

San Francisco Bay Conservation and Development Commission

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January 13, 2023

Cody Ericksen
Caltrans District 4
P.O. Box 23660, MS 8B
Oakland, CA 94623
Via Email: SR37FloodProject@dot.ca.gov



SUBJECT: Notice of Preparation of State Route (SR) 37 Flood Reduction Project (SCH# 2021110045); BCDC Inquiry File No. MC.MC.7415.026

Mr. Ericksen :

Thank you for the opportunity to comment on the previously filed Notice of Preparation (NOP) and revised project scope for the State Route 37 Flood Reduction Project (Project) as was presented in the letter provided to BCDC on December 8, 2022 and the Second Scoping Meeting held on December 14, 2022.

Depending upon the final scope of this project, the San Francisco Bay Conservation and Development Commission (BCDC) may be a responsible agency for this project under the California Environmental Quality Act (CEQA) and would rely on the future Environmental Impact Report/Environmental Assessment (EIR/EA) when considering any required BCDC permit or consistency determinations for the Project. While the description of the Project in the NOP and the details provided in the Second Scoping Meeting are not specific enough for BCDC staff to meaningfully comment on every potential issue that could be raised with respect to BCDC's laws and policies, staff would like to reemphasize that the draft Environmental Impact Report/Environmental Assessment (EIR/EA) should address all BCDC's prior comments and concerns expressed in the letter mailed to you on December 13, 2021 and as may still be relevant for the updated Project alternatives and design.

Based on information provided in the December 14, 2022 Second Public Scoping Meeting for the Project, the Project appears to have been down-scoped in size and now covers the portion of the existing State Route 37 (SR37) that runs between US 101 and Atherton Avenue in Marin County. The goal of the project is to address periodic flooding that has resulted in closures of the highway and to address future sea level rise. It appears that the proposed alternatives that will be analyzed in the draft EIR/EA include a no-build alternative and one build alternative that includes the construction of a causeway between US 101 and Atherton Avenue built to an elevation that can accommodate future, projected sea level rise up to the year 2130. More specifically, the build alternative includes a 2.5-mile-long causeway and will need to be constructed in two phases. The build alternative also includes four lanes of roadway, a median, median barrier, inside and outside shoulders, and a bike/pedestrian path with a two-foot-wide outside barrier and running along the Bayward side of the causeway. The Commission itself has not reviewed the NOP or the content of the Second Scoping Meeting; the following comments



are based on BCDC staff review of these materials in relation to the McAteer-Petris Act, the *San Francisco Bay Plan* (Bay Plan), and potentially the Coastal Zone Management Act (CZMA). BCDC strongly recommends that the Project proponents meet early in the environmental review and design process with BCDC regulatory staff to discuss the Project to determine which parts of the Project, if any, may be within BCDC jurisdiction and to identify potential consistency issues raised by the Project with respect to BCDC's laws and policies.

The SR 37 Flood Reduction Project is distinct from the planning process undertaken by Caltrans and MTC through the Planning and Environmental Linkages (PEL) process to identify a long-term/ultimate solution for issues related to SR37. However, it appears that after the initial NOP comment period and based upon the recommendations of the PEL process, Caltrans has modified the Project alternatives that will be evaluated in the draft EIR/EA to align those with the long-term goals for the corridor.

Jurisdiction

The project site indicated in the NOP has been slightly reduced during this Second Scoping period and now runs from US 101 to Atherton Avenue. At this time, there is not enough detail to definitively conclude whether the Project is located fully outside of BCDC's permitting jurisdiction under the McAteer-Petris Act or whether a portion of the work may fall within BCDC's jurisdiction and thus would require a permit. Per the McAteer-Petris Act, BCDC is responsible for granting or denying permits for any proposed fill; extraction of materials; or substantial changes in use of any water, land, or structure within the Commission's statutory jurisdiction. (Reference Government Code sections 66610(a)-(b) and 66632(a)). As defined in Government Code section 66632(a), "fill" means earth or any other substance or material, including pilings or structures placed on pilings, and structures floating at some or all times and moored for extended periods, such as houseboats and floating docks. For the purposes of this section, "materials" means items exceeding twenty dollars (\$20) in value. Fill also includes structures cantilevered over the Bay. Based on the NOP project description and information provided in the Second Scoping Meeting, relevant areas of BCDC jurisdiction for the Project may include the following:

- San Francisco Bay, being all areas subject to tidal action, including tidelands (land lying between mean high tide and mean low tide), submerged lands, and tidal marsh. (*Id.* section 66610(a).) BCDC's Bay jurisdiction includes areas of tidal marsh up to, but not exceeding, five feet above Mean Sea Level.
- A shoreline band consisting of all territory located between the shoreline of the Bay and 100 feet landward of and parallel with the shoreline. (*Id.* section 66610(b)).

