
San Francisco Bay Regional Water Quality Control Board

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September 1, 2021
WDID No. 2 43I006687

Stevens Creek Quarry, Inc.
Attn: Jason Voss
12100 Stevens Canyon Road
Cupertino, CA 95014
JVoss@scqinc.com

Subject: Requirement to Submit Technical Reports for Discharge of Waste to Waters of the State; Stevens Creek Quarry, Santa Clara County

Dear Mr. Voss:

The San Francisco Bay Regional Water Quality Control Board (Water Board) requires that Stevens Creek Quarry, Inc. assess instream sedimentation ponds for impacts from mining operations at its Cupertino facility and submit technical reports. This information will be used to determine if remedial actions are necessary to restore water quality within, and the beneficial uses of, Rattlesnake Creek and Swiss Creek.¹

Background

Stevens Creek Quarry, Inc. owns and operates an aggregate mining, rock and sand processing, and concrete and asphalt recycling facility at 12100 Stevens Creek Canyon Road (Facility). The Facility also hosts the City of Cupertino's Garden Waste Recycling Center, stores compost onsite, and produces topsoil from imported soil.

The Facility started operating in the 1940s. Sometime prior to 1956, Stevens Creek Quarry, Inc. modified waters that flow through the Facility in Rattlesnake Creek and Swiss Creek, and constructed instream sedimentation ponds to treat Facility runoff.²

¹ The *Water Quality Control Plan for the San Francisco Bay Basin* (Basin Plan) lists the following beneficial uses for Swiss Creek (to which Rattlesnake Creek, where the instream sedimentation ponds are located, is tributary): freshwater replenishment, cold and warm water habitats, wildlife habitat, and contact and noncontact water recreation. Stevens Creek Reservoir (approximately 1,000 feet downstream from the Quarry's instream sedimentation ponds) has the following beneficial uses: municipal and domestic supply, groundwater recharge, commercial and sport fishing, cold and warm water habitats, fish migration, fish spawning, wildlife habitat, and contact and noncontact water recreation. Beneficial uses of any water body specifically identified in the Basin Plan generally apply to all its tributaries.

² June 11, 2021, Letter to Water Board, Stevens Creek Quarry, Inc.

This treatment consisted of a combination of natural settling and flocculant-enhanced settling to reduce suspended pollutants prior to release to downstream waters, including Stevens Creek Reservoir. The Facility used instream sedimentation ponds until 2017, when the Water Board instructed Stevens Creek Quarry, Inc. to stop using Rattlesnake Creek for treatment.³

The Water Board recently adopted an individual NPDES permit (Order R2-2021-0010) and Cease and Desist Order (Order R2-2021-0011) to regulate Facility discharges to Rattlesnake Creek and Swiss Creek. We are now requiring steps to address historic impacts to the creek and planning for creek restoration. This 13267 Order is the next step in that process.

Pollutants Threatening Surface Water Quality

Stevens Creek Quarry, Inc. must evaluate past impacts of mining waste and mining operations on water quality, and the beneficial uses of Rattlesnake Creek, Swiss Creek, and downstream waters including Stevens Creek Reservoir. The types, amount and extent of constituents the Facility discharged into the creeks and instream sedimentation ponds, and potentially remaining there, are unknown. Based on the information we have about flocculants and pollutants discharged in stormwater, and questions we have about instream pond stability, the instream sedimentation ponds may pose a threat to water quality and beneficial uses of waters of the State, and may be a risk to public health and safety.

- *Flocculants* - The amount of flocculants added to, and remaining in, Rattlesnake Creek must be assessed. The Facility used flocculants, including Kimera Pix-311 and HaloKlear, in instream sedimentation ponds between 1956 and 2017.⁴ The composition and total quantity of material captured in the instream sedimentation ponds is unknown.
- *Pollutants in Stormwater Discharges* - For the 2018/2019 reporting year of the Industrial Stormwater General Permit (State Water Board Order 2014-0057-DWQ), Stevens Creek Quarry, Inc. reported discharging significant sediment and pollutants to Rattlesnake Creek and Swiss Creek. Stormwater discharges from the Facility exceeded the permit's annual numeric action levels for total suspended solids, total copper, total iron, total magnesium, nitrate and nitrite as nitrogen, and total selenium. Metals were detected at concentrations exceeding the Basin Plan water quality objectives. For example, aluminum was detected at 30,000 micrograms per liter ($\mu\text{g/L}$), exceeding the Basin Plan objective of 1,000 $\mu\text{g/L}$. Dissolved nickel and zinc were detected at 4,600 and 2,000 $\mu\text{g/L}$, exceeding the Basin Plan objectives of 52 and 120 $\mu\text{g/L}$.⁵ The volume of sediment and mass of pollutants discharged into and currently stored within instream sedimentation ponds is unknown.
- *Instability of Instream Sedimentation Ponds* - Instream structures, such as the dams or berms used to construct the instream sedimentation ponds, are inherently

³ May 30, 2017, Notice of Violation, Water Board.

