



California Regional Water Quality Control Board

San Francisco Bay Region



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Arnold Schwarzenegger
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June 29, 2007
File No. 2188.07 (BKW)

Mr. Darryl Boyd, Principal Planner
Department of Planning, Building,
and Code Enforcement
City of San Jose
200 East Santa Clara Street, 3rd Floor
San Jose, CA 95113

**Subject: Draft Environmental Impact Report for the Coyote Valley Specific Plan, File No. GP06-02-04/PDC03-108
SCH # 2005062017**

Dear Mr. Boyd:

San Francisco Bay Regional Water Quality Control Board (Water Board) staff has reviewed the Draft Environmental Impact Report for the Coyote Valley Specific Plan (DEIR), which assesses environmental impacts associated with future development in Coyote Valley, south of San Jose. The Coyote Valley Specific Plan (CVSP) proposes the urban development of a minimum of 25,000 residential units and 50,000 new jobs on about 3,400 acres in northern and mid Coyote Valley, located on an existing rural area south of the Santa Teresa neighborhood and Tulare Hill. The project includes a proposed strategy to implement the South Coyote Greenbelt on an area of about 3,500 acres that is intended to be a permanent non-urban buffer between San Jose and Morgan Hill. The CVSP would create a new pedestrian and transit oriented community in southern San Jose, with a projected population between 70,000 to 80,000 people. The CVSP includes urban land uses such as workplace, residential, retail, and mixed use development, as well as structured/shared parking, and new roadways. New roadways will include a multifunctional Parkway and an extension of Bailey Avenue to the southwest towards Almaden Valley. The CVSP includes an internal Bus Rapid Transit system with a connection to a multi-modal Caltrain station, on the west side of the existing Caltrain line. CVSP also includes schools, a library, a community center, parks, trails, playfields, and services and utilities necessary to support a community this size. The CVSP includes a lake and urban canal, and proposes to relocate and restore Fisher Creek to a historic alignment. Build-out of the proposed project is anticipated to occur over a 25 to 50 year time frame. The Water Board submits the following comments on the DEIR for your consideration.

Comment 1, Sections 2.1.9.2 and 2.1.9.3, Urban Canal and Lake, Pages 38 – 41 (Also impact BIO-4, page 277):

Both the urban canal and the lake will discharge water to Fisher Creek. Because of this, these features must be managed in a manner that does not degrade the water quality and habitat value of Fisher Creek. In order to evaluate potential impacts on the Beneficial Uses of Fisher Creek, the DEIR should be revised to include the management measures that will be used at the Urban Canal and Lake. For example, procedures to control unwanted vegetation, algae, and vectors should be described in sufficient detail to evaluate whether or not any of these measures may impact Fisher Creek. If potential impacts are identified, the DEIR should include proposed measures to mitigate those impacts to a less than significant level.

In addition, these water features will be perennial and, therefore, may provide habitat for non-native species, such as bullfrogs, that prey on the California red-legged frog (CRLF) and the California tiger salamander (CTS). The DEIR should include a predator control plan to mitigate for the potential impact of non-native predators on special status species. This plan should be presented in sufficient detail to allow the resource agencies to evaluate its potential effectiveness. Water Board staff have observed difficulty in the successful implementation of predator control plans in water bodies. It may be necessary for the plan to include designs of the proposed facilities in order to show that these facilities are amenable to effective control strategies, which may include, but are not limited to, seining, gigging, or periodic draining of the features to disrupt the bullfrog reproduction cycle.

Comment 2, Section 2.1.12, South Coyote Valley Greenbelt Strategy, Page 44:

The DEIR states that the Greenbelt will remain as a permanent non-urban buffer between San Jose and Morgan Hill.

The Greenbelt Strategy would establish a framework to create and sustain a rural environment that supports rural residential home sites, active open space and related recreation, conservation and various forms of small scale agriculture. It would involve the creation of a non-profit organization or quasi-public entity to facilitate and coordinate small scale agriculture, conserve open space and environmental resources, and to provide operation and funding. They would work with existing property owners and potential small scale farmers, and recreational and open space entities to provide on-going funding, and coordinate mitigation for North and Mid-Coyote development.

The implementation of a Greenbelt Strategy would be done in accordance with existing City, County, and City of Morgan Hill General Plan land use policies and zoning regulations. The strategy would include the protection of riparian corridors, and the planning of trails and other recreational facilities, including ballfields. Other uses within the Greenbelt could include agriculture, open space, groundwater recharge, and wetland and habitat mitigation areas. Residential uses would include those currently allowed by the County of Santa Clara's general plan and zoning ordinance. The Strategy would include design guidelines, landscaping standards, roadway design, and other elements that enhance the quality of the rural non-urban landscape.

