

# Appendix A

## Notice of Preparation/Scoping







# SAN RAFAEL

THE CITY WITH A MISSION

Community Development Department – Planning Division

<b>Meeting Date:</b>	February 23, 2021
<b>Agenda Item:</b>	3
<b>Case Numbers:</b>	UP21-001, ED21-002, & IS21-001
<b>Project Planner:</b>	Paul Jensen (415) 485-5064

## REPORT TO PLANNING COMMISSION

**SUBJECT: Tiscornia Marsh Restoration Project, North of Canal Street** – Scoping hearing for the Notice of Preparation of an Environmental Impact Report (EIR) to assess the impacts of the Tiscornia Marsh Restoration Project. The project proposes to restore the tidal marsh/mudflats located north and outboard of Canal Street, as well as the diked marsh located north of the Albert J. Boro Center/Pickleweed Park Playfields. APNs: 009-142-01, 009-032-08 and -09; Park/Open Space-Wetland Overlay (P/OS-WO) District. Applicant: Marin Audubon Society; Property Owners: Marin Audubon Society and City of San Rafael.

### EXECUTIVE SUMMARY

Marin Audubon Society (MAS), project applicant has filed Use Permit and Environmental and Design Review Permit applications to pursue a restoration of the Tiscornia Marsh and adjacent diked marsh located north of Canal Street. The City of San Rafael is the lead agency for permitting and completing the required environmental review for this project. The applications and plans have been reviewed and it has been determined that the project has the potential to result in significant, physical environmental effects. Therefore, the preparation of an Environmental Impact Report (EIR) is recommended.

Consistent with the California Environmental Quality Act (CEQA) Guidelines, the issuance of a Notice of Preparation (NOP) is required when the lead agency has determined that an EIR will be prepared. An NOP was issued on January 25, 2021 and mailed to the State Clearinghouse, responsible and trustee agencies and interested parties and groups, to announce the initiation of the EIR process. Further, a notice of the NOP was mailed to property owners and residents within 400 feet of the project site. The purpose of the NOP is to solicit comments regarding the scope of issues to be addressed/studied and project alternatives that should be considered in the EIR. The NOP affords a 30-day review period for comments to be submitted. During this NOP comment period, the Planning Commission is required to conduct a “scoping hearing” to receive comments and provide direction on proceeding with the EIR. The 30-day review period will close on Friday, February 26, 2021.

Please note that, for this project, an Initial Study (environmental checklist) has not been prepared, which would “screen out” certain topic areas from the EIR focus. However, staff has recommended key topic areas to be addressed/studied, which are discussed in this report. Following closure of the NOP comment period, the scope will be confirmed and preparation of the Draft EIR (DEIR) will begin. When completed and released, the DEIR will be subject to a 45-day public review period and a public hearing with the Planning Commission. Lastly, it is important to note that the specific purpose of scoping hearing is to provide comments on the issues to be addressed/studied in the EIR. Therefore, comments on the merits of this project (to support, oppose or modify the project) should be held for future public hearings when the project applications will be considered for action by the Planning Commission.

## RECOMMENDATION

It is recommended that the Planning Commission take the following action:

1. Accept public testimony on the Notice of Preparation (NOP) and scope of issues to be addressed in the EIR.
2. Direct staff to prepare a Draft Environmental Impact Report (DEIR), taking into consideration verbal and written comments received during the scoping period.

## BACKGROUND

### Site Description & Setting:

The Tiscornia Marsh site covers 21 acres of tidal marsh and bay lands and well as 2,000 feet of shoreline levee/trail located north of East Canal Street. The property, which is owned by MAS is bound to the: a) south by a shoreline levee, Schoen Park (small City-owned park/playground) and Canal Street; b) west by the Albert J Boro Community Center and Pickleweed Park; c) east by the San Rafael Bay; and d) north by the San Rafael Creek. The neighboring Albert J Boro Community Center and Pickleweed Park covers approximately 15 acres which includes an active community center, community park and an expansive playfield. Included in the City-owned holdings is an undeveloped, four-acre diked salt marsh, which is located north of the large playfield. Although subject to flooding in the winter months, this diked salt marsh is enclosed by a perimeter levee and contains a well-used, informal pedestrian trail, which loops through the area.

The Tiscornia Marsh has experienced considerable erosion along its bayward edge, which is attributed to direct wave action from the bay. Over the last 30 years, approximately three acres of the tidal marsh has been lost to this erosion, which has dramatically impacted habitat for species such as the Ridgway's rail and salt marsh harvest mouse. Under current conditions, it is expected that this erosion will continue and will likely increase as sea level rises. The second critical issue for this general area is flooding. The adjacent Canal neighborhood is low-lying and is currently at risk to coastal flooding (as well as sea level rise).

### History:

In June 2016, the voters of the nine Bay Area counties approved Measure AA, a parcel tax measure. The tax measure is a \$12.00 per year tax on every parcel in the Bay Area. The purpose of Measure AA is to generate \$500 million over a 20-year period for critical tidal marsh restoration projects around the San Francisco Bay. The goal is to improve water quality, restore habitat for wildlife, protect communities from flooding and increase shoreline public access.

Applications for Measure AA funds for local restoration projects are initiated annually by the San Francisco Bay Restoration Authority. In fall 2018, a second call for applications was released and Marin Audubon Society applied for funding. As required by the application process MAS was required to submit an endorsement of the application by the local jurisdiction (City). On October 1, 2018, the City Council reviewed this request and adopted Resolution No. 14592 authorizing the application endorsement. As part of this review, the City Council acknowledged its role as the lead agency on this project for permitting and environmental review. In 2019, the Measure AA funds were awarded to MAS for the planning, environmental review and permitting process.



