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## San Francisco Bay Regional Water Quality Control Board

May 4, 2020

Governor's Office of Planning & Research

*Sent via electronic mail: No hardcopy to follow*

**MAY 05 2020**

**STATE CLEARINGHOUSE**

East Bay Regional Park District  
ATTN: Toby Perry, Project Manager (TPerry@ebparks.org)  
2950 Peralta Oaks Court  
Oakland, CA 94605

**Subject:** San Francisco Bay Regional Water Quality Control Board Comments on the *Initial Study / Mitigated Negative Declaration for the MLK Regional Shoreline Bay Trail Gap (Doolittle Drive South) and Improvements Project*, City of Oakland, Alameda County, California  
**SCH No. 2020049031**

Dear Mr. Perry:

San Francisco Bay Regional Water Quality Control Board (Water Board) staff appreciates the opportunity to review the *Initial Study / Mitigated Negative Declaration for the MLK Regional Shoreline Bay Trail Gap (Doolittle Drive South) and Improvements Project* (ISMND). The ISMND evaluates the potential environmental impacts associated with implementing the MLK Regional Shoreline Bay Trail Gap (Doolittle Drive South) and Improvements Project (Project).

**Project Summary.** The East Bay Regional Park District (District) proposes to fill a gap in the San Francisco Bay Trail (Bay Trail) and make improvements within the existing Martin Luther King Jr. (MLK) Regional Shoreline. The Project includes construction of approximately 2,300 linear feet of a new trail section of the Bay Trail to close the existing southern Bay Trail gap, as well as resurfacing and/or widening of approximately 1,600 feet of existing Bay Trail to the north and south of the gap segment. Improvements include: replacement of the existing two-lane boat launch; shoreline protection; parking lot resurfacing/restriping; and removal of a boat ramp. The project evaluated in the ISMND proposes to place rock riprap bank armoring on 1,450 linear feet of a section of the shoreline of San Leandro Bay that is currently not armored.

**Summary.** As is discussed below, the ISMND does not include the following elements: an adequate discussion of alternatives to the proposed Project that would have less significant impacts to waters of the State; an accurate accounting of all impacts to waters of the State; an adequate discussion of potential mitigation measures for the

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Project's impacts to waters of the State; or a discussion of post-construction stormwater treatment measures.

**Comment 1. The ISMND does not provide an adequate discussion of alternatives to the proposed Project that would reduce impacts to waters of the State.**

The ISMND does not establish that the Project alignment cannot be revised to avoid or significantly minimize impacts to waters of the State, while still achieving the basic project purpose. Text in Section 1.2 of the ISMND states:

In 2014, after an extensive analysis and coordination with many agencies, the District finished the Feasibility Study for *San Francisco Bay Trail at Martin Luther King, Jr. Regional Shoreline* (May 2014). The District's goal was to identify a feasible alignment to close two gaps in the Bay Trail along the MLK Regional Shoreline, one north of the MLK Shoreline Center and one south of the boat launch. The Bay Trail is discontinuous in this area due to the difficulty of constructing a trail in a tightly constrained corridor adjacent to a heavily travelled state highway, an environmentally sensitive shoreline area, and the proximity of an intensely urbanized airport industrial complex. Three alignments were considered in the feasibility study (inland alignment - Earhart Road, upland alignment - Doolittle Drive, and coastal alignment - shoreline). For both the northern and southern gap segments, the coastal alignment was identified as the preferred alternative as it satisfied the applicable Bay Trail policies, had no traffic conflicts, was preferred by the Port of Oakland, and the District had existing easement rights to construct the coastal alignment. Within the coastal alignment two construction methods were considered: added embankment and elevated structure. Although the elevated structure would result in less solid fill within the bay, the added embankment was chosen because it would result in fewer environmental concerns from public and private entities. This Initial Study analyzes the "coastal alternative" of the southern Bay Trail gap using the "added embankment" construction type. The northern gap is not being implemented at this time.