Water Board staff are concerned that the CVSP is expecting to locate too many activities within the proposed Greenbelt. One of the most significant potential benefits of the Greenbelt is the opportunity to provide an integral link in the wildlife migration corridor between the Mount Hamilton Range and the Santa Cruz Mountains. While many of the proposed land uses in the Greenbelt are less intense than full-scale urban development (e.g., ballfields and agriculture), they are still likely to impact the value of the Greenbelt as wildlife habitat and as a migration corridor. In order to evaluate the potential impacts of proposed land uses in the Greenbelt, a conceptual map should be prepared that illustrates how the many proposed activities in the Greenbelt would be accommodated. Without such information, it is not possible to evaluate the potentially significant impacts that may be associated with the Greenbelt strategy.

For example, the Santa Clara Valley Water District (SCVWD) is requiring that percolation ponds be constructed to replenish the groundwater that will be extracted to support the future development of the CVSP. These percolation ponds will be used to introduce reclaimed water into the Coyote Valley groundwater basin. At present, the DEIR does not address the size of these proposed ponds or their location within the greenbelt. Large percolation ponds may impact flow in Fisher and Coyote Creeks, and may also provide habitat for bullfrogs and other predators of CRLF and CTS. In the absence of proposed designs for the ponds, proposed locations for the ponds, or proposed predator management plans for the ponds, it is impossible to assess the potential impacts of these ponds or the likely success of measures intended to provide mitigation for those impacts.

The Greenbelt Strategy also proposes to accommodate mitigation wetlands in the greenbelt for impacts to wetlands in the urban development area. At present, it is not yet certain that the greenbelt has the appropriate hydrology to support created wetlands.

Water Board staff are also concerned that the governing body for the Greenbelt strategy has not yet been developed, since the DEIR only refers to the “creation of a non-profit organization or quasi-public entity.” Without a better understanding of the proposed governing body, it is difficult to evaluate the ability of this body to effectively implement the Greenbelt strategy.

Comment 3, Section 4.6.1, Introduction and Regulatory Framework, Page 239, Table 4.6-1 Regulation of Biological Resources:

The summary of regulations in Table 4.6-1 should be expanded to clarify that the Water Board has regulatory authority over wetlands and waterways under both the Federal Clean Water Act (CWA) and the State of California’s Porter-Cologne Water Quality Control Act (California Water Code, Division 7). Under the CWA, the Water Board has regulatory authority over actions in waters of the United States, through the issuance of water quality certifications (certifications) under Section 401 of the CWA, which are issued in combination with permits issued by the USACE, under Section 404 of the CWA. When the Water Board issues Section 401 certifications, it simultaneously issues general Waste Discharge Requirements (WDRs) for the project, under the Porter-Cologne Water Quality Control Act. Activities in areas that are outside of the jurisdiction of the USACE (e.g., isolated wetlands, vernal pools, or stream banks above the ordinary high water mark) are regulated by the Water Board, under the authority of the

Porter-Cologne Water Quality Control Act. Activities that lie outside of USACE jurisdiction may require the issuance of either individual or general waste discharge requirements from the Water Board. Although Table 4.6-1 does include a reference to the Porter-Cologne Act, only “waters of the U.S.” are mentioned in the table.

Comment 4, Section 4.6.2, Existing Biological Resources, Page 243, Wetland and Open Water Habitats:

The DEIR includes the text, “[T]he final determination of wetlands is made by the USACE through issuance of a Jurisdictional Determination.” The DEIR text should be expanded to note that the Water Board makes the jurisdictional determination for isolated wetlands that are not regulated by the USACE as waters of the U.S. (see Comment 3, above).

Comment 5, Section 4.6.2, Existing Biological Resources, Page 244, Streams and Ponds (Also Section 4.2.2, page 13 of Appendix G):

The DEIR includes the text, “[S]treams and ponds are water bodies that contain on Ordinary High Water (OHW) mark with very little cover by wetland vegetation.” The OHW mark is a concept related to implementation of the federal Clean Water Act by the USACE. However, the OHW mark is not used in the State’s Porter Cologne Act or the California Fish and Game Code. The California Fish and Game Code defines a stream as follows.