SOURCE: Aerial Imagery: Esri

160888.01

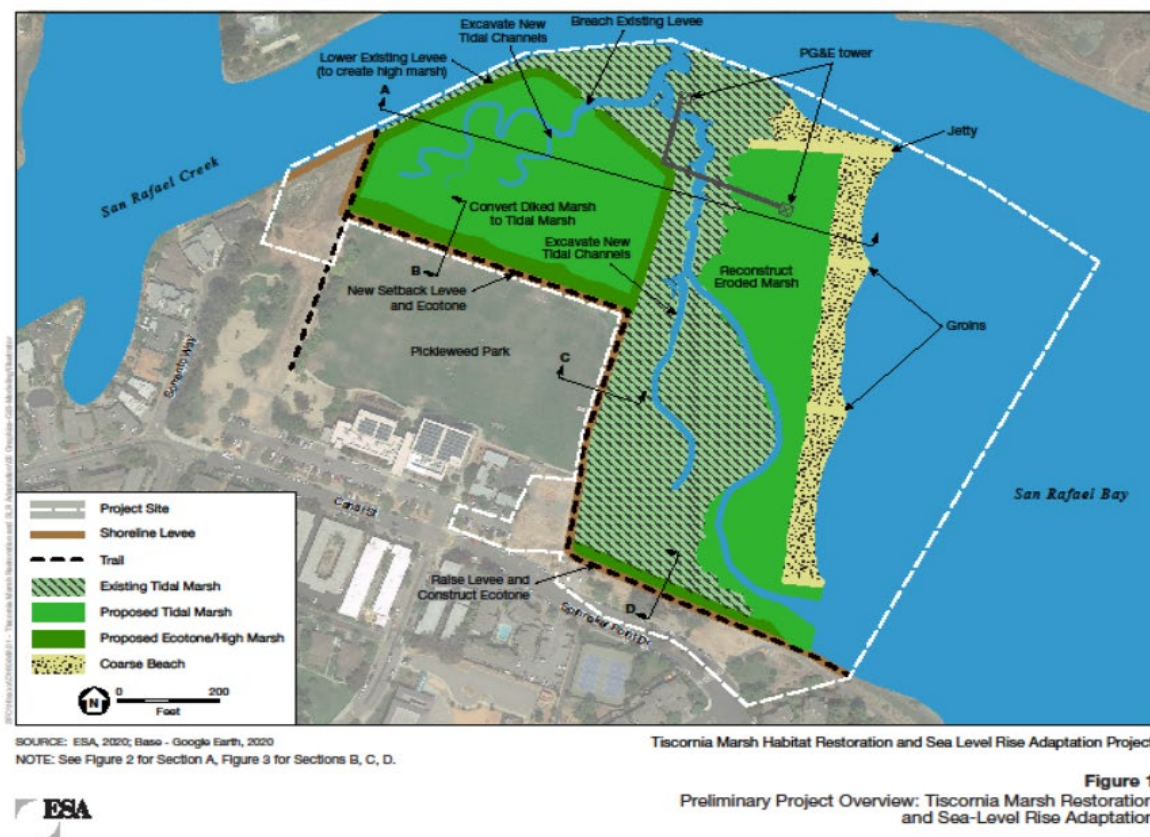


**Figure 2**  
Project Location  
Tiscornia Marsh Restoration and Sea level Rise Adaptation

## PROJECT DESCRIPTION

Tiscornia Marsh would be restored to its former extents by beneficially reusing dredged material from local sources. A coarse beach would be constructed along the bay ward edge of the restored marsh to resist future erosion. Tidal action would also be restored to the City-owned diked marsh at the north end of Pickleweed Park. Altogether, the project would reconstruct approximately four acres of eroded tidal marsh, preserve, and protect the approximately eight remaining acres of Tiscornia Marsh, and restore approximately five acres of diked marsh (City-owned area north of the Pickleweed Park playfields) by reconnecting it to tidal inundation. The project also proposes to construct a new 600-foot setback levee and improve approximately 1,100 feet of shoreline levee to achieve greater flood protection, public access, and habitat benefits. In sum, the major project elements include the:

- Development of a coarse beach;
- Reconstruction of the eroded tidal marsh;
- Restoring the diked marsh to the bay;
- Shoreline levee improvements; and
- Development of an ecotone slope.



Project plans, project description and technical studies for this project can be found on the project web page at <https://www.cityofsanrafael.org/tiscornia-marsh/>.

## ENVIRONMENTAL ANALYSIS AND REVIEW

### Notice of Preparation:

As discussed above, an NOP was published on January 25, 2021 to announce the commencement of the EIR process and to solicit comments concerning the scope of issues to be addressed in the EIR. (Exhibit 2). A 30-day public review period is being observed and public comment will be accepted until Friday, February 26, 2021. The purpose of the scoping hearing is to afford agencies and the public an opportunity to provide verbal comments on the scope of issues to be addressed in the EIR for the proposed project. Following the close of the NOP review period, City staff and the EIR consultant will review comments received for consideration in preparation of the DEIR.

Although scoping hearing is not required under CEQA, it offers another vehicle for public participation in addition to the submittal of written comments. Comments should be limited to the scope of environmental issues to be addressed in the EIR, and not on the merits of the project. There will be subsequent public hearings for the purpose the purpose of reviewing the merits of the project and action on the Planning application.

**Probable Environmental Effects:**

The primary purpose of the CEQA/environmental review process is to: a) provide full disclosure and information regarding a project's potential physical impacts on the environment, in advance of acting on a project; and b) require feasible mitigation to reduce or eliminate impacts that have been identified. The CEQA review process is not conducted to determine whether a project should be approved or denied (supported or rejected).

