



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

DEC 10 2016

Colonel Kirk E. Gibbs
District Engineer, Los Angeles District
U.S. Army Corps of Engineers
915 Wilshire Blvd, Suite 1101
Los Angeles, California 90017

Subject: Public Notice (PN) SPL-2006-01460-AJS for the proposed Lytle Creek Levee Repair Project, CEMEX, San Bernardino County, California

Dear Colonel Gibbs:

EPA Region 9 (EPA) has reviewed the October 28, 2015 PN describing the proposed Lytle Creek Levee Repair Project (Proposed Project). We appreciate the 11-day comment period extension, and your staff's ongoing efforts to coordinate with federal and state resource agencies.

In response to 2002 and 2013 PNs for the adjacent Lytle Creek North and South Planned Developments, we identified aquatic resources associated with Lytle Creek as an "aquatic resource of national importance" (ARNI),¹ in part due to their critical landscape position for maintaining biodiversity in the region. We maintain that resource designation in the context of the subject PN, and respectfully identify the permit action as a candidate for review by EPA and Corps headquarters because the project may have substantial and unacceptable impacts to ARNI. Our concerns include an inappropriately defined project purpose, failure to identify the least environmentally damaging practicable alternative (LEDPA), an inaccurate jurisdictional determination, and the potential to jeopardize the continued existence of endangered species.

The site is an existing gravel mining operation within Lytle Creek, which has not been actively mined since 2004 when high flows damaged an earthen levee and flowed through the mine pit. The proposed action is to repair and improve the levee, such that a new structure capable of withstanding a projected 100-year flood event could allow resumption of aggregate mining within the South Pit. According to the PN, this work would permanently fill 2.6 acres of jurisdictional waters with an additional temporary impact of 2.7 acres to Lytle Creek.

Jurisdictional Determination

The Corps characterizes the South Pit as a water-filled depression created in dry land incidental to mining that subsequently filled with water, and thus determined that it is excluded from consideration as

¹ARNI refers to procedures outlined in the 1992 Memorandum of Agreement between EPA and the Department of the Army Part IV, paragraph 3(a) regarding section 404(q) of the CWA.

a water of the United States pursuant to the 2015 Clean Water Rule (Rule).² This jurisdictional call was not coordinated with EPA consistent with prior Corps practices. Our review of historical photos shows that Lytle Creek has flowed through the South Pit since the 2004-2005 levee breach, and currently includes the active channel. The lateral limits of jurisdiction on Lytle Creek should be to its ordinary high water mark, which encompasses the South Pit. We request the Corps reconsider this jurisdictional determination in coordination with EPA.

Practicable Alternatives and Project Purpose

The Clean Water Act Section 404(b)(1) Guidelines (Guidelines) require an alternatives analysis that demonstrates the proposed discharge is the least environmentally damaging practicable alternative (LEDPA) meeting the project purpose. The LEDPA is the alternative with the fewest adverse impacts on the aquatic ecosystem, provided it does not have other unacceptable environmental consequences (40CFR 230.10(a)). EPA is concerned that the proposed project would result direct and secondary impacts to Lytle Creek from construction of the armored levee system. We believe there are practicable alternatives to meeting the project purpose that would not require these discharges.

The PN describes the overall project purpose as “to reconstruct an earthen levee that was breached by flooding in 2004-2005 to enable resumption of aggregate mining in the South Pit in a manner that will eliminate or reduce upstream headcutting.” For purpose of determining compliance with the Guidelines, EPA maintains the project purpose is to mine aggregate. Therefore, the alternatives analysis must include a range of offsite and onsite alternatives to achieve the project purpose of mining aggregate. In addition to the four “conceptual alternatives” summarized in the PN (*i.e.*, no action, modified, armored low-level and reduced flood protection alternatives), other alternatives for consideration include rotational mining and mining offsite areas currently under ownership or areas which could reasonably be obtained, utilized, expanded or managed in order to mine aggregate (40 CFR 230.10(a)(2)).