⁴ August 1, 2017, Stevens Creek Quarry Technical Report, Geosyntec Consultants Inc. (p. 5).

⁵ These nickel and zinc objectives reflect an assumed hardness of 100 milligrams/liter CaCO_3 .

unstable in hillside topography. Catastrophic failure of the instream sedimentation ponds could cause downstream flooding and mud flows. Also, they may be impacting habitat and stream functions adversely and unnecessarily. It is unknown how the instream sedimentation ponds were designed and constructed, and how they will be maintained to protect waters of the State and the public. Stevens Creek Quarry, Inc. must evaluate their stability, on-going impacts on the stream and stream habitat, and options for safely maintaining them or decommissioning them. Any future work in the stream itself will require careful planning to avoid additional risk.

Restoration of Instream Sedimentation Ponds

The Water Board will continue to work with Santa Clara County and Stevens Creek Quarry, Inc. to address issues related to investigation and analysis of ongoing water quality and public health and safety as a result of Facility operations. We appreciate the steps Stevens Creek Quarry, Inc. has taken so far to improve treatment of Facility runoff. Further investigation and actions are needed to understand impacts and restore the functionality of the creeks.

As stated in the Water Board's comments on the Stevens Creek Reclamation Plan, instream sedimentation ponds left in place pose a threat to surface water quality, beneficial uses, and ultimately waters of the State because their gradual deterioration and eventual failure may result in offsite flooding and mud flows. This 13267 Order requires Stevens Creek Quarry, Inc. to evaluate and consider the current and possible future impacts from use of the instream sedimentation ponds.

Previous Stevens Creek Quarry, Inc. statements include claims that use of the instream sedimentation ponds prior to the enactment of the Clean Water Act prevents the Water Board from utilizing current or later enacted environmental quality laws to require remediation and reclamation. This position is not supported by law or policy. Courts have ruled that discharges beginning before enactment of the Porter-Cologne Act and Clean Water Act are still subject to State cleanup requirements.⁶ Stevens Creek Quarry, Inc. has also suggested that retention of instream sedimentation ponds may provide sediment and water retention benefits; however, the functions of natural creeks provide greater ecosystem benefits and are most effective at preventing degradation of water quality and protecting beneficial uses of creeks.⁷

⁶ See *Tesoro Refining & Marketing Co. LLC v. Los Angeles Regional Water Quality Control Bd.* (2019) 42 Cal.App.5th 453, 472-75. In *Tesoro*, the appeals court upheld a cleanup and abatement order issued to remedy a gasoline pipeline leak that began before the Porter-Cologne Act was passed. (*Ibid.*) In rebutting the defendant's argument that this was a retroactive application of the Porter-Cologne Act, the court analyzed the legislative intent of the Act as well as 40 years of State Water Board precedent defining "discharge" as the "entire time during which the discharged waste remains in the soil or groundwater and continues to impact or to threaten the groundwater." (*Id.* at pp. 472, 475.) The court agreed with the State Water Board's definition of discharge because it best effectuated the legislative intent to prevent uncontrolled contamination of waters of the State. (*Id.* at p. 475.) See also State Water Board Order WQ 74-13 (*Atchinson, Topeka, and Santa Fe Railway*); State Water Board Order WQ 86-2 (*Zoecon Corp.*); State Water Board Order WQ 89-8 (*Spitzer*).

⁷ April 2003, *A Primer on Stream and River Protection for the Regulator and Program Manager*, Technical Reference Circular W.D. 02 #1, by Ann L. Riley.

Rather than continuing to disagree about the ability of the Water Board to require Stevens Creek Quarry, Inc. to remove the instream ponds, this Order compels the consideration of impacts the ponds pose to the waters and their beneficial uses. This is permissible according to Water Code section 13267 and applicable portions of the Public Resources Code, including sections 2730 and 2772, which apply to the Quarry's reclamation plan amendment. The information this Order requires is needed to inform a restoration plan for the Facility.

As investigation of the creeks progresses, Stevens Creek Quarry, Inc. should be aware that we may require remediation and restoration of water quality within, and the beneficial uses of, Rattlesnake Creek and Swiss Creek that may include a restoration plan. If necessary, the Water Board plans to require remediation and reclamation pursuant to Water Code section 13304. The restoration plan may be required to include a timeline for removing instream structures and contaminants and restoring natural flow and sustainable use of the creeks for beneficial uses prior to completion of mining and other reclamation activities at the Facility. The restoration plan may also be required to include any necessary biotechnical stabilization measures, rock weirs, step-pool structures, or rock cascades to maintain the long-term stability of the creek channels at the Facility.