Typically, at the start of the CEQA/environmental review process, an Initial Study is prepared to determine if an EIR is required for a project. However, at the onset of this process, the applicant agreed to proceed with the preparation an EIR without the need to prepare an Initial Study. This approach is consistent with CEQA Guidelines Section 15060. Nonetheless, as discussed below, City staff has identified: a) the topic areas for which the project will clearly have no significant effect and could be removed from further study; and b) the topic areas where the project has the potential to significantly impact the environment and, therefore, require analysis in the EIR:

**No Impact Determination**

Based on the preliminary review of project application materials including the Applicant's Project Description and Project Plans (Exhibit 1), the following environmental Impact factors were determined to clearly not apply to this project and would not warrant further discussion in the EIR:

- *Agriculture and Forestry Resources*
- *Energy*
- *Mineral Resources*
- *Population/Housing*

This determination was based on the fact that there are no agricultural, forestry uses, mapped mineral resources or existing housing on the site. Further, the proposed use and its construction would not wasteful, inefficient, or unnecessary consumption of energy resources, nor conflict for a plan for renewable energy. Should there be evidence presented that any of the above impact categories could result in environmental impacts, the environmental factors would be addressed in the EIR.

**Less than Significant or Potentially Significant Impact Determination**

The EIR will analyze the extent to which the project design and alternatives would result in "Less than Significant", "Less than Significant with Mitigation Incorporation", and "Potentially Significant" environmental impacts and will identify appropriate project modifications or mitigation measures to reduce or eliminate these impacts. If an impact remains "Potentially Significant" even with mitigation incorporated, the City will have to consider adoption of findings of overriding consideration if it were to approve the project. Preliminary review has determined the following environmental impact categories to be addressed in the EIR:

- *Aesthetics* - The project will result in physical changes in topography and landscape that have potential effects related to scenic vistas (e.g., views of the Bay in the project vicinity), the existing character of the site and its surroundings. It is recommended that the EIR include visual simulations of the project from several vantage points.
- *Air Quality* – It is recommended that the EIR include an analysis of potential construction-related air emissions. The EIR will identify temporary construction-related mitigation measures to reduce potential air quality impacts to less than significant levels.
- *Hazards* - A review of hazardous materials investigation reports and databases for the site and area is recommended. While most of the site consists of mudflats, tidal marsh and diked marsh,



there is the potential for encountering contaminated soils during the dredging and grading process. The presence of contaminated soil material could influence the re-use of this material in the restoration project.

- Land Use and Planning – The proposed restoration activity would be consistent with the current property zoning and General Plan 2020. However, there are elements of the project that will require careful review of City land use regulations and policies to ensure consistency, particularly related to wetland protection policies and regulations (WO- Wetland Overlay District). It is recommended that project consistency with the adopted San Rafael Climate Action Plan be addressed. The EIR consistency analysis will focus on policies and regulation related to protection of the environment.
- Noise – Project construction has the potential to result in temporary noise impacts. It is recommended that construction-related noise impacts be analyzed in the EIR. The project is surrounded by sensitive noise receptors (residential uses). The EIR will identify temporary construction-related mitigation measures to reduce potential construction-related noise impacts to less than significant levels.
- Traffic and Transportation - The project is not expected to increase traffic or result in new traffic impacts. However, project construction (import/export of dredge materials and soil) and staging (construction vehicle trips) will result in a temporary increase in vehicle trips. Depending upon the logistics of the construction management plan, temporary traffic impacts could be significant. Although the City will soon be phasing out of analyzing Level of Service (LOS) for CEQA review,<sup>1</sup> it is recommended that the EIR evaluate construction traffic generation against the Level of Service (LOS) thresholds in the General Plan, as well as Vehicle Miles Travelled (VMT) metrics presented in the Draft General Plan 2040. With this analysis, the EIR will identify mitigation measures for construction-related traffic and staging.
- Biological Resources – The project has the potential to result in significant short-term and long-term impacts to biological resources. The *Tiscornia Marsh Habitat Restoration and Sea Level Rise Adaptation Project Habitat Assessment* (ESA, December 2020) was prepared to assess the natural communities of the site and the environs, extent of wetlands, special-status species, wildlife movement corridors and critical habitat. It is recommended that the information and findings of this assessment be included in the EIR. With inclusion of this analysis, the EIR will identify mitigation measures to reduce potential impacts to biological resource.
- Cultural/Tribal Resources – It is recommended that the EIR assess if the project has the potential result in significant impacts to pre-historic or archaeological/tribal resources. As part of the EIR process, the City will be following the tribal consultation protocols set forth in State Resources Code Section 21080.3.1 (AB 52) and CEQA Guidelines Section 15064.5. The City of San Rafael has initiated the tribal consultation process through an initial request with the Federated Indians of Graton Rancheria.
- Geology and Soils - The project site contains various forms of geologic conditions and soil types. The predominant, underlying soil type is bay mud, and in some areas, it is overlaid with fill. Consequently, the site is susceptible to seismic ground shaking and risks such as liquefaction. It is recommended that the EIR analyze the geologic and soil conditions of the site, as well as the proposed restoration work, which would change the landscape. The use of imported dredge spoils

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<sup>1</sup> Senate Bill 743 mandates a phase out of analyzing local intersections and arterials utilizing the LOS metric for CEQA review. However, this law permits local jurisdictions to continue to use LOS as a metric for non-CEQA purposes such as monitoring and managing local intersections and roadways. The Draft General Plan 2040 includes policies and programs that support the continued use of LOS for development application review.



and other associated materials will be reviewed under this topic area. With this analysis, the EIR will identify mitigation measures to reduce potential impacts to biological resource.

