

Memorandum

Date: November 10, 2011

To: John Chesnutt, Chief, Navy & Army Section, Superfund Division
United States Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105

From: Michael Anderson, Ph.D., Resource Assessment Program Manager
California Department of Fish and Game
Office of Spill Prevention and Response
1700 K Street, Suite 250
Sacramento, California 95811

Subject: Identification of State "Applicable" Or "Relevant and Appropriate" Requirements (ARARs) for the Yosemite Creek Sediment Site, San Francisco, California

This memorandum is in response to your request for coordination with Natural Resource Trustees, received on October 14, 2011. Your letter requested the Trustees provide any specific natural resource related concerns regarding the contamination at the Yosemite Creek Sediment site (also known as the Yosemite Slough site), information on current and future beneficial uses of the slough, and any natural resources that may be present at the site and adjacent areas. The California Department of Fish and Game, Office of Spill Prevention and Response (DFG-OSPR) appreciates the opportunity to provide general ARARs for consideration in the remedial activities at the Yosemite Slough site; however, DFG-OSPR has not been previously involved in reviewing any documentation pertaining to this site.

The DFG is the State's Trustee for fish and wildlife resources pursuant to California Fish and Game Code Section 711.7. The DFG is also designated as a Trustee for natural resources pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act Section 107 (f)(2)(B). The enclosed general ARARs are provided per your request and are provided for the protection of State fish, wildlife, and plant species and their habitat at the Yosemite Slough site. Please refer to the California Department of Fish and Game Codes (available on-line at <http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=fgc&codebody=&hits=20>) and Title 14 California Code of Regulations (available on-line at <http://ccr.oal.ca.gov/linkedslice/default.asp?SP=CCR-1000&Action=Welcome>) for a complete list of potential DFG ARARs. Although DFG-OSPR is submitting the enclosed table of proposed DFG ARARs per your request, our submission does not mean DFG-OSPR condones or approves of the proposed remedial activities at the Yosemite Slough site since (1) we have not reviewed any documentation or submissions to determine site ecological risks to date, (2) we do not have a cost-reimbursement agreement with the U.S. Environmental Protection Agency that would be required to expend the time necessary to definitively support the selection of ARARs for this site, and (3) remedial activities in this location may have the potential for 'take' as defined by the fish and game codes provided in the enclosed table and we

have not provided appropriate avoidance, minimization, and mitigation measures for protecting species potentially affected by these actions.

Background

The Yosemite Slough site is approximately 320,000 square feet in size and is located within the Yosemite Creek drainage basin. Before 1900, the area around the site consisted primarily of wetlands, marshlands, and submerged lands. Between 1940 and 1970, much of the surrounding areas were developed for residential, commercial, and industrial purposes. Historically, the site received sewage overflows, and stormwater overflows and runoff. The majority of the sediments are exposed at low tide. Previous investigations have shown the site sediments to be contaminated with polychlorinated biphenyls, metals (including chromium, lead, mercury, and zinc), petroleum hydrocarbons, and pesticides (including chlordane, dieldrin, and dichlorodiphenyltrichloroethane). This information is summarized from your request for coordination letter dated October 11, 2011. We also are familiar with the area downgradient of the slough, Hunters Point Naval Shipyard, as we are involved with oversight in the cleanup of this former naval base.

Comments

The salt marsh harvest mouse and California Clapper Rail are State-listed as endangered, the California Black Rail is State-listed as threatened, and all three are designated as Fully Protected Species pursuant to the California Fish and Game Code. These species have the potential to occur within the salt marsh habitats at the Yosemite Slough site. Other than collection for scientific research purposes for the recovery of the species, Fully Protected Species may not be "taken" or possessed at any time and DFG is not authorized to issue a permit for their "take", including trapping. The attached generic ARARs address the protection of species such as these.

If you have any questions regarding these ARARs or require further details, please contact Michael Anderson at (916) 324-9784 or by email at manderso@ospr.dfg.ca.gov.

