

**CALIFORNIA STATE LANDS COMMISSION**  
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Governor's Office of Planning & Research

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## STATE CLEARINGHOUSE

February 1, 2021

**Contact Phone: (916) 574-1890**

File Ref: SCH # 2020050414

West Bay Sanitary District  
Attn: Sergio Ramirez, District Manager  
500 Laurel Street  
Menlo Park, CA 94025

VIA ELECTRONIC MAIL ONLY ([Info@westbaysanitary.org](mailto:Info@westbaysanitary.org))

**Subject: Draft Environmental Impact Report (EIR) for the Flow Equalization and Resource Recovery Facility Levee Improvements and Recycled Water Facility Project, San Mateo and Santa Clara Counties**

Dear Mr. Ramirez:

The California State Lands Commission (Commission) staff has reviewed the Draft EIR for the Flow Equalization and Resource Recovery Facility Levee Improvements and Recycled Water Facility Project (Project), which is being prepared by the West Bay Sanitary District (District). The District, as the public agency proposing to carry out the Project, is the lead agency under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). The Commission is a trustee agency for projects that could directly or indirectly affect State sovereign land and their accompanying Public Trust resources or uses. Additionally, because the Project will involve work on State sovereign land, the Commission may act as a responsible agency. Commission staff requests that the District consult with us on preparation of the Draft EIR as required by CEQA section 21153, subdivision (a), and the State CEQA Guidelines section 15086, subdivisions (a)(1) and (a)(2). A letter was previously submitted to the District on the Project's Notice of Preparation on June 22, 2020.

### **Commission Jurisdiction and Public Trust Lands**

The Commission has jurisdiction and management authority over all ungranted tidelands, submerged lands, and the beds of navigable lakes and waterways. The Commission also has certain residual and review authority for tidelands and submerged lands legislatively granted in trust to local jurisdictions (Pub. Resources Code, §§ 6009, subd. (c); 6009.1; 6301; 6306). All tidelands and submerged lands granted or ungranted, as well as navigable lakes and waterways, are subject to the protections of the common law Public Trust Doctrine.

As general background, the State of California acquired sovereign ownership of all tidelands and submerged lands and beds of navigable lakes and waterways upon its admission to the United States in 1850. The state holds these lands for the benefit of all people of the state for statewide Public Trust purposes, which include but are not limited to waterborne commerce, navigation, fisheries, water-related recreation, habitat preservation, and open space. On tidal waterways, the State's sovereign fee ownership extends landward to the mean high tide line, except for areas of fill or artificial accretion or where the boundary has been fixed by agreement or a court. Such boundaries may not be readily apparent from present day site inspections.

Based on the information provided in the Draft EIR and a review of in-house records, the proposed Project would extend onto the bed of Westpoint Slough, which at this location is within Commission-managed lands conveyed to the State by Leslie Salt Co. According to the Project Description, the proposed ecotone levee on the northern perimeter of the site would recontour the existing levee with a 10:1 to 20:1 slope to the water line and would extend beyond Assessor Parcel Number 055-400-010 onto the bed of Westpoint Slough. Therefore, a lease from the Commission will be required. As more detailed plans are prepared, please submit them to Dobri Tutov in the Lands Management Division (contact information provided below) for further review.

### **Project Description**

The District proposes to construct levee improvements to protect the District's existing facilities and San Francisco Bay water quality from the current 100-year floodplain and future sea level rise, and to construct a new Recycled Water Facility at the District's Menlo Park Flow Equalization Facility and Resource Recovery (FERRF) site, located on the edge of Flood Slough in the San Francisco Baylands. The Project would meet the District's objectives and needs as follows:

- Provide Federal Emergency Management Agency 100-year and anticipated sea-level rise flood protection.
- Allow the District to provide recycled water to customers.

From the Project Description, Commission staff understands that the Project would include the following components that may have the potential to affect State sovereign lands:

- Construction of an ecotone levee (living shoreline)

The Proposed Project Alternative is considered the environmentally superior alternative. This alternative would allow the District to obtain all the project objectives and preserve habitat functions on the northern levee under anticipated sea-level rise conditions.

### **Environmental Review**

Commission staff requests that the District consider the following comments prior to certifying the Draft EIR, to ensure that impacts to State sovereign land are adequately analyzed for the Commission's use to support a future lease approval for the Project.