Requirement to Submit Technical Reports

Rattlesnake Creek and Swiss Creek are waters of the State subject to State water quality laws, and reclamation of the creeks will be required for compliance with both the Water Code and Surface Mining and Reclamation Act (SMARA). Technical information on the instream sedimentation ponds and the nature and extent of the sediment and pollutants within the instream sedimentation ponds and creeks is necessary to determine if additional remedial actions are necessary prior to reclamation.

- A. No later than February 28, 2021, Stevens Creek Quarry, Inc. shall submit a technical report with the following information:
1. Operation and maintenance history of the instream sedimentation ponds. This history shall include the following information: records of design; inspection records; records of sediment removal from instream sedimentation ponds, including the quantity of sediment removed; and dates on which flocculants were discharged to the instream sedimentation ponds, including the names and quantities of flocculants used.
 2. Evaluation of historic Facility operations to identify potential sources of pollutants that could have been discharged into the instream sedimentation ponds.
 3. Plan for evaluation of pollutants retained in sediment of the instream sedimentation ponds. The plan shall explain how Stevens Creek Quarry, Inc. will characterize the physical and chemical properties of instream sediment, and include a sampling and analysis plan to measure pH and evaluate sediment quality for metals, flocculants, and other constituents identified through the

evaluation of historic Facility operations and pollution sources. The plan shall identify a minimum of three sample locations along the longitudinal profile of each instream sedimentation pond and a vertical profile of sediment samples collected at one-foot intervals at each location starting from the sediment-water interface and extending until native soil or bedrock is encountered. The plan shall also explain how Stevens Creek Quarry, Inc. will evaluate sediment upstream and downstream of the facility. The plan shall call for a minimum of two instream sediment samples to be collected upstream of outfall 5 as reference sites, and a minimum of two instream sediment samples to be collected downstream of outfall 4 to assess impacts to the creek downstream of the Facility. The plan shall call for these samples to be analyzed for the same constituents as those for samples collected from the instream sedimentation ponds.

- B. No later than August 31, 2022, Stevens Creek Quarry, Inc. shall submit a technical report with the results of the evaluation of pollutants retained in sediment in instream sedimentation ponds, as well as upstream in Rattlesnake Creek and downstream in Swiss Creek, as proposed in the plan submitted pursuant to task A.3 above.
- C. No later than December 31, 2022, Stevens Creek Quarry, Inc. shall submit a technical report with the following information:
1. Complete inventory of all anthropogenic structures placed within the 100-year flood elevation. These structures shall include all discharge pipes, culverts, berms, weirs, and any other modifications to the creek channels. The inventory shall include an assessment of the structural condition of each structure and the stability of each structure relative to the fluvial geomorphology of the creek. This inventory may be used to design an appropriate closure plan that will be protective of water quality and will enhance the stability of the creeks that pass through the Facility.
 2. Assessment of the physical dimensions and stability of the creek channels. This assessment shall include a Thalweg (longitudinal) survey and cross-sectional channel profiles to characterize the dimensions of the creek channels, ponds, pipes, and other structures in the 100-year flood elevation.
 3. Assessment of the fluvial geomorphic stability of the creek channels and instream sedimentation ponds prepared by an experienced fluvial geomorphologist. This assessment shall incorporate the information required in tasks B.2 and B.3, as well as any necessary assessments of appropriate offsite reference sites.

Legal Basis for Water Code Section 13267 Order

The requirements of this Order are made pursuant to Water Code section 13267, which allows the Water Board to require technical monitoring program reports from any person who has discharged, discharges, proposes to discharge, or is suspected of discharging waste that could affect water quality. Stevens Creek Quarry, Inc. is properly named

under Water Code section 13267 because Stevens Creek Quarry, Inc. has discharged flocculant, sediment, and other pollutants to, and has placed structures in the bed of, Rattlesnake Creek and Swiss Creek, which are waters of the State and subject to State water quality laws. Given the Facility's operation and discharge of materials by virtue of the ponds' instream use for more than 60 years, it is appropriate to fully analyze the current and expected future impacts of such operations on the creek.

We expect that the development of the technical report required above can be prepared with the assistance of an environmental consultant. We developed the deliverables and timeline for the technical report to allow for investigation to consider both rainy and dry conditions. Some of the work required encompasses identification of internal documents and practices over time. We expect the cost for such activities to be minimal and largely within Stevens Creek Quarry, Inc.'s control. The sampling needed pursuant to task A.3 of the first technical report will likely involve heavy metals and other constituents, which can be tested at any State-accredited lab at an approximate cost of \$200 per sample once samples are collected. Summarizing the current structures within the creek will likely require site visits as well as considerations of changes over time both related and unrelated to Facility operations. We estimate the field visits and consultant technical expertise required to prepare the report to cost up to about \$50,000, exclusive of sampling costs.