Reviewer: Wendy Johnson, Staff Counsel

Attachments: 1

cc: Craig Cooper, Superfund Project Manager
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ATTACHMENT 1 of 1
 CALIFORNIA DEPARTMENT OF FISH AND GAME
 LOCATION AND ACTION SPECIFIC ARARS
 FOR YOSEMITE CREEK SEDIMENT SITE, SAN FRANCISCO COUNTY

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Aquatic habitat/species	Action must be taken if toxic materials are placed where they can enter waters of the State. There can be no release that would have a deleterious effect on species or habitat.	Fish and Game Code section 5650 (a), (b) & (f)	This code section prohibits depositing or placing where it can pass into waters of the state any petroleum products (Section 5650(a)(1)), factory refuse (section 5650(a)(4)), sawdust, shavings, slabs or edgings (section 5650(a)(3)), and any substance deleterious to fish, mammals, plant life or bird life (section 5650(a)(6)). These are substantive, promulgated environmental protection requirements. These requirements impose strict criminal liability on violators. (<i>People v. Chevron Chemical Company (1983) 143 Cal. App. 3d 50</i>). This imposition of strict criminal liability imposes a standard that is more stringent than federal law. The extent to which each section of 5650 is relevant and appropriate depends on the site characterization and the potential for contaminants to enter state waters.
Wildlife Species	Action must be taken to prohibit the taking of birds and mammals, including the taking by poison	Fish and Game Code section 3005 (Stats. 1957, c. 456, p. 1353 section 3005)	This code section prohibits the taking of birds and mammals, including taking by poison. "Take" is defined by Fish and Game Code section 86 to include killing. "Poison" is not defined in the code. Although there is no state authority on this point, federal law recognizes that poison, such as Strychnine, may effect incidental taking. (<i>Defenders of Wildlife v. Administrator, Environmental Protection Agency (1989) 882. F. 2d. 1295</i>). This code section imposes a substantive, promulgated environmental protection requirement and is relevant and appropriate to the remedial activities at the Yosemite Creek Sediment site.

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 LOCATION AND ACTION SPECIFIC ARARs
 FOR YOSEMITE CREEK SEDIMENT SITE, SAN FRANCISCO COUNTY

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Rare native plants	Action must be taken to conserve native plants. There can be no releases and/or actions that would have a deleterious effect on species or habitat.	Fish and Game Code section 1908 (Added by Stats. 1977, c. 1181, p. 3869, section 8)	Section 1908 imposes a substantive requirement by forbidding any "person" to take rare or endangered native plants. California Code of Regulations Title 14 section 670.2 provides a listing of the plants of California that have been declared to be Endangered, Threatened or Rare. Fish and Game Code section 67 provides the definition of "person" as any natural person or any partnership, corporation, limited liability company, trust, or other type of association. Whether the federal government or contractors acting on behalf of the federal government would fall within that definition is a potential issue. To the extent that there are rare or endangered plants on or near the site, section 1908 would be an ARAR.
Endangered Species	Action must be taken to conserve endangered species. There can be no releases and/or actions that would have a deleterious effect on species or habitat.	Fish and Game Code section 2080 (Added by Stats. 1984, c. 1240, section 2).	This section prohibits the take, possession, purchase or selling within the state, any species (including rare native plant species), or any product thereof, that the commission determines to be an endangered or threatened species, or the attempt of any of these acts. This section is relevant and appropriate to the extent that there are endangered or threatened species in the area, such as the salt marsh harvest mouse, California Clapper Rail, California Black Rail, which have the potential of being affected if actions are not taken to conserve the species. This section prohibits releases and/or actions that would take species or their habitat.

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 LOCATION AND ACTION SPECIFIC ARARS
 FOR YOSEMITE CREEK SEDIMENT SITE, SAN FRANCISCO COUNTY

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Fully protected bird species/habitat	Action must be taken to prevent the taking of fully protected birds	Fish and Game Code section 3511 (Added by Stats. 1970, c. 1036, p. 1848 section 4)	<p>This section provides that it is unlawful to take or possess any of the following fully protected birds:</p> <ul style="list-style-type: none"> (a). American Peregrine Falcon (b). Brown Pelican (c). California Black Rail (d). California Clapper Rail (e). California Condor (f). California Least Tern (g). Golden Eagle (h). Greater Sandhill Crane (i). Light-footed Clapper Rail (j). Southern Bald Eagle (k). Trumpeter Swan (l). White-tailed Kite (m). Yuma Clapper Rail <p>This section should be considered relevant and appropriate to the extent that such fully protected birds, including the American Peregrine Falcon, Brown Pelican, California Black Rail, California Clapper Rail, California Least Tern, Golden Eagle, Southern Bald Eagle, and White-tailed Kite, and/or their habitat are detected on or near the site.</p>