If a permit is required for any portion of the Project or construction thereof, then approval of a BCDC permit will require a showing of consistency with the McAteer-Petris Act and the Bay Plan. Please note that it appears that a portion of the Project area may also be located partially in an area designated by the Bay Plan as wildlife refuge areas.



Even if the Project as currently proposed is completely outside of BCDC's jurisdiction and would not require a permit under the agency's state-law authority pursuant to the McAteer-Petris Act, if the Project includes a federal partner, would receive any federal approval, or receive any funding associated with the Project, then BCDC may review the project pursuant to the CZMA and BCDC's certified Coastal Management Program, which includes the enforceable policies of the San Francisco Bay Plan, for any potential affects to coastal resources or uses within BCDC's segment of the California Coastal Zone.

The draft EIR/EA should map and describe the elements of the Project that would occur within BCDC permitting jurisdiction, distinguishing between the Bay and shoreline band jurisdictions, and note the presence of the Wildlife Refuge designation. Note that per section 10710 of BCDC's regulations, any "areas once subject to Commission jurisdiction remain subject to that same jurisdiction," including areas that may have been "filled or otherwise artificially altered." (14 CCR section 10710.) Thus, the draft EIR/EA should identify whether any portion of the proposed Project would be located on Bay fill that was placed since 1965. The draft EIR/EA should also reference the potential need for consistency review for the Project pursuant to CZMA, even if the Project will be situated outside of BCDC's permitting jurisdiction, if it is determined that the Project has the potential to affect coastal resources and uses within BCDC's segment of the Coastal Zone.

Commission Law and Bay Plan Policies Relevant to the Project

Please see BCDC's prior comments from its December 13, 2021 letter, enclosed, regarding relevant policy sections of the San Francisco Bay Plan that should be considered when developing the draft EIR/EA and considerations for any work that may be within BCDC jurisdiction. The relevant policy sections mentioned in that letter include the policies covering the protection of Bay resources, including fish, other aquatic organisms, and wildlife; tidal marshes and tidal flats; subtidal areas; water quality; and others, as well as issues related to development, such as climate change; fills; shoreline protection; water-related uses; appearance, design, and scenic views; public access; and mitigation.

In addition, BCDC would like to again highlight a few major considerations that should be evaluated in the draft EIR/EA. The draft EIR/EA should include and evaluate ways to avoid, minimize, and mitigate for any impacts to species and their habitats within the Commission's jurisdiction, and should also include ways to avoid, minimize, and mitigate for any potential impacts to existing public access trails or public areas. The design of the new and improved public access should be fully described in the draft EIR/EA to allow the Commission to evaluate the public access proposed with the Project and whether it constitutes maximum feasible public access consistent with the Project for any portion of the Project within the Commission's jurisdiction. For any portion of the Project that is within BCDC's jurisdiction, please note our prior comments indicating that this Project may need to be reviewed by the Commission's Engineering Criteria Review Board related to the safety of any fills that may be proposed and the Design Review Board regarding public access improvements associated with the Project. Any mitigation that is designed as part of the proposed Project and any mitigation measures included in the draft EIR/EA should be consistent with the Bay Plan's Mitigation policies.




Cody Ericksen
CALTRANS District 4
BCDC Inquiry File No. MC.MC.7415.026

Page 4
January 13, 2023

Additionally, BCDC urges the preparers of the draft EIR/EA and Caltrans to review the Bay Plan's Environmental Justice and Social Equity policies that may be relevant to the planning, environmental review, and outreach related to the proposed Project.

We appreciate your attention to the topics discussed above and for the opportunity to make the above comments revised scope of the draft EIR/EA. If you have any questions or concerns regarding this matter, please do not hesitate to contact me at (415)352-3624 or by email at anniken.lydon@bcdc.ca.gov.

Sincerely,

DocuSigned by:

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ANNIKEN LYDON

Bay Resources Program Manager

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Enc. BCDC December 13, 2021 Comment Letter on SR 37 Flood Reduction Project NOP

cc: State Clearinghouse

