
San Francisco Bay Regional Water Quality Control Board

October 6, 2025

Town of Los Gatos
Attn: Erin Walters, Senior Planner
110 E. Main Street
Los Gatos, CA 95030
Email: EWalters@losgatosca.gov

**Initial Study / Mitigated Negative Declaration, 178 Twin Oaks, Surrey Farms
Estates Subdivision Project
SCH No. 2025090920**

Dear Ms. Walters

This is the third comment letter provided by San Francisco Bay Regional Water Quality Control Board (Water Board) staff on proposals to develop a residential subdivision at 178 Twin Oaks Drive in the Town of Los Gatos (Project). We provided comments on the Draft Environmental Impact Report (DEIR) on October 8, 2015, and comments on a recirculated DEIR on June 12, 2017 (See Attachments). As we note below in our comments on the Initial Study / Mitigated Negative Declaration (ISMND), 10 years after our initial comment letter, we remain concerned that the extent of waters subject to the jurisdiction of the Water Board and the California Department of Fish and Wildlife (CDFW) in the ephemeral creek at the Project site has not been confirmed and that State jurisdictional waters may be impacted by the proposed Project. In addition, we have concerns with the proposed post construction stormwater treatment measures, which may be difficult to inspect and may also dewater the ephemeral channel.

Comment 1. The ISMND does not acknowledge the potential need to obtain approvals from the Water Board and CDFW.

The Water Board and CDFW have not been asked to confirm the full extent of jurisdictional waters of the State associated with the ephemeral creek channel at the Project site. If the Project will impact a jurisdictional ephemeral creek either through fill of a portion of the creek or through disconnecting the creek from its watershed, approvals will be necessary from the Water Board and CDFW.

Comment 2. Section IV, Biological Resources, asserts that the ephemeral creek is not a water of the State without providing documentation that State agencies concur with this assertion.

The ISMND includes the following text on Page 48.

The on-site ephemeral drainage with swales was determined not to be considered jurisdictional water of the U.S. or the State. Nonetheless, as shown in Figure 3, the proposed project would be designed to incorporate a minimum 10-foot buffer between the proposed development and the vegetation surrounding the ephemeral drainage. As such, the ephemeral drainage with swales would not be directly impacted by the proposed project. Similarly, as discussed above, the proposed project would retain the 100- to 110-foot flood easement between the development footprint and Ross Creek. Therefore, the proposed project would not result in the disturbance of any on-site wetlands.

The ISMND notes that the U.S. Army Corps of Engineers (Corps) has determined that the ephemeral creek is not a water of the U.S. However, no documentation is provided that the Water Board or CDFW have determined that the ephemeral creek is not a water of the State. Until the Water Board and CDFW have assessed the jurisdictional status of the ephemeral creek, the Project should assume that the ephemeral creek is a water of the State.

The ISMND states that a 10-foot buffer will be established along vegetation adjacent to the ephemeral creek. However, a topographic map of the Project site provided on the Town of Los Gatos' (Town's) website indicates that the channel appears to extend upstream from the uppermost cluster of vegetation. Based on the topographic map, the footprint of the access road may fill the upper portion of the ephemeral creek. If this is the case, the road should be redesigned to completely avoid the upper end of the ephemeral creek or mitigation should be proposed for impacting the ephemeral creek.

Also, as discussed below in Comment 5, the proposed stormwater treatment infrastructure appears to divert the runoff that currently sustains the ephemeral creek into the bioretention areas and pervious pavement. From the bioretention areas and pervious pavement, the treated runoff would be discharged to the municipal storm drain system. This will deprive the ephemeral creek of the hydrology necessary to sustain the preserved vegetation along the creek. We encourage the Project to redesign the proposed post-construction stormwater treatment system to direct treated runoff back to the ephemeral creek.

At this time, we disagree with the conclusion presented on page 49 of the ISMND, that asserts that the proposed Project would not have a substantial adverse effect on any riparian habitat or other sensitive natural community.

Comment 3. The proposed use of pervious pavement may not be appropriate at the Project site.

Text on page 73 in Section X, Hydrology and Water Quality, states that:

A portion of the internal roadway, as well as the proposed driveways, would be lined with pervious pavement to allow for stormwater infiltration.

However, it is not clear from the ISMND if the soils at the Project site are sufficiently permeable to make the use of pervious pavement an effective form of treatment or if the steep topography of portions of the Project site is appropriate for the use of pervious pavement. Pervious pavements shouldn't be used on slopes greater than 5 percent (without underdrains) or 16 percent (with underdrains). Please provide the slopes of the roads and driveways at which pervious pavement is proposed, along with the permeability of the underlying soils at the site. If underdrains are required for the pervious pavement, please include designs for the underdrains.