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 FOR YOSEMITE CREEK SEDIMENT SITE, SAN FRANCISCO COUNTY

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Fully Protected Mammals	Actions must be taken to assure that no fully protected mammals are taken or possessed at any time.	Fish and Game Code section 4700 (Added by Stats. 1970, c. 1036, p. 1848 section 6)	<p>This section prohibits the take or possession of any of the fully protected mammals or their parts. The following are fully protected mammals:</p> <ul style="list-style-type: none"> (a) Morro Bay kangaroo rat (b) Bighorn sheep except Nelson bighorn sheep (c) Northern elephant seal (d) Guadalupe fur seal (e) Ring-tailed cat (f) Pacific right whale (g) Salt marsh harvest mouse (h) Southern sea otter (i) Wolverine <p>This section is relevant and appropriate to the extent that salt marsh harvest mouse and their habitat are located on or near the site.</p>
Fully Protected Reptiles and Amphibians	Actions must be taken to prevent the take or possession of any fully protected reptile or amphibian.	Fish and Game Code section 5050 (Added by Stats. 1970, c. 1036, p. 1849, section 7)	<p>This section prohibits the take or possession of fully protected reptiles and amphibians or parts thereof. The following are fully protected reptiles and amphibians:</p> <ul style="list-style-type: none"> (1) Blunt-nosed leopard lizard (2) San Francisco garter snake (3) Santa Cruz long-toed salamander (4) Limestone salamander (5) Black toad <p>This section is relevant and appropriate in that the Yosemite Creek Sediment site is within the known range of the San Francisco garter snake and habitat for this species may be present on or near the site.</p>

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LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Birds	Action must be taken to avoid the take or destruction of the nest or eggs of any bird	Fish and Game Code section 3503	This section prohibits the take, possession, or needless destruction of the nest or eggs of any bird, except as otherwise provided by this code or any regulation made pursuant thereto. This section is relevant and appropriate to the extent that birds and their habitat are located on or near the site.
Birds of Prey	Action must be taken to prevent the take, possession, or destruction of any birds-of prey or their eggs	Fish and Game Code section 3503.5 (Added by Stats. 1985, c. 1334, section 6)	This section prohibits the take, possession, or destruction of any birds in the orders of Falconiformes or Strigiformes (birds-of-prey) or to take, possess, or destroy the nest or eggs of any such bird except as otherwise provided by this code or any regulation adopted pursuant thereto. This section will be relevant and appropriate to the extent that species, such as American Kestrel, Osprey, Northern Harrier, Red-tailed Hawk, Barn Owl, and Western Burrowing Owl, or their eggs are located on or near the site.
Migratory Birds	Action must be taken to prevent the take or possession of any migratory nongame birds.	Fish and Game Code section 3513	This section makes it unlawful to take or possess any migratory nongame bird as designated in the Migratory Bird Treaty Act or any part of such migratory nongame bird except as provided by rules and regulations adopted by the Secretary of the Interior under provisions of the Migratory Bird Treaty Act. This section is relevant and appropriate to the extent that migratory nongame birds and their habitat are located on or near the site.

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LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Wetlands	Actions must be taken to assure that there is "no net loss" of wetlands acreage or habitat value. Action must be taken to preserve, protect, restore and enhance California's wetland acreage and habitat values.	Fish and Game Commission Wetlands Policy (adopted 1987) included in Fish and Game Code Addenda	This policy seeks to provide for the protection, preservation, restoration, enhancement and expansion of wetland habitat in California. Further, it opposes any development or conversion of wetland that would result in a reduction of wetland acreage or habitat value. It adopts the USFWS definition of a wetland which utilizes hydric soils, saturation or inundation, and vegetation criteria, and requires the presence of at least one of these criteria (rather than all three) in order to classify an area as a wetland. This policy is not a regulatory program and should be included as a TBC.