

CALIFORNIA STATE LANDS COMMISSION

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Governor's Office of Planning & Research

June 02 2021

STATE CLEARINGHOUSE

Established in 1938

June 2, 2021

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File Ref: SCH #2021040759

City of San Jose
Attn: Sanhita Ghosal
200 E. Santa Clara Street
San José, California 95113

VIA ELECTRONIC MAIL ONLY (sanhita.ghosal@sanjoseca.gov)

Subject: Initial Study/Mitigated Negative Declaration (IS/MND) for Newby Island Sanitary Landfill Coyote Creek Bank Repair Project, Santa Clara County

Dear Sanhita Ghosal:

The California State Lands Commission (Commission) staff has reviewed the IS/MND for the Newby Island Sanitary Landfill Coyote Creek Bank Repair Project (Project), which is being prepared by the City of San Jose (City). The City, as the public agency with primary permitting authority, 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 involves work on State sovereign land, the Commission will act as a responsible agency.

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.

After review of the information contained in the IS/MND, and our in-house records, Commission staff has determined that Coyote Creek at this location, over which a portion of the Project will extend, includes State-owned sovereign lands under the jurisdiction of the Commission. Therefore, a lease from the Commission will be required for the portion of the Project encroaching through State-owned lands. Please note that on December 14, 2018, International Disposal Corporation of California submitted a lease application to the Commission (W 27226) for the Project. Lease application W 27226 is for a General Lease – Protective Structure Use.

In addition, please be advised that the waterways involved in the Project area, are subject to a public right of navigation. This public right provides that members of the public have the right to navigate and exercise the incidences of navigation in a lawful manner on State waters that are capable of being physically navigated by oar or motor-propelled small craft. Such uses may include, but are not limited to, boating, rafting, sailing, rowing, fishing, fowling, bathing, skiing, and other water-related public uses (*People ex rel. Baker v. Mack* (1971) 19 Cal. App.3d 1040). The proposed Project must not unduly restrict or impede the navigation and recreational rights of the public (Civ. Code, § 3479). Please contact George Asimakopoulos, Public Land Management Specialist (see contact information below) should you have any questions concerning the leasing jurisdiction of the Commission.

Project Description

The Project site is located on the eastern side of the Newby Island Sanitary Landfill (NISL) property, along the northern border of Santa Clara County. The City proposes to repair a failing section (approximately 140 feet in length) of the Coyote Creek bank on the northeasterly side of the Newby Island Sanitary Landfill facility to meet the City's objectives and needs as follows:

- Stabilize the channel to arrest the current bank retreat and protect the integrity of the gas collection system
- Provide viable localized habitat improvements

From the Project Description, Commission staff understands that the permanent placement of rock and large woody debris structures in the Coyote Creek channel would have the potential to affect State sovereign land.

Environmental Review

Commission staff requests that the City consider the following comments on the Project's MND, to ensure that impacts to State sovereign land are adequately analyzed for the Commission's use of the final MND to support a future lease approval for the Project.

General Comments

1. Project Description: Figure 3 indicates the extent of the San Francisco Bay Conservation and Development Commission (BCDC) jurisdiction; however, Commission staff would appreciate a similar line indicating the jurisdiction of the Commission.
2. Public Agency Approvals: Commission staff requests that Section 5.0 of the MND identify that the Commission is a public agency with jurisdiction and has discretionary approval over the Project.
3. Mitigation/Protection Measures: All but one impact identified in the IS/MND are reduced to a less than significant level by the incorporation of protection measures into the Project description or by providing details of permit conditions in the impact discussion. Impact BIO-1 is addressed through Mitigation Measure BR-1 which identifies numerous permit conditions within the Streambed Alteration Agreement, as well as U.S. Army Corps of Engineers and Regional Water Quality Control Board permits. As the Commission will be a responsible agency tasked with enforcing a Mitigation Monitoring Program (MMP) over those portions of the project within its jurisdiction, for clarity and transparency, Commission staff requests that the final IS/MND delineate all permit conditions that are anticipated to occur as a part of BR-1.

Cultural Resources and Tribal Cultural Resources

4. Commission staff understands the City believes no outreach or consultation with California Native American Tribes is necessary because no tribes sent written requests for notification of projects. The State CEQA Guidelines Appendix G Checklist Form was revised via formal rulemaking in September 2016 to ensure lead agencies include in their environmental documents a thorough discussion of Tribal engagement and consideration of Tribal Cultural Resources in order to demonstrate compliance with AB 52 (Gatto; Stats. 2014, ch. 532). AB 52 applies to all CEQA projects initiated after July 1, 2015.¹ Commission staff notes that the City's IS/MND, was initiated after AB 52 went into effect, but does not contain adequate information as to how the City conducted outreach. There are procedural and substantive requirements for lead agency consultation with California Native American Tribes, consideration of effects on Tribal Cultural Resources (as defined in Pub. Resources Code, § 21074), and examples of mitigation measures to avoid or minimize impacts to these resources.

Demonstration of outreach to affiliated California Native American Tribes, as well as documentation of any Consultation or other relevant comments/suggestions received from the City, is necessary prior to the Commission considering a lease approval. If the City is unwilling or unable to conduct the required outreach and

¹ Sections 21073, 21074, 21080.3.1, 21080.3.2, 21082.3, 21083.09, 21084.2, and 21084.3 were added to CEQA pursuant to AB 52.


consultation, Commission staff will have to undertake that process; this will likely delay processing and consideration of the lease application.

5. Title to Resources: The IS/MND should also mention that the title to all abandoned 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 Commission (Pub. Resources Code, § 6313). Commission staff requests that the City 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 the IS/MND's MMP: "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."
6. Standard Permit Conditions: On pages 72 and 73 of the IS/MND, two "Standard Permit Conditions" are used to reduce impacts to archeological resources and human remains. Staff believes the IS/MND should describe what permit the measures come from and explain why they are not considered "mitigation measures."

Thank you for the opportunity to comment on the IS/MND for the Project. As a responsible and trustee agency, Commission staff will need to rely on the adopted MND for the issuance of any lease as specified above and, therefore, we request that you consider our comments prior to adoption of the MND.

Please send copies of future Project-related documents, including electronic copies of the adopted MND, Mitigation Monitoring Program, Notice of Determination, and City Resolution when they become available. Please refer questions concerning environmental review to Cynthia, Senior Environmental Scientist, at cynthia.herzog@slc.ca.gov. For questions concerning archaeological or historic resources under Commission jurisdiction, please contact Jamie Garrett, Staff Attorney, at (916) 574-0398 or Jamie.Garrett@slc.ca.gov. For questions concerning Commission leasing jurisdiction, please contact Public Land Management Specialist George Asimakopoulos at (916) 575-0990, or George.Asimakopoulos@slc.ca.gov.

Sincerely,



Nicole Dobroski, Chief
Division of Environmental Planning
and Management

cc: Office of Planning and Research
J. Mattox, Commission
G. Asimakopoulos, Commission
C. Herzog, Commission