Comment 4. The ISMND does not identify the responsible party for operation and maintenance of stormwater treatment infrastructure or the treatment proposed to mitigate the impact of hydrograph modification.

As a permittee under the Municipal Regional Stormwater NPDES Permit (MRP) (Order No. R2-2022-0018, as amended; NPDES Permit No. CAS612008), the Town must ensure that stormwater runoff from new areas of impervious surfaces is treated in conformance with Section C.3 of the MRP. In addition to confirming that proposed treatment measures are appropriately sized and designed, the Town must confirm that the Project's stormwater treatment measures are operated and maintained in conformance with the requirements of the MRP.

For a new subdivision, it is easiest to confirm the proper operation and maintenance of stormwater treatment measures if they are maintained by a Homeowners Association (HOA), rather than individual homeowners. And there is also less risk of damage to the bioretention areas if the bioretention areas and any necessary hydromodification management measures are located on land that is held in fee title by the HOA. The Covenants, Contracts, and Restrictions (CC&Rs) for the HOA provide a legally binding mechanism for ensuring that stormwater treatment and management measures are operated and maintained in conformance with the requirements of the MRP.

To facilitate the Town's ability to inspect bioretention areas for proper operation and maintenance, the bioretention areas should be visible from public roadways. In the current design, the bioretention areas at Lots 5, 6, and 10 would be difficult to inspect from the roadway.

Finally, the ISMND lacks a discussion of hydromodification management measures. Section X should be revised to discuss the need for MRP-compliant hydromodification measures.

Comment 5. The proposed stormwater treatment measures will dewater the preserved ephemeral creek channel.

Page 16 of the ISMND contains the following text:

Following on-site treatment, stormwater flows would be directed to the existing 27- and 36-inch storm drains located north and west of the site, respectively.

Stormwater runoff that currently supports riparian vegetation along the ephemeral creek would be diverted to storm drains. This could deprive riparian vegetation along the ephemeral creek of sufficient water to sustain the vegetation. We urge the Project design team to redesign the stormwater treatment system to discharge treated runoff of the ephemeral creek. Diverting water away from the ephemeral creek channel would be a significant impact to the creek.

Sincerely,



Brian Wines
Water Resource Control Engineer
Watershed Management Division

Attachments
October 8, 2015, Comments on the DEIR
June 12, 2017, Comments on the recirculated DEIR

cc:
State Clearinghouse, state.clearinghouse@opr.ca.gov
CDFW
Jason Faridi, Jason.faridi@wildlife.ca.gov
Emily Galli, Emily.galli@wildlife.ca.gov

San Francisco Bay Regional Water Quality Control Board

October 8, 2015
CIWQS Place ID No. 818654

Sent via electronic mail: No hardcopy to follow

Town of Los Gatos
Community Development Department
110 E. Main Street
Los Gatos, CA 95030

Attn: Marni Moseley (MMosely@losgatosca.gov)

Subject: Draft Environmental Impact Report, Surrey Farm Estates, 170 Twin Oaks Drive,
Planned Development Application PD-10-006, Town of Los Gatos, Santa Clara
County
SCH No. 2012072027

Dear Ms. Moseley:

San Francisco Bay Regional Water Quality Control Board (Water Board) staff has reviewed the *Draft Environmental Impact Report, Surrey Farm Estates, 170 Twin Oaks Drive, Planned Development Application PD-10-006* (DEIR). The DEIR assesses potential impacts associated with approving a General Plan Amendment that would allow the 17.55-acre site at 170 Twin Oaks Drive to be developed with 10 single-family residences. Water Board staff have the following comments on the ISMND.

Comment 1. Section 4.3, Biological Resources. The extent of waters of the State should be verified.

Water Board staff encourage the project proponent to contact U.S. Army Corps of Engineers (Corps) regulatory staff, California Department of Fish and Wildlife (CDFW) staff, and Water Board staff to confirm the jurisdictional status of the ephemeral headwater tributary to Ross Creek at the Project site. If the apparent full apparent extent of the ephemeral creek is a jurisdictional water of the State, then the Project should be redesigned to avoid the channel to the maximum extent practicable. When we review applications for permits to fill waters of the State, we require that the applicant demonstrate that all opportunities to avoid or minimize fill in waters of the State have been avoided. The project proponent should not assume that all proposed fill at the project site will be authorized by the Water Board.