This report will allow the Water Board to consider needed remedial and reclamation actions, whether undertaken voluntarily or compelled through a cleanup and abatement order pursuant to Water Code section 13304. This 13267 Order is intended to secure an appropriate evaluation of possible remedial and reclamation actions that may be needed and how they may need to be implemented. The required report will enable the Water Board to assess the impacts to the creeks and the corrective actions that should be taken to reverse or mitigate these impacts. The cost is appropriate given the benefits to be obtained from the reports, which include the timely restoration of riparian habitat, protection of beneficial uses, and improvement of water quality. While the actual cost may vary from the estimate provided herein, the burden of preparing the reports above, including the costs, bears a reasonable relationship to the need for the reports.

For more information regarding the Water Board's authority to require technical reports, please refer to the attached fact sheet (Attachment A, 13267 Fact Sheet).

Right to Petition

Any person aggrieved by this action may petition the State Water Resources Control Board (State Water Board) to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m. October 1, 2021. Copies of the law and regulations applicable to filing petitions can be provided upon request and may be found on the Internet at

www.waterboards.ca.gov/public_notices/petitions/water_quality.

Consequences of Not Submitting Report

The Water Board reserves the right to take any enforcement action authorized by law, including issuance of a cease and desist order or cleanup and abatement order, or imposition of monetary penalties pursuant to Water Code sections 13261, 13265, 13268, 13308, 13350, and 13385(a). Collectively, these provisions authorize the Water Board to impose penalties of up to \$10,000 per day and \$10 per gallon of material discharged in excess of 1,000 gallons, and a superior court to impose penalties of up to \$25,000 per day and \$25 per gallon of material discharged in excess of 1,000 gallons.

We would be pleased to discuss or clarify the requirements set forth above, including but not limited to the adequacy of sampling plans or the propriety of selected reference sites. We would like to meet with Stevens Creek Quarry, Inc. prior to March 31, 2022, to review its plan to comply with the requirements of this 13267 Order. We hope to ensure the technical report requirements will be adequately met so that planning for creek restoration may proceed without delay.

Please contact Maya McInerney at maya.mcinerney@waterboards.ca.gov or 510-560-4416 to confirm receipt of this letter and discuss any concerns or questions.

Sincerely,

Lisa Horowitz-McCann
Assistant Executive Officer

Enclosure: Attachment A: 13267 Fact Sheet

Copied via email: Robert Salisbury, robert.salisbury@pln.sccgov.org
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San Francisco Bay Regional Water Quality Control Board

Fact Sheet – Requirements for Submitting Technical Reports Under Section 13267 of the California Water Code

What does it mean when the Regional Water Board requires a technical report?

Section 13267¹ of the California Water Code provides that "...the regional board may require that any person who has discharged, discharges, or who is suspected of having discharged or discharging, or who proposes to discharge waste...that could affect the quality of waters...shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires."

This requirement for a technical report seems to mean that I am guilty of something, or at least responsible for cleaning something up. What if that is not so?

The requirement for a technical report is a tool the Regional Water Board uses to investigate water quality issues or problems. The information provided can be used by the Regional Water Board to clarify whether a given party has responsibility.

Are there limits to what the Regional Water Board can ask for?

Yes. The information required must relate to an actual or suspected or proposed discharge of waste (including discharges of waste where the initial discharge occurred many years ago), and the burden of compliance must bear a reasonable relationship to the need for the report and the benefits obtained. The Regional Water Board is required to explain the reasons for its requirement.

What if I can provide the information, but not by the date specified?

A time extension may be given for good cause. Your request should be promptly submitted in writing, giving reasons.

Are there penalties if I don't comply?

Depending on the situation, the Regional Water Board can impose a fine of up to \$5,000 per day, and a court can impose fines of up to \$25,000 per day as well as criminal penalties. A person who submits false information or fails to comply with a requirement to submit a technical report may be found guilty of a misdemeanor. For some reports, submission of false information may be a felony.

Do I have to use a consultant or attorney to comply?

There is no legal requirement for this, but as a practical matter, in most cases the specialized nature of the information required makes use of a consultant and/or attorney advisable.

What if I disagree with the 13267 requirements and the Regional Water Board staff will not change the requirement and/or date to comply?

You may ask that the Regional Water Board reconsider the requirement, and/or submit a petition to the State Water Resources Control Board. See California Water Code sections 13320 and 13321 for details. A request for reconsideration to the Regional Water Board does not affect the 30-day deadline within which to file a petition to the State Water Resources Control Board.

If I have more questions, whom do I ask?

Requirements for technical reports include the name, telephone number, and email address of the Regional Water Board staff contact.

Revised March 2014

¹ All code sections referenced herein can be found by going to <http://leginfo.legislature.ca.gov/faces/codes.xhtml>.