A stream is a body of water that flows at least periodically or intermittently through a bed or channel having banks and supports fish or other aquatic life. This includes watercourses having a surface or subsurface flow that supports or has supported riparian vegetation.

Therefore, the OHW mark should not be used in assessing the extent of State jurisdiction over streams and ponds.

Comment 6, Section 4.6.3.1, Thresholds of Significance, Page 274 (Also Section 5.1, page 41 of Appendix G):

The third item in the list of thresholds of significance for biological resources in the DEIR includes the text, “or have a substantial adverse effect on federally protected wetlands as defined by Section 404 of the Clean Water Act.” When the CEQA thresholds of significance were first developed, most of the wetlands in the State were regulated both as waters of the State, pursuant to Porter Cologne, and waters of the U.S., pursuant to the Clean Water Act. In recent years, U.S. Supreme Court decisions have had the effect of reducing federal jurisdiction over isolated wetlands and seasonal streams. Therefore, the thresholds of significance should be revised to include project impacts that would have an adverse impact on State protected wetlands and other waters of the State (see Comment 3, above).

Comment 7, Section 4.6.3.2, Impacts to Biological Habitats, Page 276, Table 4.6-6:

The note in this table should be revised to acknowledge that permits for the temporary impacts in Laguna Seca were received from the Water Board, as well as the USACE. Please replace all references to “USACE” in the note with “USACE and the Water Board”.

Comment 8, Section 4.6.3.2, Impacts to Biological Habitats, Impacts to Riparian Communities, Page 277:

Text in this subsection states that, “[W]ith the exception of the two bridge crossings of Coyote Creek, all of the urban development proposed as part of the CVSP project on the east side of Metcalf Road would be constructed outside of the 100-foot riparian setback of Coyote Creek, as required by the City’s Riparian Corridor Policy.” At some individual project sites in developed urban areas, Water Board staff have found that the 100-foot riparian setback is appropriate for the protection of Beneficial Uses of waters of the State. However, because of the large area included in the CVSP, we recommend that a project-specific assessment be performed to establish a riparian setback that will protect the Beneficial Uses of Coyote Creek.

The Beneficial Uses of Coyote Creek, which are specified in the *San Francisco Bay Basin Water Quality Control Plan* (Basin Plan), include preservation of rare and endangered species and wildlife habitat. Therefore, the buffer established at Coyote Creek in the CVSP should be sized to protect both water quality and the habitat needs of rare and endangered species, as well as wildlife in general. The analysis of the appropriate buffer size at Coyote Creek should include information on sizing buffers provided in the U.S. EPA’s *National Management Measures to Control Nonpoint Source Pollution from Urban Areas, Management Measure 3: Watershed Protection* (U.S. EPA, November 2005; EPA-841-B-05-004). Text on page 3-17 of this document provides guidance on establishing appropriate buffer sizes.

Factors for delineating setbacks and buffer zones vary with location and environment and include:

- Seasonal water levels;
- Nature and extent of wetlands and floodplains;
- Steepness of adjacent topography;
- Type of riparian vegetation;
- Quantity and velocity of runoff entering the buffer;
- Soil types and infiltration capacity;
- Density of development adjacent to the riparian corridor; and
- Wildlife values.

Buffer width is an important measure of pollutant removal effectiveness. Buffers typically range from 20 to 200 feet wide and should include the 100-year floodplain, riparian areas including adjacent wetlands, steep slopes, or critical habitat areas. A buffer at least 100 feet wide is recommended for water quality protection, and a 300-foot buffer is recommended to maintain a wildlife habitat corridor. Wider buffers offer increased detention times, infiltration rates, and diversity of soil, vegetation, and wildlife.

Comment 9, Section 4.6.4.1, Mitigation for Impacts to Biological Habitats, Pages 290 - 292, and Table 4.6-9 (Also Section 6.1.1, pages 64 - 66 of Appendix G):

Water Board staff are concerned that some of the proposed mitigation ratios for impacts to biological habitats appear to be on the low side, on the basis of the information that has been

provided to date to the resource agencies. Based on the information provided in the DEIR, it is possible that the proposed 1:1 mitigation ratio for impacts associated with the restoration of Fisher Creek to a more natural and historic alignment may be considered acceptable by the Water Board. Preliminary designs in the DEIR suggest that the realigned Fisher Creek channel is likely to provide improved habitat with respect to the existing Fisher Creek channel. However, the proposed 1:1 mitigation ratio for impacts to wetlands associated with development activities is lower than the ratio that is usually considered acceptable by the Water Board for impacts associated with development.