Comment 2. Section 4.3, Biological Resources. Mitigation Measure 4.3-7, of the DEIR does not include a concrete mitigation proposal and is, therefore, inadequate.

For proposed impacts to the ephemeral channel, Mitigation Measure 4.3-7 consists of the following:

- a. Prior to initiation of project construction, the project proponent shall secure a verified jurisdictional determination from the USACE.*

b. For impacts to federally regulated waters of the U.S. that cannot be avoided, the applicant shall apply for and receive authorization pursuant to CWA. The project proponent shall comply with all permit conditions, as specified by the USACE. Mitigation ultimately required by the USACE could include on-site habitat creation, off-site habitat creation, purchase of credits from an approved habitat mitigation bank, and/or payment of in-lieu fees to an approved conservation organization for wetland habitat enhancement of preservation activities.

c. For impacts to waters of the State or other State-regulated habitats that cannot be avoided, the applicant shall apply for and receive authorization pursuant to CFGC Section 1602 and Porter Cologne, as applicable. Section 1602 applies to impacts to the ephemeral swale that drains into Ross Creek, while Porter-Cologne would apply to impacts to waters of the State that are not also waters of the US subject to regulation by USACE under the Clean Water Act. The project proponent shall comply with all permit conditions (including monitoring of any restoration plantings for long-term survivorship), as specified by the CDFW and RWQCB. Mitigation ultimately required by the CDFW/ RWQCB could include on-site habitat creation, off-site habitat creation, purchase of credits from an approved habitat mitigation bank, and/or payment of in-lieu fees to an approved conservation organization for wetland habitat enhancement of preservation activities.

Applying for permits from the resource agencies prior to impacting jurisdictional waters is a legal requirement, but it is not a mitigation measure. The DEIR lacks concrete proposals for mitigation. Therefore, the DEIR fails to demonstrate that the project's impacts to waters of the State can be mitigated to less than significant levels. Without a revision to include concrete mitigation proposals, it is likely that the DEIR will not be adequate to support the issuance of State permits for impacts to the ephemeral channel.

In a CEQA document, a project's potential impacts and 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. While it is true that any impacts to waters of the State would require permit(s) from the Water Board, compliance with regulatory requirements is not in itself a mitigation measure. CEQA documents should identify impacts associated with a project and propose specific mitigation measures in sufficient detail for persons reviewing the CEQA document to assess the feasibility and adequacy of the proposed mitigation measures. This kind of assessment is not possible on the basis of the information provided in the DEIR.

According to the DEIR, a culverted portion of Ross Creek abuts the project site. The project proponent is encouraged to consider options for daylighting the portion of the Ross Creek at the project site. This may provide appropriate mitigation for any impacts to the ephemeral creek channel that the resource agencies determine to be unavoidable. Opportunities for creek

daylighting are very rare. Since the Project site is currently undeveloped, there may be unique opportunities for revising the project design to allow for creek daylighting.

Please contact me at (510) 622-5680 or brian.wines@waterboards.ca.gov if you have any questions. All future correspondence regarding this Project should reference the CIWQS Place ID Number indicated at the top of this letter.

Sincerely,

Brian Wines
Water Resources Control Engineer
Watershed Division

cc: State Clearinghouse (state.clearinghouse@opr.ca.gov)

San Francisco Bay Regional Water Quality Control Board

June 12, 2017
CIWQS Place ID No. 818654

Sent via electronic mail: No hardcopy to follow

Town of Los Gatos
Community Development Department
110 E. Main Street
Los Gatos, CA 95030

Attn: Jennifer Armer (jarmer@losgatosca.gov)

Subject: Partial Recirculated Draft Environmental Impact Report, Surrey Farm Estates, 170 Twin Oaks Drive, Planned Development Application PD-10-006, Town of Los Gatos, Santa Clara County
SCH No. 2012072027

Dear Ms. Armer:

On October 8, 2015, San Francisco Bay Regional Water Quality Control Board (Water Board) staff submitted comments on the *Draft Environmental Impact Report, Surrey Farm Estates, 170 Twin Oaks Drive, Planned Development Application PD-10-006* (DEIR). The October 8, 2015, letter is included as an attachment to this letter. The DEIR circulated for comment in 2015 assessed potential impacts associated with approving a General Plan Amendment that would allow the 17.55-acre site at 170 Twin Oaks Drive to be developed with 10 single-family residences. In 2015, Water Board staff expressed concerns with respect to the unconfirmed jurisdictional status of an ephemeral channel at the project site and the lack of an actual mitigation proposal for impacts to waters of the State at the Project site.