- Greenhouse Gas Emissions – While the completed project is not expected to increase greenhouse gas (GHG) emission, it is recommended that the EIR address this topic area to confirm this finding. This review will also include an assessment of construction-related impacts.
- Hydrology and Water Quality - The project will result in a change in the landscape, which will impact the pattern and movement of surface water and runoff. This change is potentially significant. In addition, construction-related activities will occur within tidelands and waterways, which could result in potentially significant water quality impacts. It is recommended that the EIR assess both hydrologic and water quality impacts. With this analysis, the EIR will identify mitigation measures to reduce impacts.

The project proposes to implement adaptation measures that would ultimately result in a beneficial impact to combating and adapting to projected sea level rise. However, elements of this project design could potentially exacerbate projected sea level rise conditions to adjacent and nearby properties. Therefore, it is recommended that the EIR assess project impacts associated with projected sea level rise.

- Public Services & Facilities – It is recommended that the EIR include a discussion to confirm existing City services and infrastructure. This discussion would include police, fire, and public works services, as well as the ability to access the site for services.

The project has the potential to result in significant impacts the City's park and recreation facilities that border the project site. It is recommended that the EIR will analyze these impacts and identify potential mitigation measures.

- Utilities and Services Systems – It is recommended that the EIR assess potential project impacts related to water, wastewater, storm water, and power infrastructure. Utility and service system infrastructure traverse and border the site (e.g., PG & E power lines, San Rafael Sanitation District pipeline and easement, and storm water systems). With this analysis, the EIR will identify mitigation measures to potentially significant impacts to these systems, which may include recommended adjustments to the design and layout of the restoration plan.
- Wildfire – While the project is not anticipated to exacerbate the potential for wildfire risk, it may result in indirect environmental effects such as impairment of evacuation routes.
- Cumulative Impacts – As required by CEQA, cumulative impacts will be assessed.

### **Project Alternatives**

CEQA requires that an EIR describe a range of reasonable alternatives to a project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project. One of the intents of the NOP and the Commission's scoping session is to help determine potential alternatives to the project for discussion in the EIR. Staff is recommending that the EIR assess three alternatives including the "No Project" alternative (required by CEQA). The two alternatives to be finalized will consider the following approaches:

- Restore the outer, eastern marsh (Tiscornia Marsh) only with a smaller restoration construction footprint.
- Restore the inner, diked marsh (City-owned land) only with a smaller restoration construction footprint.
- Modify the marsh restoration design that would not include the beach protection feature.

The finalized project alternatives will not include concepts or approaches that would not meet the project objectives, which is to create a restoration project that: benefits biological resources and habitat; provides longer-term protection of the marsh; and combats projected sea level rise.

## **NEXT STEPS**

### **Draft EIR**

Preparation of a Draft EIR (DEIR) will be initiated once the scoping period has been completed. It is expected that completion of the DEIR to the date of release will take approximately three (3) months. Once the DEIR is completed, a Notice of Availability will be released initiating a 45-day public review period for comment on the document. The Planning Commission will hold a public hearing on the DEIR during the public review period and to provide comments on the adequacy of the document.

### **Final EIR and Project Merits**

Following the completion of the DEIR and hearing, the environmental consultant will respond to the comments raised at the DEIR hearing and prepare a Final EIR (FEIR). The FEIR, along with the project merits, will be considered by the Planning Commission at a public hearing. This project involves quasi-judicial permit actions, so the Planning Commission will have final decision-making authority. However, the Planning Commission's action can be appealed to the City Council.

## **CORRESPONDENCE**

As of the date and publication of this staff report, the City has received no correspondence on the NOP. Correspondence received before the Planning Commission meeting will be forwarded to Commission members under separate cover.