The South Pit is located in a highly sensitive aquatic resource area supporting federally-listed endangered species (*i.e.*, San Bernardino Merriam’s kangaroo rat, and Santa Ana River woolly star). Given the sensitivity of the site, alternatives to mining the site, and the potential demand for compensatory mitigation in the watershed, the applicant might consider pursuing the establishment of a mitigation bank as an alternative, productive use of the property.

Compensatory Mitigation

Avoiding impacts to Lytle Creek is the best way to ameliorate the need for compensatory mitigation. However, if this proves impracticable, we are concerned that the applicant’s proposal to compensate for permanent impact to 2.6 acres and temporary impact to 2.7 acres of Lytle Creek through enhancement of 2.8 acres of Riversidean alluvial fan sage scrub habitat within the CEMEX property along Lytle Creek will not be sufficient to offset impacts. Consistent with the Corps and EPA 2008 Compensatory Mitigation Rule, a mitigation plan must be commensurate with the amount and type of permitted impact, and is only appropriate after a determination that the proposed discharge complies with the Guidelines. We anticipate that the significance of these aquatic resources will justify a mitigation ratio much greater than 1:1, especially if the mitigation proposed relies on enhancement of upland habitat for the loss of aquatic resource acreage and functions. We are unaware of any existing mitigation banks or in-lieu fee programs that service the project area and are concerned that there may not be sufficient permittee responsible mitigation opportunities to offset impacts of the Proposed Project.

² Clean Water Rule, Final Rule dated June 29, 2015 (33 CFR Part 328).

Consistent with South Pacific Division guidance, EPA recommends the Corps require a functional or condition assessment of the waters in order to allow for a “quantitative impact-mitigation comparison” using the South Pacific Division Mitigation Ratio Setting Checklist (Mitigation SOP). When adequate information is provided by the applicant to perform this analysis under the SOP, EPA offers our assistance in evaluating the data and interpreting appropriate mitigation under a watershed approach. We also request a copy of the draft proposed compensatory mitigation plan when it is provided to the Corps.

Endangered Species

The Guidelines prohibit issuance of a 404 permit if the discharge would jeopardize the continued existence of a federally listed species or result in the destruction or adverse modification of designated critical habitat (40 CFR 230.10(b)(3)). The Corps has preliminarily determined that the proposed project may affect the federally endangered San Bernardino Merriam’s kangaroo rat (SBKR) and the Santa Ana River woolly star, as well as the designated critical habitat for the SBKR. The project site is within the second largest of only three remaining viable populations of occupied and designated critical habitat for SBKR. The severity of direct, secondary and cumulative impacts to critical habitat is a very serious consideration for CWA and ESA compliance for the proposed discharges.

Summary

Prior to granting a permit pursuant to §404 CWA, the Corps must determine that the project complies fully with each restriction on discharge articulated in EPA’s Guidelines. There is not sufficient information to determine whether the proposed discharge complies with the substantive requirements related to alternatives analysis, endangered species, significant degradation, or mitigation.

Thank you for the opportunity to provide comments on this project. We look forward to working with your staff on this application to avoid substantial and unacceptable impacts to ARNI. As additional information on this project becomes available, please contact Elizabeth Goldmann at (415) 972-3398. If you would like to discuss this project personally, please call me at (619) 235-3337 or have your Regulatory Division Chief contact Jason Brush, Supervisor of our Wetlands Office, at (415) 972-3483.

Sincerely,



Tomás Torres
Director
Water Division

ec:

- Mr. Aaron Allen, North Coast Branch Chief, USACE, Ventura Field Office
- Ms. Karin Cleary-Rose, Division Chief, USFWS, Palm Springs Office
- Mr. Geary Hund, Fish and Wildlife Biologist, USFWS, Palm Springs Office
- Mr. Marc Brown, Santa Ana Regional Water Quality Control Board
- Mr. Jeff Brandt, Supervisor, California Department of Fish and Wildlife, Ontario Office