In May of 2017, the Town of Los Gatos issued a *Partial Recirculated Draft Environmental Impact Report, Surrey Farm Estates, 170 Twin Oaks Drive, Planned Development Application PD-10-006* (PRDEIR). Section 1.2 of the PRDEIR provides the reason for recirculation.

In the time since the Draft EIR was released for public review (August 26, 2015 to October 9, 2015), the project applicant received correspondence from the United States Army Corps of Engineers (USACE) confirming the amount of jurisdictional Waters of the U.S. Waters of the U.S. are regulated by the USACE. The Draft EIR assumed that the ephemeral swale that traverses the western portion of the site would be jurisdictional waters. Following a site visit by USACE personnel in June 2016, the Army Corps of Engineers prepared a letter stating the extent of the jurisdictional Waters of the U.S. consisted of a 342-square foot (0.008-acre) area in the northwestern corner of the site. The ephemeral swale was determined not be jurisdictional Waters of the U.S.

Water Board staff are providing comments on the PRDEIR that explain why the issues raised in the October 8, 2015, comment letter on the DEIR have not been sufficiently resolved in the PRDEIR.

Comment 1. Section 4.3, Biological Resources. The extent of waters of the State should be verified.

In the October 8, 2015, comment letter, Water Board staff encouraged the project proponent to contact the U.S. Army Corps of Engineers (Corps) regulatory staff, California Department of Fish and Wildlife (CDFW) staff, and Water Board staff to confirm the jurisdictional status of the ephemeral headwater tributary to Ross Creek at the Project site. Since 2015, the project proponent has contacted the Corps, and in June of 2016 the Corps determined that the ephemeral headwater tributary was not a water of the U.S. According to text on page 4.3-12 of the PRDEIR:

An ephemeral swale crosses the middle of the property, conveying sheet flow to the northwestern corner of the site, where it is collected in a storm drain system that outfalls into Ross Creek. ~~While only incised portions of the ephemeral swale are expected to qualify as waters of the U.S.,~~ It is assumed the entire swale ~~is expected to~~ would qualify as a waters of the State, given that it conveys concentrated flows from an off-site watershed to a named tributary. As such, impacts to this feature are expected to be regulated by the CDFW pursuant to the LSAP⁸ and the RWQCB pursuant to Porter-Cologne.

In addition, Page 4.3-46 of the PRDEIR contains the following text:

Preliminary input from the CDFW (D. Johnston, e-mail dated 7/17/2012) indicates that impacts to the ephemeral swale would require authorization under the Lake and Streambed Alteration Program (CFGC Section 1600, et seq.). Work within the ephemeral swale is also expected to require issuance of a water quality certification under Section 401 of the Clean Water Act and the State Porter Cologne Act and either individual or general waste discharge requirements from the RWQCB ~~pursuant to Porter-Cologne~~ (see Section 4.5, Hydrology and Water Quality, Impact and Mitigation Measure 4.5-1). Implementation of Mitigation Measures 4.3-7a and 4.3.7b, and ~~Conformance with Applicable Federal and State Regulations and Jurisdictional Waters Mitigation,~~ would ensure that project-related impacts on surface waters would be reduced to less than significant.

Therefore, the PDREIR continues to treat the ephemeral swale as a water of the State, subject to CDFW and Water Board jurisdiction. When the project proponent applies to the Water Board for permits for impacts to the ephemeral channel, Water Board staff will request that the Project be redesigned to avoid the channel to the maximum extent practicable. Water Board staff will require that the applicant demonstrate that all opportunities to avoid or minimize fill in waters of the State have been avoided. The project proponent should not assume that all proposed fill at the project site will be authorized by the Water Board.

When the DEIR was circulated, the ephemeral channel was assumed to be subject to Corps, CDFW, and Water Board jurisdiction. At the time that the PRDEIR was circulated, the ephemeral channel was assumed to be subject to CDFW and Water Board jurisdiction. It is not clear why establishing the absence of federal jurisdiction over the ephemeral channel, while continuing to assume State jurisdiction over the channel, was a sufficiently significant change to justify the circulation of a partially recirculated DEIR.

Comment 2. Section 4.3, Biological Resources. Mitigation Measures 4.3-7a and 4.3-7b, of the PRDEIR do not include a concrete mitigation proposal and are, therefore, inadequate.