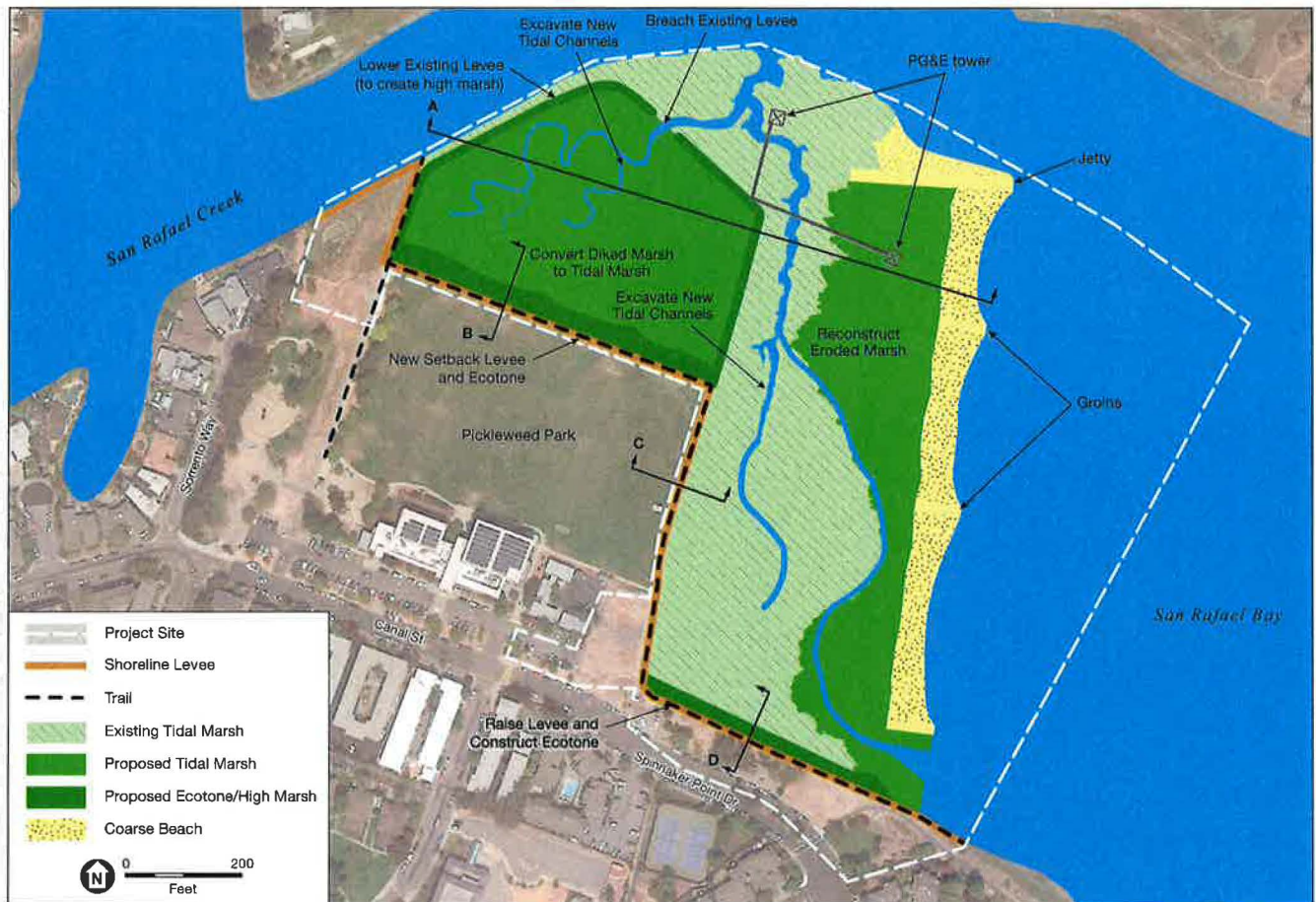
## **EXHIBITS**

1. Tiscornia Marsh Project Description and Plans
2. Notice of Preparation, January 25, 2021

Plans/Documents and supportive studies provided on web site ([www.cityofsanrafael.org/tiscornia-marsh/](http://www.cityofsanrafael.org/tiscornia-marsh/))

## EXHIBIT A

# TISCORNIA MARSH RESTORATION & SEA LEVEL RISE ADAPTATION PRELIMINARY PLANS



SOURCE: ESA, 2020; Base - Google Earth, 2020

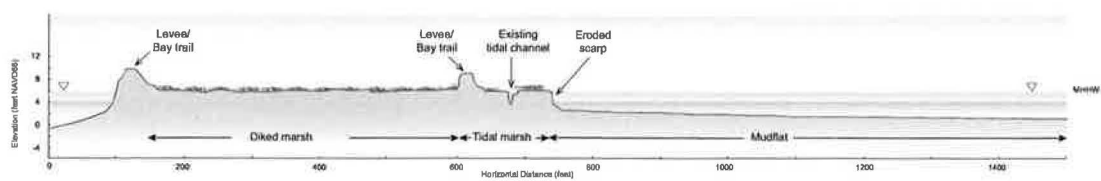
NOTE: See Figure 2 for Section A, Figure 3 for Sections B, C, D.

Tiscornia Marsh Habitat Restoration and Sea Level Rise Adaptation Project

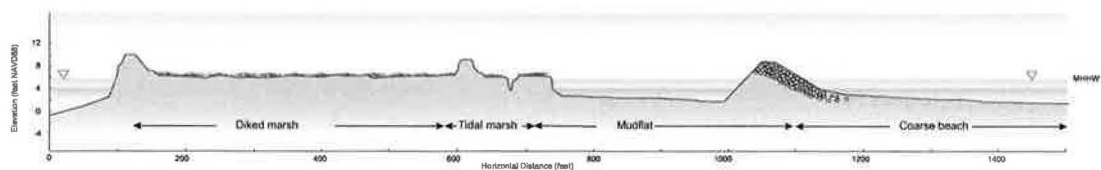
**Figure 1**

Preliminary Project Overview: Tiscornia Marsh Restoration and Sea-Level Rise Adaptation