The "many agencies" involved in the *Feasibility Analysis* are not identified, but they do not appear to have included the Water Board, since the selected alignment maximizes impacts to waters of the State. Please note that the Water Board is not bound by the *Feasibility Analysis* in reviewing the Project's impacts to waters of the State and may decline to issue permits for the currently proposed Project, if an alternative with less impacts to waters of the State is practicable.

The ISMND also states that "Although the elevated structure would result in less solid fill within the bay, the added embankment was chosen because it would result in fewer environmental concerns from public and private entities." The specific "environmental concerns" and the "public and private entities" are not identified, but it appears improbable that an alternative that places more fill in waters of the State than an elevated structure results in fewer "environmental concerns". The ISMND should have

identified these “environmental concerns” so that Water Board staff could assess their relative significance in comparison to placing fill on an unarmored reach of shoreline.

Since the ISMND did not include the *Feasibility Study*, we are not able to assess the extent to which mitigation costs were included in evaluating the feasibility of each of the evaluated alternative alignments. Mitigation Measure BIO-6 suggests that the District may consider purchasing mitigation credits from a mitigation bank. Based on the Project’s proposed impacts to waters of the State, which appear to be under-estimated in the ISMND (See Comment 2), the District should assume that the cost of purchasing mitigation credits from a mitigation bank may be on the order of a million dollars.

The photographs of the Project site on the cover of the ISMND illustrate that the current shoreline consists of unarmored soil. Unarmored shorelines provide valuable habitat for juvenile fish, who are able to forage along the shallow, earthen shoreline, while avoiding predation by larger fish, who cannot swim in the shallow, near-shore band of water. When shorelines are armored with rock riprap, juvenile fish lose access to this relatively secure foraging habitat. As the Bay shoreline is armored with rock riprap to provide resistance from increased erosion associated with sea level rise, this valuable foraging habitat becomes less abundant. We encourage the District to evaluate protecting the shoreline at the Project site with living shoreline techniques that will sustain valuable aquatic habitat.

Based on the trail alignment illustrated in Figure 2a, there is sufficient room between the shoreline and Doolittle Drive to relocate the trail away from the shoreline between the boat launch replacement and the pump station dock. The District should evaluate re-routing the trail further inland to minimize project impacts to waters of the State.

Finally, when an application for the Project is submitted to the Water Board, it must include an alternatives analysis that demonstrates that the proposed Project has avoided and minimized impacts to waters of the State to the maximum extent practicable. Since the trail is not a water-dependent project, it is assumed that there are alternatives to the Project design that avoid impacts to waters of the State. We will not issue permits for a project if a viable alternative with less impacts to waters of the State is practicable.

**Comment 2. The ISMND does not appear to correctly identify the full extent of impacts to waters of the State.**

The ISMND appears to treat mean high water (MHW) as the upper extent of waters of the State. Along the Bay shoreline, the upper extent of waters of the State is the epic high tideline (e.g., highest Spring tide in the preceding 18-year period). Please revise the impacts to waters of the State to include all proposed fill placed along the shoreline up to the epic high tideline. Mitigation requirements (see Comment 3 below) will be based on this quantity of fill placed in waters of the State.

Text in Section 3.4.c of the ISMND states that the project will place 28,996 square feet of fill in waters of the State and will result in a net increase of 1,406 square feet of floating fill in waters of the State. Please confirm that all impacts below the epic high tide line have been included in the amount of fill associated with Project implementation.

**Comment 3. The ISMND does not describe concrete mitigation measures for about three quarters of an acre of fill of waters of the State at the Project site.**

As mitigation for about three-quarters of an acre of fill in waters of the State, the ISMND proposes to implement Mitigation Measure BIO-6:

Permanent loss of jurisdictional aquatic features shall be mitigated through a mitigation banking option, Coastal Conservancy mitigation project, or an on-site restoration/enhancement mitigation plan. On-site restoration opportunities exist adjacent to, and south of, New Marsh. Enhancement opportunities exist along the shoreline. If an on-site restoration/enhancement mitigation plan is developed, the plan will identify the type and quantity of impacted aquatic resources and a strategy for preservation, enhancement, or re-establishment/restoration of mitigation features suitable for the setting. The plan also will identify monitoring methods and success criteria for the proposed mitigation. Potential mitigation options include pile or other structure removal, man-made debris removal, marsh restoration, and shoreline layback or other shoreline improvements that are compatible with the project. Enhancement and restoration activities will be located as near to the impact location as possible; however, in the event that local mitigation opportunities are not available, such activities could occur elsewhere within the San Francisco Bay. Mitigation ratio for mitigation identified within San Leandro Bay will be 1:1, and would increase the further from the Project site that mitigation was identified or as negotiated with jurisdictional resource agencies.

Please note that the required amount of mitigation will depend on the similarity of the impacted waters to the waters in the mitigation proposal, the uncertainty associated with successful implementation of the mitigation project, and the distance between the site of the impact and the site of the mitigation wetland. In-kind mitigation for the fill of waters consists of the creation of new waters. If the mitigation consists of restoration or enhancement of waters, the amount of mitigation will be greater than if the mitigation consists of creation. As the ISMND notes, the amount of required mitigation increases as the distance between the impact site and the mitigation site increases.

Mitigation Measure MM BIO-6, does not actually include a mitigation plan; it only requires the future development of a mitigation plan. 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. The current text of the ISMND does not demonstrate that it is feasible to mitigate all potentially significant impacts to waters of the State that may result from project implementation to a less than significant level. Impacts to the jurisdictional waters at the project site, as well as proposed mitigation measures or such impacts, will require review under CEQA before the Water Board can issue permits for those proposed impacts. The current text of the ISMND does not appear to be sufficient to support issuance of a permit by the Water Board for the proposed Project.

**Comment 4. The proposed removal of a sycamore tree may not be possible to mitigate.**

Section 3.4.e of the ISMND states:

The Project would remove one sycamore tree at the southwest corner of the boat launch ramp.

Shoreline trees add valuable complexity to shoreline habitat values. The loss of a sycamore tree on shoreline habitat will be difficult to mitigate, since it has not been possible in recent decades to grow unhybridized California sycamore trees. Although many mitigation sites have attempted to plant California sycamores, almost all sycamores planted at mitigation sites have become hybridized with London plane trees. We encourage the District to revise the Project plans to avoid removing the sycamore tree.

**Comment 5. The ISMND does not include a discussion of post-construction stormwater treatment in the discussion of Hydrology and Water Quality.**

According to Section 3.10.c, the Project will create 0.6 acres of new impervious surfaces. However, the ISMND does not explain how the Project will provide treatment for stormwater runoff from these new impervious surfaces. Please revise the ISMND to provide treatment for stormwater runoff from the Project's new impervious surfaces.

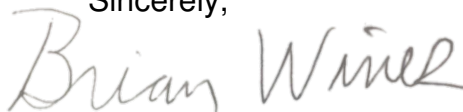
**Conclusion**

The ISMND does not justify the selection of an alternative that places fill in three quarters of an acre of waters of the State or provide sufficient detail with respect to mitigation for the Project's impacts to waters of the State. The ISMND should be revised to provide specific mitigation measures for all impacts to waters of the State. These mitigation measures should be in-kind and on-site mitigation measures to the maximum extent possible. The amount of proposed mitigation should include mitigation for temporal losses of any impacted waters of the State. If mitigation is out-of-kind and/or off-site, then the amount of the proposed mitigation should be increased. Proposed mitigation measures should include a monitoring and maintenance plan for tracking the success of the mitigation measures.

If the ISMND is adopted without providing concrete mitigation proposals for impacts to waters of the State, it is possible that the ISMND will not be adequate to support the issuance of a CWA Section 401 certification for the Project.

If you have any questions, please contact me at (510) 622-5680, or via e-mail at [brian.wines@waterboards.ca.gov](mailto:brian.wines@waterboards.ca.gov).

Sincerely,

A handwritten signature in cursive script that reads "Brian Wines".

Brian Wines  
Water Resources Control Engineer  
South and East Bay Watershed Section

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