved through transfer as currently detailed in the Clean Water Act Section 401 Water Quality Certification and Order for the RWF, WDID CW431485.
- **RWF staff met with the USACE and VW staff on August 26 to provide the definition of the desired operations boundary line for Reach 4-5** and will deliver it in writing to the USACE as soon as feasible.
- **RWF must be assured that effluent will continue to flow, with the USACE agreeing to not close any newly constructed gate structures prior to 2030 without permission of the RWF .** If the Preferred Alternative is truly not feasible, the RWF will require certainty about the operation of the gate, because the gate structure closing before construction of the FEPS would block the flow of effluent from the RWF and endanger the health of 1.7M residents.
- **The RWF is prepared to forego our request for VW to cost-share 50% of the betterment costs up to \$9,000,000, and to contribute significant additional funding to the flood wall if the Preferred Alternative is implemented.**

RWF staff remain committed to engaging the USACE and VW for a successful outcome of this incredibly important project. This proposal requires approval by the City Councils of San José and Santa Clara, which are prepared to confer expeditiously to allow the RWF to submit a counteroffer to VW once all required information is obtained.

Going forward, we feel that better communication at the engineering level will be required to help resolve outstanding challenges and to allow the plant to plan for the evolving project. The RWF requests regularly scheduled working sessions between project engineers from now on.

Thank you for your continued cooperation and support in finding a solution to these issues. I'm confident that, through mutual respect of our needs, we'll be able to find a path forward on the necessary timeline. We request scheduling a high-level decision-making session with the RWF, USACE, and VW to resolve these final issues, because we are focused on moving the project forward.

Sincerely,



Nanci Klein
Director of Economic Development
Director of Real Estate
City of San José

cc:
San Jose-Santa Clara Regional Wastewater Facility (RWF)
Mayor Sam Liccardo, City of San Jose

Mr. Cunningham and Mr. Townsley
September 4, 2020

Councilmember Debi Davis, City of Santa Clara
Councilmember Lan Diep, City of San Jose
Councilmember Dev Davis, City of San Jose
David Sykes, City Manager, City of San Jose
Deanna Santana, City Manager, City of Santa Clara
Councilmember Kathy Watanabe, City of Santa Clara
Director John Gotto, Cupertino Sanitary District
Councilmember Carmen Montaro, City of Milpitas
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