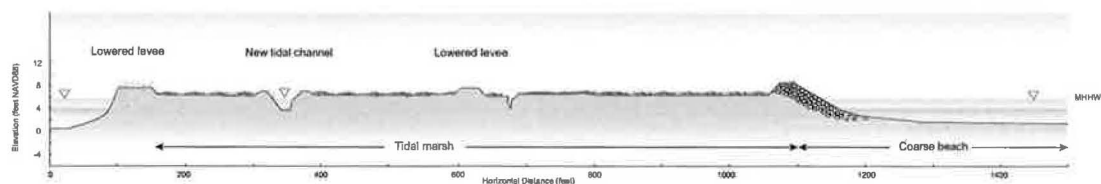
Existing Conditions



Interim Construction Conditions



Design Conditions

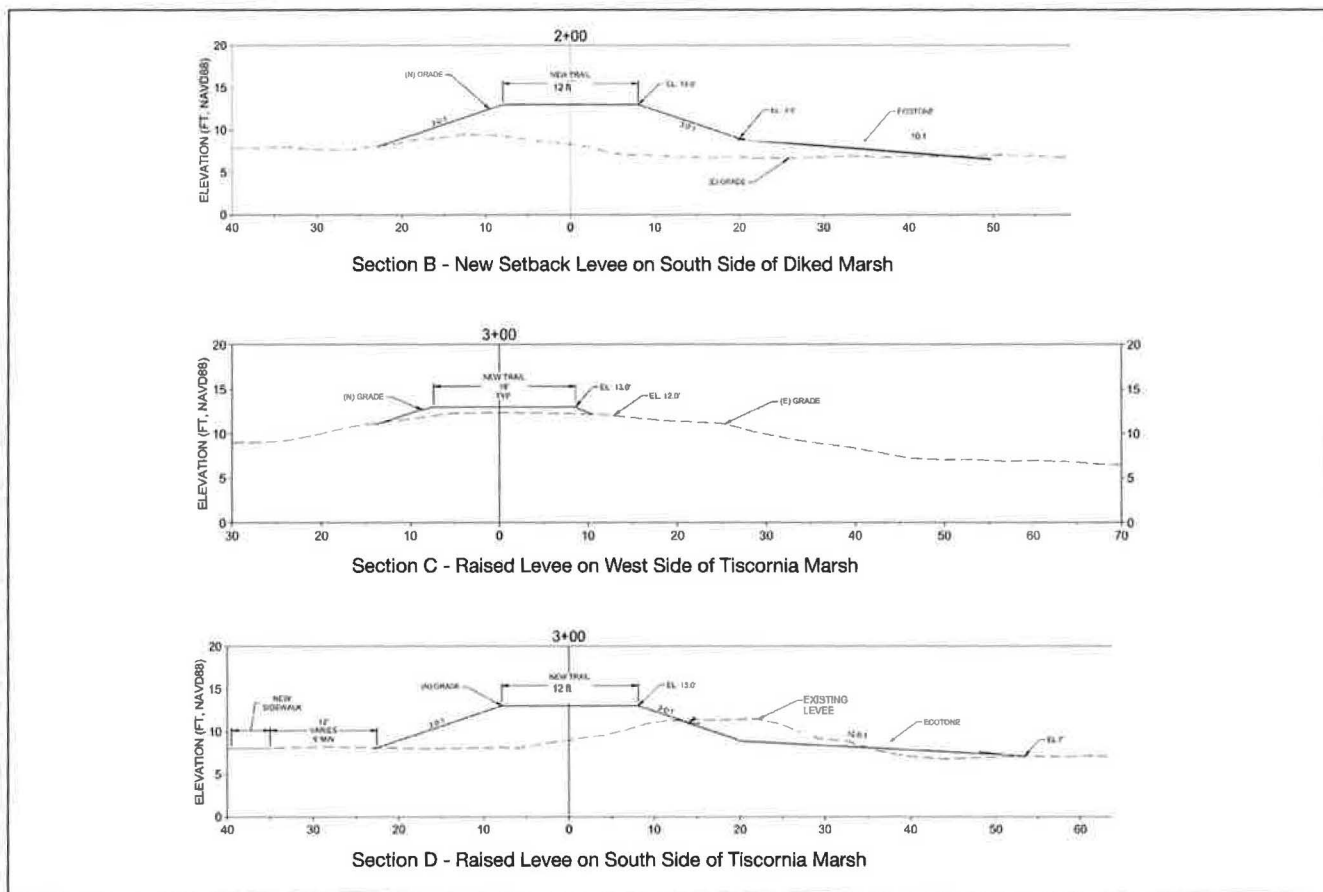


SOURCE: ESA 2020

Tiscomla Marsh Habitat Restoration and Sea Level Rise Adaptation Project

ESA

**Figure 2**  
Section A – Preliminary Schematic Marsh Cross-section



SOURCE: ESA, 2020

Tiscornia Marsh Habitat Restoration and Sea Level Rise Adaptation Project



**Figure 3**  
Sections B, C, and D - Preliminary Levee Cross-sections

**EXHIBIT B**

**NOTICE OF PREPARATION**





# SAN RAFAEL

THE CITY WITH A MISSION

## NOTICE OF PREPARATION

**Date of Mailing:** January 25, 2021

<b>TO:</b>	Office of Planning and Research State Clearinghouse 1400 Tenth Street, Room 212 Sacramento, CA 95814	<b>FROM:</b>	City of San Rafael Community Development Department Attn: Paul Jensen, Community Development Director 1400 Fifth Ave San Rafael, CA 94901
	Responsible and Trustee Agencies, Utility Providers, Organizations, Neighboring Property Owners, Neighboring Occupants, and Interested Parties		

### NOTICE OF PREPARATION OF AN ENVIRONMENTAL IMPACT REPORT AND SCHEDULED SCOPING MEETING FOR THE TISCORNIA MARSH RESTORATION PROJECT EIR

The City of San Rafael (City) is preparing an Environmental Impact Report (EIR) for the Tiscornia Marsh Restoration Project. The project proposes to restore the tidal marsh/mudflats located north and outboard of Canal Street and the diked marsh located north of the Albert J. Boro Community Center/Pickleweed Park playfields. Pursuant to the California Environmental Quality Act (CEQA) Guidelines, this project is subject to environmental review. It has been determined that the project has the potential to result in environmental impacts and the preparation of an EIR is recommended to assess these impacts. The City is the "Lead Agency" for the project and is the public agency with the principal responsibility for approving and carrying out the project.

The City is issuing this Notice of Preparation (NOP) to invite comments on the scope and content of study for the EIR. This NOP is being sent to local agencies, nearby residents, and other interested parties. When the draft EIR is published, it will be sent to all parties who respond to this NOP or who otherwise indicate that they would like to receive a copy of the draft EIR.

**RESPONDING TO THIS NOP:** Responses to this NOP and any related questions or comments regarding the scope or content of the Draft EIR must be directed in writing to: **Paul Jensen, Community Development Director, City of San Rafael, 1400 Fifth Avenue, San Rafael, CA 94901** or by e-mail to [paul.jensen@cityofsanrafael.org](mailto:paul.jensen@cityofsanrafael.org).