The use of 1:1 mitigation ratios is appropriate when the mitigation is created well in advance of the impacts (e.g., mitigation that is created sufficiently in advance of the impact for appropriate functions and values to become established at the mitigation site), and the mitigation wetlands are both in-kind and onsite. The ratio will be increased if the mitigation wetlands are not in-kind and onsite, and if there is some uncertainty related to the successful attainment of wetland functions and values at the mitigation sites. The text that introduces Table 4.6-9 states that the, “following mitigation ratios for impacts to sensitive habitats are based on those required or commonly required under applicable policies, laws, and regulations.” In our experience, mitigation ratios of 1:1 for development-related impacts are rarely accepted by the resource agencies. Therefore, we recommend using a potential range of mitigation ratios for development-related impacts in Table 4.6-9, to reflect the current level of uncertainty associated with these impacts, as well as the amounts of mitigation that are commonly required by the resource agencies. In addition, the text of this section should be modified to note the necessary sequencing of avoidance, minimization, and mitigation in the evaluation of impacts to wetlands and other waters of the State.

The ratio of 1:1 for development-related impacts to wetlands is also inappropriate in the DEIR, because the resource agencies have not yet been provided with a complete wetlands delineation for the CVSP, or an assessment of the functions and values of those wetlands. Without this information, the significance of the impacts cannot be evaluated. In addition, with the exception of some preliminary designs for the realignment of Fisher Creek, we have not been provided with proposed designs for the mitigation wetlands or the proposed locations for the mitigation wetlands. Without this information, the Water Board cannot evaluate the likely success of the proposed mitigation.

Proposed mitigation measures should be presented in sufficient detail for readers of the CEQA document to evaluate the likelihood that the proposed remedy will actually reduce impacts to a less than significant level. CEQA requires that mitigation measures for each significant environmental effect be adequate, timely, and resolved by the lead agency. In an adequate CEQA document, mitigation measures must be feasible and fully enforceable through permit conditions, agreements, or other legally binding instruments (CEQA Guidelines Section 15126.4). Mitigation measures to be identified at some future time are not acceptable. It has been determined by court ruling that such mitigation measures would be improperly exempted from the process of public and governmental scrutiny which is required under the California Environmental Quality Act. Based on the information provided in the DEIR, it is not possible to

evaluate the extent of potential impacts to waters of the State, or the adequacy of mitigation measures to reduce the impacts of the project to a less than significant level.

Self-sustaining mitigation wetlands or stream channels require an adequate source of water. Locations with appropriate hydrology to support wetlands or streams are often difficult to find, since, in general, locations with appropriate hydrology will already have developed as wetlands or streams. The EIR should be revised to include locations of potential mitigation wetlands and streams within the project area, as well as areas in which off-site creation or preservation opportunities are available. Without this information, we cannot evaluate whether or not the proposed mitigation will be able to provide appropriate mitigation for the CVSP's impacts.

Text describing Mitigation Measure BIO-2.1 states that, “[A] 1:1 replacement ratio is appropriate due to the degraded and farmed nature of the majority of existing wetlands.” At present, the resource agencies have not been provided with supporting documentation for this assertion. Beyond stating that “a majority of the existing wetlands” are degraded, the DEIR provides no further information on the actual acreage of wetlands that the DEIR considers to be degraded. In addition, several wetland functions (e.g., infiltration of runoff into groundwater, flood storage, or nutrient cycling) may occur in wetlands that appear degraded, or have been farmed. On the basis of the information provided in the DEIR, we are not able to concur with the proposed mitigation ratio.

Text in Mitigation Measure BIO-2.2 states that, “[I]f stream acreage and length cannot be replaced within the relocated/restored Fisher Creek Corridor, planting of appropriate riparian vegetation along Coyote Creek or Fisher Creek in the Greenbelt (which is in the same watershed) at a 2:1 ratio shall be implemented.” Planting of additional riparian vegetation is out-of-kind mitigation for the loss of stream channels. The Water Board is likely to require a higher amount of mitigation if riparian plantings are used as mitigation for the loss of stream channels.

Water Board staff are in support of the proposed ratio of 10:1 for offsite preservation of streams, if opportunities for stream restoration are not available onsite, and impacts to the onsite streams are demonstrated to be unavoidable. However, specific opportunities for stream preservation and restoration should be presented in the EIR, so that the feasibility of the proposed mitigation can be assessed by the resource agencies.

