

**CALIFORNIA STATE LANDS  
COMMISSION**

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*Established in 1938*

May 1, 2023

**JENNIFER LUCCHESI**, Executive Officer

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File Ref: SCH # 2023030749

Marin County Flood Control and Water Conservation District  
Roger Leventhal  
3501 Civic Center Drive, Room 304  
San Rafael, CA 94903  
VIA ELECTRONIC MAIL ONLY ([envplanning@marincounty.org](mailto:envplanning@marincounty.org))

**Subject: Initial Study and Mitigated Negative Declaration for the Deer Island  
Basin Complex Tidal Wetland Restoration Project, Marin County**

Dear Roger Leventhal:

The California State Lands Commission (Commission) staff has reviewed the Initial Study and Mitigated Negative Declaration (IS/MND) for the Deer Island Basin Complex Tidal Wetland Restoration Project (Project), which is being prepared by the Marin County Flood Control and Water Conservation 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 involves work on State sovereign land, the Commission will act as a responsible agency.

**Commission Jurisdiction**

Staff is processing the District's application A3039 for amendment of Lease No. PRC 7008 for wetland restoration. The application identifies restoration work within two ponds (Duck Bill Pond and Heron's Beak Pond) that are adjacent to Novato Creek. Staff has reviewed the Draft IS/MND, and it appears that the Project would include excavation and other activities adjacent to and within the bed of Novato Creek. The bed of Novato Creek is State-owned sovereign land. Any proposed work taking place on sovereign land within Novato Creek will require amendment of application A3039 to include the additional work.

## **Project Description**

The District proposes to restore and enhance 245 acres of aquatic habitat, 6.4 acres of transitional habitat, and 20.8 acres of uplands to restore ecologically valuable tidal wetlands for endangered species and improve tidal connectivity to the diked areas that were historically tidal wetlands along Novato Creek. From the Project Description, Commission staff understands that the Project would include the following components that have potential to affect State sovereign land:

- Novato Creek Channel Widening. The Novato Creek channel would be enhanced by both widening the creek channel in areas where the existing channel is immediately adjacent to the Duck Bill and Heron's Beak Levees and creating new side channels to the main channel in areas where the existing channel is further from the Levees. Excavation would also occur within a 50-foot corridor along the creek side of the existing Levees.
- Duck Bill and Heron's Beak Ponds (Bird Ponds) Restoration. Tidal wetland and open water habitat would be restored within the Bird Ponds by lowering the existing Levees to tidal wetland elevations, creating new tidal wetlands along the Bird Ponds side of the Lynwood Levee using material excavated from the existing Bird Ponds levees and Novato Creek floodplain, and breaching the existing Bird Pond levees to re-introduce tidal hydraulic connectivity.

## **Environmental Review**

Commission staff requests that the District consider the following comments on the Project's IS/MND, to ensure that impacts to State sovereign land are adequately analyzed for the Commission's use of the IS/MND when considering application A3039 for the Project.

### General Comments

1. Deferred Mitigation: When it is impractical or infeasible to develop the specific details of a mitigation measure during the CEQA review process, the document should explain the reasons why it is impractical or infeasible, and the lead agency should commit to implement the mitigation, adopt a specified performance standard to be achieved by the mitigation, and identify the types of actions that may achieve compliance with the performance standard (State CEQA Guidelines, §15126.4, subd. (a)(1)(B)). MM BIO-1 requires the District to prepare and approve a mitigation and monitoring plan for any discovered special-status plant species and MM BIO-11 requires a monitoring and adaptive management plan for habitat restoration, but neither identifies a performance standard or provides metrics or action types that will be included in the plan to measure the measure's

efficacy in reducing the particular impact to a less than significant level. Instead, both measures note that the future plans will specify “success criteria” (MM BIO-1) or “performance criteria” (MM BIO-11). Recent case law continues to spotlight the importance of performance standards in properly formulated mitigation (*Save the Agoura Cornell Knoll et al. v. City of Agoura Hills et al.* (2020) 46 Cal.App.5th 665). Commission staff requests that more specific information be provided to 1) explain why it is infeasible for the District to develop specific mitigation measure details in MMs BIO-1 and BIO-11 and 2) set forth performance criteria and types of actions that will mitigate the potentially significant impacts to less than significant.

2. Project Description – Site Preparation: As part of site preparation, the Novato Creek marshplain and Deer Island Basin tidal excavation areas would be cleared and grubbed. The material would then be used at the Project site to either build ecotone subgrade or be disposed of at an offsite location. However, the Project Description only mentions this alternative when discussing site preparation activities, and the IS/MND does not later explain under which circumstances the material would be transported offsite. Commission staff recommends that the document provide additional information specifying when and how offsite disposal would occur. In addition, please confirm that the potential truck trips associated with offsite disposal are already included in the Appendix A calculations and incorporated into the Environmental Impact Checklist analysis.
3. Mitigation Monitoring Program (MMP): The adopted IS/MND will also require adoption of an MMP, pursuant to CEQA Guidelines section 15074, subdivision (d). Each mitigation measure (MM) should be included with the associated timing for the measure, the agency responsible (if different from the District), and metrics to track and determine whether the measure has been fulfilled. Without this information, CEQA responsible agencies may need to take additional actions to ensure implementation of those activities under their respective jurisdiction.
4. Project Description – Revegetation: The Project would revegetate the Bird Pond areas after grading activities and would include planting and seeding to provide a variety of locally native wetland, ecotone transition, and upland habitats. Staff recommends that the District consider soliciting and incorporating the consulting tribes’ input regarding the proposed native plant species.