For proposed impacts to the ephemeral channel, the PRDEIR includes two mitigation Measures; Mitigation Measure 4.3-7a, which was Mitigation Measure 4.3-7 in the DEIR, and new Mitigation Measure 4.3-7b. Mitigation Measure 4.3-7a consists of the following:

- a. Prior to initiation of project construction, the project proponent shall secure a verified jurisdictional determination from the USACE.*
- b. For impacts to federally regulated waters of the U.S. that cannot be avoided, the applicant shall apply for and receive authorization pursuant to CWA. The project proponent shall comply with all permit conditions, as specified by the USACE. Mitigation ultimately required by the USACE could include on-site habitat creation, off-site habitat creation, purchase of credits from an approved habitat mitigation bank, and/or payment of in-lieu fees to an approved conservation organization for wetland habitat enhancement of preservation activities.*
- c. For impacts to waters of the State or other State-regulated habitats that cannot be avoided, the applicant shall apply for and receive authorization pursuant to CFGC Section 1602 and Porter Cologne, as applicable. Section 1602 applies to impacts to the ephemeral swale that drains into Ross Creek, while Porter-Cologne would apply to impacts to waters of the State that are not also waters of the US subject to regulation by USACE under the Clean Water Act. The project proponent shall comply with all permit conditions (including monitoring of any restoration plantings for long-term survivorship), as specified by the CDFW and RWQCB. Mitigation ultimately required by the CDFW/ RWQCB could include on-site habitat creation, off-site habitat creation, purchase of credits from an approved habitat mitigation bank, and/or payment of in-lieu fees to an approved conservation organization for wetland habitat enhancement of preservation activities.*

Mitigation Measure 4.3-7b consists of the following:

Mitigation Measure 4.3.7b, Jurisdictional Waters Mitigation: *The project applicant shall implement avoidance, minimization, and compensation measures to reduce impacts on jurisdictional waters and riparian habitats to a less than significant level. If avoidance of jurisdictional waters is not feasible, the project applicant shall implement one or more of the following options to the satisfaction of the Community Development Director and the applicable the appropriate [sic] federal and State regulatory agencies.*

Option 1: Mitigation Banking

Prior to the issuance of a grading permit or improvement plan, the applicant shall provide to the satisfaction of the Community Development Director, a letter from a qualified mitigation bank showing that the appropriate mitigation credits for wetland habitat have been purchased at a replacement-to-loss ratio of 2:1. The mitigation bank must be a habitat mitigation bank approved by the appropriate federal and State regulatory agencies. Additionally, the habitat mitigation bank must be within the same watershed (or other hydrological connection, to the satisfaction of the resource agencies listed in Mitigation Measures 4.3-7a above) of which Ross Creek is located.

Option 2: Wetland Creation

Prior to the issuance of a grading permit or improvement plan, the applicant shall provide to the satisfaction of the Community Development Director, a mitigation plan that results in the creation of new habitat as replacement for habitat lost or enhance the quality of existing habitat for native plants and wildlife. Mitigation measures shall include replacement of riparian and aquatic habitat at a replacement-to-loss ratio of up to 2:1 for permanent acreage impacts (up to two acres created for each acre permanently impacted) as well as reseeding or replanting of vegetation in temporarily disturbed areas according to a site-specific mitigation plan. At a minimum, this plan shall identify mitigation areas, a planting plan, site maintenance activities, success criteria, and remedial measures to compensate for lack of success. The mitigation goal shall be to create and enhance riparian or aquatic habitats with habitat functions and values greater than or equal to those existing in the impact zone. This could include enhancing the ephemeral drainages to increase their wetland and riparian value, which would benefit native wildlife in the region.

A detailed Habitat Mitigation and Monitoring Plan, including specific success criteria, shall be developed and submitted to permitting agencies during the permit process. The mitigation area shall be monitored in accordance with the plan approved by the permitting agencies. The basic components of the monitoring plan consist of final success criteria, performance criteria, monitoring methods, data analysis, as-built plans, monitoring schedule, contingency/remedial measures, and reporting requirements.