Comment 10, Section 4.6.4.3, Mitigation for Impacts to Special Status Animal Species, Mitigation Measure MM BIO 9.1, Pages 296 – 297 (Also Section 5.2.2, page 45 of Appendix G):

Water Board staff are in agreement with the basic mitigation concepts related to the construction of the proposed new bridges over Coyote Creek. However, since designs have not yet been developed for these bridges, we recommend that supplemental CEQA documents be prepared for these bridges when the designs have been developed. The preparation of supplemental CEQA documents for the bridge designs will allow the resource agencies to review the extent to which the designs have succeeded in incorporating the mitigation measures proposed in MM BIO 9.1.

Comment 11, Section 4.6.4.3, Mitigation for Impacts to Special Status Animal Species, Mitigation Measure MM BIO 10.5, Pages 297 – 298 (Also Section 6.2.2, pages 70 - 71 of Appendix G):

Mitigation Measure MM BIO 10.5 proposes to prepare a Management Plan for Bullfrog and Other Invasive Predatory Species. The Management Plan shall include measures for eradication and monitoring. The resource agencies should be provided with details of the Management Plan as soon as possible. In practice, these plans are often difficult to successfully implement without also impacting special status species. In addition, the Management Plan should be provided to the persons designing all water features in the CVSP. The success of predator management programs can be enhanced by designing all water containing features to facilitate predator control methods.

Comment 12, Section 4.6.4.7, Mitigation Measures for BOH Impacts, Mitigation Measures MM BIO 3.1 – MM BIO32.1, Pages 306 – 307 (Also Section 5.5, pages 60 and 61 of Appendix G):

At present, the designs for the roadway construction related to the Bailey-over-the-Hill (BOH) roadway improvements are very preliminary. Water Board staff are in agreement with some of the basic mitigation concepts related to the BOH impacts. However, as is noted in the following comment, mitigation for fill of waters of the State is not yet evaluated in the DEIR. Since the road alignment and designs have not yet been selected for BOH, we recommend that a revised DEIR be circulated that includes a more complete analysis of impacts associated with the BOH component of the CVSP. Since there is much greater uncertainty with respect to BOH impacts than there is with respect to future bridges over Coyote Creek, we do not consider the preparation of a supplemental EIR to be appropriate for BOH impacts.

The discussion of the BOH road alignment in the revised DEIR should contain sufficient detail to allow the resource agencies to review the extent to which the designs have succeeded in incorporating the mitigation measures proposed in Section 4.6.4.7. The evaluation of alignment alternatives in the revised DEIR should use the “avoid, minimize, and only then mitigate” sequencing to select the preferred alternative. This analysis may eliminate alignments that have little chance of receiving resource agency approval.

Comment 13, Appendix G, Section 6.4.3, Special Status Wildlife Species or Critical Habitat that May Occur in the BOH Alignment Corridor, page 76.

The proposed mitigation measures do not include mitigation for potential fill of wetlands or other waters of the State. It appears that some of the proposed alignments will result in fill of creeks in the BOH alignment corridor. The analysis of the alignment alternatives should use the avoid, minimize, mitigate sequencing required for all proposed impacts to waters of the State. The mitigation measures should include appropriate mitigation for any unavoidable fill associated with the BOH alignment corridor. Proposed mitigation measures should contain sufficient detail for the resource agencies to evaluate the likely success of these measures to mitigate for BOH alignment corridor’s impacts.

Comment 14, General Comment.

Although a large amount of work has gone into the preparation of the DEIR, there are several areas of impacts for which the impacts are not evaluated in sufficient detail and/or the proposed mitigation measures have not been provided in sufficient detail to meet the requirements of CEQA (See Comments 1, 2, 8, 9, 10, 11, 12, and 13). Because of this, we are requesting that a revised DEIR that addresses these concerns be re-circulated for review. Without the circulation a revised DEIR that addresses incompletely described impacts and provides specific mitigation measures, we are concerned that the Final EIR may not contain the analysis of impacts and mitigation measures that is necessary to support the issuance of Clean Water Act Section 401 Water Quality Certification and the issuance of Waste Discharge Requirements.

Thank you again for the opportunity to review the DEIR and provide comments. We look forward to your response. If you have any questions, please contact Brian Wines at (510) 622-5680, or via email at bwines@waterboards.ca.gov.

Sincerely,

ORIGINAL SIGNED BY SHIN-ROEI LEE 6/29/2007

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