Comments on the NOP must be received at the above mailing or e-mail address within 30 days of receipt of this notice, or **before Friday, February 26, 2021 at 5:00 PM.** Please reference the project title of "Tiscornia Marsh Restoration Project" in all correspondence.

Responses to this NOP should focus, specific to this project, on the potentially significant environmental effects that the project may have on the physical environment, ways in which those effects might be minimized, and potential alternatives to the project that should be addressed in the EIR. This focus aligns with the purpose of the EIR to inform the public about these aspects of the project.

**EXISTING CONDITIONS AND PROJECT LOCATION:** The Tiscornia Marsh site covers 20 acres of tidal marsh and bay lands located north and outboard of East Canal Street (APN 009-142-01). The property, which is owned by Marin Audubon Society, is bound to the: a) south by a shoreline levee, Schoen Park (small City-owned park/playground) and Canal Street; b) west by the Albert J Boro Community Center and Pickleweed Park; c) east by the San Rafael Bay; and d) north by the San Rafael Creek. The neighboring Albert J Boro Community Center and Pickleweed Park covers approximately 15 acres which includes an active community center, community park and an expansive playfield (APNs 009-032-06, 08 and 09). Included in the City-owned holdings is an undeveloped, four-acre diked salt marsh, which is located north of the large playfield. Although subject to flooding in the winter months, this diked salt marsh is enclosed by a perimeter level and contains a well-used, informal pedestrian trail, which loops through the area. The Tiscornia Marsh and environs are presented in the attached Site Area Map (Attachment 1).

The Tiscornia Marsh has experienced considerable erosion along its bay ward edge, which is attributed to direct wave action from the bay. Over the last 30 years, approximately three acres of the tidal marsh has been lost to this erosion, which has dramatically impacted habitat for species such as the Ridgway's rail and salt marsh harvest mouse. Under current conditions, it is expected that this erosion will continue and will likely increase as sea level rises. The second critical issue for this general area is flooding. The adjacent Canal neighborhood is low-lying and is currently at risk to coastal flooding (as well as sea level rise).

**PROJECT DESCRIPTION:** Tiscornia Marsh would be restored to its former extents by beneficially reusing dredged material from local sources. A coarse beach would be constructed along the bay ward edge of the restored marsh to resist future erosion. Tidal action would also be restored to the City-owned diked marsh at the north end of Pickleweed Park. Altogether, the project would reconstruct approximately four acres of eroded tidal marsh, preserve, and protect the approximately eight remaining acres of Tiscornia Marsh, and restore approximately five acres of diked marsh by reconnecting it to tidal inundation. The Project would also construct a new 600-foot setback levee and improve approximately 1,100 feet of shoreline levee to achieve greater flood protection, public access, and habitat benefits. Major project elements include the: a) development of a coarse beach; b) reconstruction of the eroded tidal marsh; c) restoring the diked marsh to the bay; d) shoreline levee improvements; and e) development of an ecotone slope.

Project plans, project description and technical studies for this project can be found on the project web page at <https://www.cityofsanrafael.org/tiscornia-marsh/>.

**POTENTIAL ENVIRONMENTAL EFFECTS:** An Initial Study Checklist has NOT been prepared to accompany this NOP. The scoping of the topic areas to be studied in the EIR will be determined and confirmed as part of this NOP process. However, as part of the initial scoping review, City staff will be recommending that the following the EIR address the following potential environmental effects: Aesthetics, Air Quality, Biological Resources, Cultural Resources, Geology/Soils, Hazards/Hazardous Materials, Noise, Public Services, Recreation, Greenhouse Gas Emissions, Hydrology and Water Quality, Transportation/Traffic, and Utilities/Service Systems. The EIR will examine project and cumulative effects and a reasonable range of alternatives to the project that may be capable or reducing or avoiding potential environmental effects that may be identified for the project. The topics of Agricultural and Forestry Resources, Mineral Resources, and Population/Housing will not be addressed in the EIR as these do not apply to the project or project site.

**SCOPING MEETING:** A scoping meeting will be held before the City of San Rafael Planning Commission on Tuesday, February 23, 2021 at 7 PM. **COVID-19 ADVISORY NOTICE:** Consistent with Executive Orders No.-25-20 and No. N-29-20 from the State of California Shelter in Place Order, the San Rafael Planning Commission hearing listed above WILL NOT be physically open to the public and the meeting will be streamed live to YouTube at [www.youtube.com/sanrafael](http://www.youtube.com/sanrafael). Instructions on how to participate online, will be available on the YouTube channel. This virtual meeting will include a brief overview of the EIR process and allow time for comments on the scope of the EIR.

**For More Information:** For additional information on the project or if you wish to be placed on a mailing list to receive further information as the project progresses, please contact Paul Jensen at (415) 485-5064, [paul.jensen@cityofsanrafael.org](mailto:paul.jensen@cityofsanrafael.org) or the mailing address above.