## Cultural Resources

1. Tribal Outreach: The Draft EIR (page 6-13) states that no Native American tribes contacted the District under AB 52; however, the Native American Heritage Commission's (NAHC's) Sacred Lands File search indicated positive results and the District conducted outreach to five Tribes recommended by the NAHC. The Draft EIR further states that responses to the outreach indicated that Native American burials were found in the area. From Commission staff's perspective, the Draft EIR could be more informative if it were to provide additional details about which Tribe or Tribes responded, whether there were any other concerns expressed about cultural sensitivity or heritage, whether the Tribes requested a site visit or Project monitoring, or whether they suggested measures to avoid or otherwise protect Tribal cultural resources. Importantly, in addition to its Consultation provisions, AB 52 requires that public agencies avoid, when feasible, damaging effects to Tribal Cultural Resources, and offers examples of mitigation measures that should be included in EIRs unless other measures are agreed to through Consultation (see Pub. Resources Code, § 21084.3). When it enacted AB 52, the Legislature expressed its preference for preservation in place of Tribal Cultural Resources (Assem. Bill No. 52 (2013-2014 Reg. Sess.) § 1). In order to make the Draft EIR more informative, Commission staff recommends that the District include additional information in a revised EIR that more comprehensively discusses the District's communication with the contacted Tribes and how the results of that outreach and coordination, including any requests or suggestions made by the Tribes, were incorporated into the EIR's mitigation measures or Project design decisions. Without such a record, Commission staff is unable to determine whether Tribal concerns have been fully addressed and resolved, and thus whether the significance determination is supported.
2. Tribal Cultural Resources: MM CUL-1b states that "It is possible for a lead agency to determine that an artifact is considered significant to a local tribe...even if it would not otherwise be considered significant under CEQA." Commission staff appreciate that the District recognizes that significance determinations, in the Tribal Cultural Resource's context, must consider the importance or value *beyond* the commonly understood archaeological metrics. However, in most cases, it is appropriate to defer to a culturally affiliated Tribe for a final determination of the significance of Tribal Cultural Resources, which are not limited to "artifacts" as the measure suggests. As a result, Commission staff requests that MM CUL-1b be modified to state that "As such, all Native American artifacts (tribal finds) or other Tribal Cultural Resources shall be considered as a significant Tribal Cultural Resource, pursuant to Public Resources Code section 21074 until the lead agency in consultation with the appropriate Tribe has enough evidence to make a determination of significance." Commission staff further recommend, consistent with the above comment related to avoidance (preservation in place) and maintenance of cultural integrity, that the District expand the discussion of disposition and treatment of unanticipated discoveries, including measures providing for reburial of discovered materials or returning discovered materials to Tribal custody if they cannot be reburied on site. It

is the Commission's policy that ownership/custody of Native American artifacts, materials, and resources collected from State-owned lands be returned after evaluation to the culturally affiliated Tribe whenever possible regardless of significance. This modification would allow for the protection of any Tribal Cultural Resources that may be identified during the ongoing regulatory process.

3. Title to Resources: The Draft EIR should also mention that the title to all archaeological sites, and historic or cultural resources on or in the tide and submerged lands of California is vested in the state and under the jurisdiction of the California State Lands Commission (Pub. Resources Code, § 6313). Commission staff requests that the District consult with Staff Attorney Jamie Garrett, should any cultural resources on State lands be discovered during construction of the proposed Project. In addition, Commission staff requests that the following statement be included in MM CUL-1a: "The final disposition of archaeological, historical, and paleontological resources recovered on State lands under the jurisdiction of the California State Lands Commission must be approved by the Commission."

Thank you for the opportunity to comment on the Draft EIR for the Project. As a responsible and trustee agency, Commission staff will need to rely on the certified EIR for the issuance of a lease as specified above and, therefore, we request that you consider our comments prior to certification of the Final EIR.

Please send copies of future Project-related documents, including electronic copies of the certified EIR, approving resolution, Mitigation and Monitoring Program, Notice of Determination, CEQA Findings and, if applicable, Statement of Overriding Considerations when they become available. Please refer questions concerning environmental review to Cynthia Herzog, Senior Environmental Scientist, at (916) 574-1310 or [cynthia.herzog@slc.ca.gov](mailto:cynthia.herzog@slc.ca.gov). For questions concerning archaeological or historic resources under Commission jurisdiction, please contact Staff Attorney Jamie Garrett, at (916) 574-0398 or [jamie.garrett@slc.ca.gov](mailto:jamie.garrett@slc.ca.gov). For questions concerning Commission leasing jurisdiction, please contact Dobri Tutov, Public Land Management Specialist, at (916) 574-0722 or [dobri.tutov@slc.ca.gov](mailto:dobri.tutov@slc.ca.gov).

Sincerely,



Nicole Dobroski, Chief  
Division of Environmental Planning  
and Management

cc: Office of Planning and Research  
C. Herzog, Commission  
D. Tutov, Commission  
J. Garrett, Commission