The Habitat Mitigation and Monitoring Plan shall at a minimum:

- *Define the location of all restoration/creation activities;*
- *Provide evidence of suitable water availability (e.g., from precipitation and surface runoff) to support any created wetland and riparian habitats;*
- *Identify the species, amount and location of plants to be installed;*
- *Identify time of year for planting and method for supplemental watering during the establishment period;*
- *Identify the monitoring period which should be not less than five years for wetland restoration and not less than five years for riparian restoration, defines success criteria that shall be required for the wetland restoration to be deemed a success;*
- *Identify adaptive management procedures that accommodate the uncertainty that comes with restoration projects. These include (but not limited to) measures to address colonization by invasive species, unexpected lack of water, excessive foraging of installed wetland plants by native wildlife; etc.;*
- *Define management and maintenance activities (weeding of invasive, providing for supplemental water, repair of water delivery systems, etc.); and,*
- *Provide for surety in funding the monitoring and ensuring that the created wetland and riparian habitats fall within lands to be preserved and managed into perpetuity.*

Option 3: Wetland Restoration

Prior to the issuance of a grading permit or improvement plan, the applicant shall provide to the satisfaction of the Community Development Director, a wetland restoration plan that results in the daylighting of a portion of Ross Creek on the project site. Currently a portion of Ross Creek is conveyed through an underground culvert on the project site. The project applicant, with the concurrence of the resource agencies (listed in Mitigation

Measures 4.3-7a above) and the Santa Clara Valley Water District proposed, shall remove the culvert (daylight) from a portion of Ross Creek on the project site. The restoration plan shall include replacement of riparian and aquatic habitat at a replacement-to-loss ratio of up to 2:1 for permanent acreage impacts. The wetland restoration plan shall include a hydrological report, prepared by a qualified civil engineer to demonstrate that the restored creek has been designed such that it is compatible with the upstream point of connection, the design is appropriate for the specific stretch of Ross Creek, and that it has been designed to accommodate the appropriate flood conditions. The restoration plan shall also include a Habitat Mitigation and Monitoring Plan.

A detailed Habitat Mitigation and Monitoring Plan, including specific success criteria, shall be developed and submitted to permitting agencies during the permit process. The mitigation area shall be monitored in accordance with the plan approved by the permitting agencies. The basic components of the monitoring plan consist of final success criteria, performance criteria, monitoring methods, data analysis, as-built plans, monitoring schedule, contingency/remedial measures, and reporting requirements.

The Habitat Mitigation and Monitoring Plan shall at a minimum:

- Define the location of all restoration/creation activities;*
- Provide evidence of suitable water availability (e.g., from precipitation and surface runoff) to support any created wetland and riparian habitats;*
- Identify the species, amount and location of plants to be installed;*
- Identify time of year for planting and method for supplemental watering during the establishment period;*
- Identify the monitoring period which should be not less than five years for wetland restoration and not less than five years for riparian restoration, defines success criteria that shall be required for the wetland restoration to be deemed a success;*
- Identify adaptive management procedures that accommodate the uncertainty that comes with restoration projects. These include (but not limited to) measures to address colonization by invasive species, unexpected lack of water, excessive foraging of installed wetland plants by native wildlife; etc.;*
- Define management and maintenance activities (weeding of invasive, providing for supplemental water, repair of water delivery systems, etc.); and,*
- Provide for surety in funding the monitoring and ensuring that the created wetland and riparian habitats fall within lands to be preserved and managed into perpetuity.*

Water Board staff are not aware of any mitigation bank capable of providing mitigation credits for impacts to the ephemeral channel. At present there are no mitigation banks with a service area that includes the project site. Therefore, Option 1 is not a viable mitigation option.

In the October 8, 2015, comment letter, Water Board staff made the following statements:

Applying for permits from the resource agencies prior to impacting jurisdictional waters is a legal requirement, but it is not a mitigation measure. The DEIR lacks concrete proposals for mitigation. Therefore, the DEIR fails to demonstrate that the project's impacts to waters of the State can be mitigated to less than significant levels. Without a revision to include concrete mitigation proposals, it is likely that the DEIR will not be adequate to support the issuance of State permits for impacts to the ephemeral channel.

In a CEQA document, a project's potential impacts and 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. While it is true that any impacts to waters of the State would require permit(s) from the Water Board, compliance with regulatory requirements is not in itself a mitigation measure. CEQA documents should identify impacts associated with a project and propose specific mitigation measures in sufficient detail for persons reviewing the CEQA document to assess the feasibility and adequacy of the proposed mitigation measures. This kind of assessment is not possible on the basis of the information provided in the DEIR.

Option 2 does not provide sufficient detail to satisfy the concerns raised in the October 2015 comment letter. Option 2 proposes to create new habitat as replacement for habitat lost or enhance the quality of existing habitat. However, the text of Option 2 does not identify property available to the project proponent for a mitigation project and does not describe an actual mitigation project. In the absence of an actual mitigation project, Water Board staff is not able to determine if Option 2 would provide sufficient mitigation for the project's impacts to the ephemeral channel.