#### Biological Resources

5. California Ridgway’s Rail and California Black Rail: The IS/MND would implement MMs BIO-2 and BIO-4 to mitigate potential impacts to California Ridgway’s rail and California black rail. However, neither measure addresses

impacts to any active nests discovered during MM BIO-4's protocol-level surveys. Please augment MM BIO-4 to include what actions would be taken if an active nest is found. Alternatively, Commission staff notes that MM BIO-5 addresses nesting bird protection and could be included as a measure for California Ridgway's rail and California black rail.

6. Tree Replacement: The District would need to replace up to seven trees that may need to be removed during primary tidal channel excavation. MM BIO-10 notes that the replacement trees would be located at an "ecologically appropriate site identified by the District." Please clarify whether the replacement tree location would be evaluated first for any feasible on-site mitigation and how off-site mitigation locations would be prioritized (i.e., proximity to the Project site, habitat connectivity).
7. Monitoring and Adaptive Management Plan: To address impacts to federal-protected wetlands and waters, MM BIO-11 would establish a monitoring and adaptive management plan to ensure the success of post-Project habitat conversions. While Section VI., 4., c) requires MM BIO-11 to address the success of these habitat conversions, Section VI., 4., b) describes similar post-Project habitat conversions, including increased habitat acreage, but determines that impacts to salt marsh bulrush marsh are less than significant and does not require a mitigation measure to ensure that habitat conversion success. Commission staff recommends that the IS/MND provide additional information to support the significance determination for salt marsh bulrush marsh impacts. In the alternative, Commission staff would recommend including MM BIO-11 for Section VI., 4., b) and c).

### Cultural Resources

8. Title to Resources Within Commission Jurisdiction: The IS/MND should state 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 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.

Staff requests that the following statement be included in the IS/MND's Mitigation Monitoring Program: "The final disposition of archaeological, historical, and paleontological resources recovered on State land under the jurisdiction of the California State Lands Commission must be approved by the Commission."

Tribal Cultural Resources

9. Unanticipated Discovery: MM CUL-2 describes how a qualified archaeologist would prepare the Project's Cultural Resources Monitoring Plan (CRMP) that describes the locations, methods, and reporting for cultural resources construction monitoring. The CRMP would also include the inadvertent discovery protocol. While the IS/MND acknowledges that neither the Federated Indians of Graton Rancheria nor the Coast Miwok Tribal Council of Marin have identified a known and potentially impacted tribal cultural resource, the document does not clarify whether the tribes have provided any input related to unanticipated discovery and CRMP development. In the absence of this information, Commission staff strongly encourages the District to revise MM CUL-2 to state that the CRMP will be developed and implemented in coordination with culturally affiliated tribes who have requested participation.
  
10. Tribal Monitoring: MM CUL-2 notes that "If the District deems it necessary, they may invite a California Native American Tribe to participate in the construction monitoring." (page VI-44). Please clarify how the District would deem tribal monitoring "necessary." In addition, MM TRI-1 requires the District to retain an archaeologist to assess any unanticipated discovery. It appears that this archaeologist would first determine whether the resource was of Native American origin, then contact the District, and finally the District would contact any potentially affected Tribes. Commission staff recommends that the IS/MND clarify whether consulted tribes have requested tribal monitoring during construction activities. If unknown, staff requests that MM CUL-2 and MM TRI-1 be modified to require an archeological monitor and a Tribal monitor (if requested by a culturally affiliated Tribe) onsite.

Thank you for the opportunity to comment on the IS/MND for the Project. As a responsible and trustee agency, the Commission will rely on the adopted IS/MND when issuing an amended lease as specified above (see Section "Commission Jurisdiction and Public Trust Lands"). We request that you consider our comments before adopting the IS/MND.

Please send electronic copies of the adopted IS/MND, Mitigation Monitoring Program, Notice of Determination, and approving resolution when they become available. Please note that federal and state laws require all government entities to improve accessibility of information technology and content by complying with established accessibility requirements. (29 U.S.C. § 794d; 36 C.F.R. § 1194.1 et seq.; Gov. Code, § 7405.) California State law prohibits State agencies from publishing on their websites content that does not comply with accessibility requirements. (Gov. Code, § 115467.) Therefore, any documents submitted to Commission staff during the processing of a lease or permit,

including all CEQA documentation, must meet accessibility requirements for Commission staff to place the application on the Commission agenda.

Refer questions concerning environmental review to Alexandra Borack, Senior Environmental Scientist, at [Alexandra.Borack@slc.ca.gov](mailto:Alexandra.Borack@slc.ca.gov) or (916) 574-2399. For questions concerning archaeological or historic resources under Commission jurisdiction, please contact Jamie Garrett, Staff Attorney III, at [Jamie.Garrett@slc.ca.gov](mailto:Jamie.Garrett@slc.ca.gov) or (916) 574-0398. For questions concerning Commission leasing jurisdiction, please contact Marlene Schroeder, Public Land Management Specialist IV, at [Marlene.Schroeder@slc.ca.gov](mailto:Marlene.Schroeder@slc.ca.gov) or (916) 574-2320.

Sincerely,



Nicole Dobroski, Chief  
Division of Environmental Science,  
Planning, and Management

cc: Office of Planning and Research  
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J. Garrett, Commission  
M. Schroeder, Commission