Option 3 consists of daylighting a culverted section of Ross Creek. Water Board staff had encouraged the project proponent to consider the feasibility of daylighting a culverted section of Ross Creek in the October 2015 comment letter. Option 3 should be improved by assessing how much land around the existing culvert would be necessary to establish a geomorphically stable daylighted reach of Ross Creek, and verifying that the project proponent has sufficient control over this land to support successful daylighting of the culverted reach and placing a conservation easement or deed restriction over the daylighted reach. Also, for a channel mitigation project, impacts and mitigation should be quantified in linear feet, rather than surface area.

Comment 3. Section 4.3, Biological Resources. Mitigation Measures 4.3-8 of the PRDEIR do not include a concrete mitigation proposal and is, therefore, inadequate.

As mitigation for impacts to riparian habitat near Ross Creek and the fill of part of the ephemeral channel at the projects site, the PRDEIR provides Mitigation Measure 4.3-8.

Mitigation for the placement of fill into the ephemeral swale is outlined in Mitigation Measure 4.3-7, above. Construction in and adjacent to Ross Creek and the ephemeral swale requires conformance to the Town's adopted sections of the Guidelines and Standards for Land Use Near Streams. In order to conform to these guidelines, the following measures shall be implemented:

- *Protection of the riparian zone shall be assured by establishment of an appropriate riparian corridor buffer. Based on site conditions, channel geomorphology, slope, size of watershed, and type of habitat, a minimum*

riparian setback of 25 feet from the top of bank or outer edge of the riparian zone, whichever is greater, would provide for an appropriate protection of the habitat values and water quality associated with Ross Creek.

- *Based on site conditions, channel geomorphology, slope, size of watershed, and type of habitat, a minimum riparian setback of 10 feet from the top of bank of the incised portion of the ephemeral swale and outer oak canopy edge would provide for an appropriate protection of the habitat values and water quality. It is recognized that the placement of fill into the ephemeral swale is necessary to construct Streets A and B. At these locations, there is no habitat meeting the definitions of “riparian vegetation” or “stream/channel/creek” as provided in the Guidelines. As such, this portion of the proposed project is not in conflict with the Guidelines. Mitigation for these impacts is specified in Mitigation Measure 4.3-7.*

a. Grading and culvert construction to accommodate the construction of Street B would result in impacts on the portions of the ephemeral swale that are incised and situated directly beneath the canopy of mature oak woodland. Such grading and construction at this location would not necessarily conflict with the Guidelines, but would be subject to review and permitting requirements by the regulatory agencies. Mitigation for these impacts is specified in Mitigation Measure 4.3-7.

b. A 10-foot wide protective easement shall be recorded over the length of the preserved swale across Lot 9. No grading, filling, or trenching shall be permitted within this easement.

c. Orange construction fencing or a similar visual barrier shall be installed to prevent accidental grading or movement of equipment beyond what is specified on the grading plans and approved under the grading permit.

d. Construction activities shall conform to the Town of Los Gatos’ Tree Protection Ordinance, as required in Mitigation Measure 4.3-10, Tree Mitigation and Monitoring Plan.

As Water Board staff noted in Comment 2, above, Mitigation Measures 4.3-7a and 4.3-7b are not yet sufficient to establish that impacts to waters of the State at the ephemeral channel can be mitigated to a less than significant level. Since Mitigation Measure 4.3-8 relies on Mitigation Measures 4.3-7a and 4.3-7b to provide mitigation for impacts to the ephemeral channel, the PRDEIR has not demonstrated that impacts to the ephemeral channel can be mitigated to less than significant levels.

Please contact me at (510) 622-5680 or brian.wines@waterboards.ca.gov if you have any questions. All future correspondence regarding this Project should reference the CIWQS Place ID Number indicated at the top of this letter.

Sincerely,

Brian Wines
Water Resources Control Engineer
Watershed Division

Attachment: October 8, 2015, Comment letter on the DEIR

cc: State Clearinghouse (state.clearinghouse@opr.ca.gov)
CDFW, Brenda Blinn (brenda.blinn@wildlife.ca.gov)
CDFW, Kristin Garrison (kristin.garrison@wildlife.ca.gov)

San Francisco Bay Regional Water Quality Control Board

October 8, 2015
CIWQS Place ID No. 818654

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Town of Los Gatos
Community Development Department
110 E. Main Street
Los Gatos, CA 95030

Attn: Marni Moseley (MMosely@losgatosca.gov)

Subject: Draft Environmental Impact Report, Surrey Farm Estates, 170 Twin Oaks Drive,
Planned Development Application PD-10-006, Town of Los Gatos, Santa Clara
County
SCH No. 2012072027

Dear Ms. Moseley:

San Francisco Bay Regional Water Quality Control Board (Water Board) staff has reviewed the *Draft Environmental Impact Report, Surrey Farm Estates, 170 Twin Oaks Drive, Planned Development Application PD-10-006* (DEIR). The DEIR assesses potential impacts associated with approving a General Plan Amendment that would allow the 17.55-acre site at 170 Twin Oaks Drive to be developed with 10 single-family residences. Water Board staff have the following comments on the ISMND.

Comment 1. Section 4.3, Biological Resources. The extent of waters of the State should be verified.

Water Board staff encourage the project proponent to contact U.S. Army Corps of Engineers (Corps) regulatory staff, California Department of Fish and Wildlife (CDFW) staff, and Water Board staff to confirm the jurisdictional status of the ephemeral headwater tributary to Ross Creek at the Project site. If the apparent full apparent extent of the ephemeral creek is a jurisdictional water of the State, then the Project should be redesigned to avoid the channel to the maximum extent practicable. When we review applications for permits to fill waters of the State, we require that the applicant demonstrate that all opportunities to avoid or minimize fill in waters of the State have been avoided. The project proponent should not assume that all proposed fill at the project site will be authorized by the Water Board.

Comment 2. Section 4.3, Biological Resources. Mitigation Measure 4.3-7, of the DEIR does not include a concrete mitigation proposal and is, therefore, inadequate.

For proposed impacts to the ephemeral channel, Mitigation Measure 4.3-7 consists of the following:

- a. Prior to initiation of project construction, the project proponent shall secure a verified jurisdictional determination from the USACE.*

b. For impacts to federally regulated waters of the U.S. that cannot be avoided, the applicant shall apply for and receive authorization pursuant to CWA. The project proponent shall comply with all permit conditions, as specified by the USACE. Mitigation ultimately required by the USACE could include on-site habitat creation, off-site habitat creation, purchase of credits from an approved habitat mitigation bank, and/or payment of in-lieu fees to an approved conservation organization for wetland habitat enhancement of preservation activities.

c. For impacts to waters of the State or other State-regulated habitats that cannot be avoided, the applicant shall apply for and receive authorization pursuant to CFGC Section 1602 and Porter Cologne, as applicable. Section 1602 applies to impacts to the ephemeral swale that drains into Ross Creek, while Porter-Cologne would apply to impacts to waters of the State that are not also waters of the US subject to regulation by USACE under the Clean Water Act. The project proponent shall comply with all permit conditions (including monitoring of any restoration plantings for long-term survivorship), as specified by the CDFW and RWQCB. Mitigation ultimately required by the CDFW/ RWQCB could include on-site habitat creation, off-site habitat creation, purchase of credits from an approved habitat mitigation bank, and/or payment of in-lieu fees to an approved conservation organization for wetland habitat enhancement of preservation activities.

Applying for permits from the resource agencies prior to impacting jurisdictional waters is a legal requirement, but it is not a mitigation measure. The DEIR lacks concrete proposals for mitigation. Therefore, the DEIR fails to demonstrate that the project's impacts to waters of the State can be mitigated to less than significant levels. Without a revision to include concrete mitigation proposals, it is likely that the DEIR will not be adequate to support the issuance of State permits for impacts to the ephemeral channel.

In a CEQA document, a project's potential impacts and 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. While it is true that any impacts to waters of the State would require permit(s) from the Water Board, compliance with regulatory requirements is not in itself a mitigation measure. CEQA documents should identify impacts associated with a project and propose specific mitigation measures in sufficient detail for persons reviewing the CEQA document to assess the feasibility and adequacy of the proposed mitigation measures. This kind of assessment is not possible on the basis of the information provided in the DEIR.

According to the DEIR, a culverted portion of Ross Creek abuts the project site. The project proponent is encouraged to consider options for daylighting the portion of the Ross Creek at the project site. This may provide appropriate mitigation for any impacts to the ephemeral creek channel that the resource agencies determine to be unavoidable. Opportunities for creek

daylighting are very rare. Since the Project site is currently undeveloped, there may be unique opportunities for revising the project design to allow for creek daylighting.

Please contact me at (510) 622-5680 or brian.wines@waterboards.ca.gov if you have any questions. All future correspondence regarding this Project should reference the CIWQS Place ID Number indicated at the top of this letter.

Sincerely,

Brian Wines
Water Resources Control Engineer
Watershed Division

cc: State Clearinghouse (state.clearinghouse@opr.ca.gov)