Date: January 25, 2021

Signature:

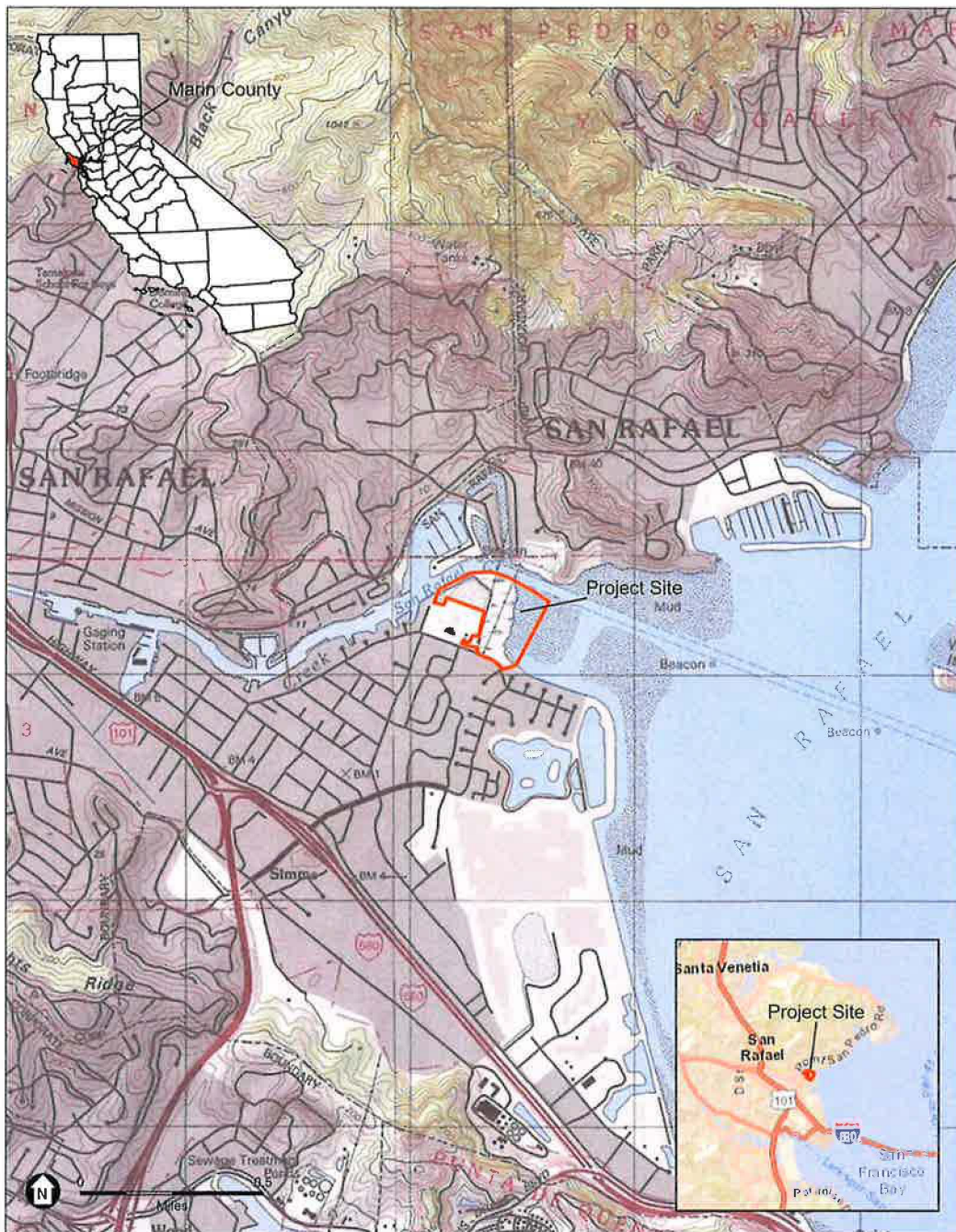


Name/Title: Paul A. Jensen, Community Development Director

Reference: California Code of Regulations, Title 14, (State CEQA Guidelines) Sections 15082(A), 15103, 15375

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SOURCE: USGS, Esri

Project Name

**Figure 1**

Regional Setting

Tiscornia Marsh Restoration and Sea level Rise Adaptation





SOURCE: Aerial Imagery: Esri

160888.01



**Figure 2**  
Project Location  
Tiscornia Marsh Restoration and Sea level Rise Adaptation



# San Francisco Bay Conservation and Development Commission

375 Beale Street, Suite 510, San Francisco, California 94105 tel 415 352 3600 fax 888 348 5190

State of California | Gavin Newsom – Governor | [info@bcdc.ca.gov](mailto:info@bcdc.ca.gov) | [www.bcdc.ca.gov](http://www.bcdc.ca.gov)

*Transmitted Via Electronic Mail*

March 22, 2021

Paul Jensen  
City of San Rafael  
1400 Fifth Avenue  
San Rafael, California 94901

**SUBJECT:** Notice of Preparation of a Draft Environmental Impact Report for the Tiscornia Marsh Restoration Project; SCH# 2021020362

Dear Mr. Jensen:

Thank you for the opportunity to comment on the Notice of Preparation (NOP) of a Draft Environmental Impact Report (DEIR) for the Tiscornia Marsh Restoration Project, which our office received on January 27, 2021. The proposed project is located on a 28-acre site that will restore and create tidal marsh habitat located north and outboard of Canal Street and restore the diked marsh located north of the Albert J. Boro Community Center/Pickleweed Park playfields. The NOP states that the project would involve reconstruction of approximately 4 acres of eroded tidal marsh on the mudflats, protection of the approximately 8 acres of remaining Tiscornia Marsh, and restoration of 5 acres of diked marsh to tidal marsh. The project would also include construction of a new 600-foot setback levee and improving approximately 1,100 feet of shoreline levee for flood protection, public access, and habitat benefits. The project elements include construction of a coarse beach outboard of the reconstructed marsh, beneficial reuse of sediment to reconstruct the eroded marsh, restoring the diked marsh to tidal connection, shoreline levee improvements, and an ecotone slope.

The Commission is a responsible agency for this project and will rely on the DEIR when it considers the project. The project is not specific enough at this time for us to comment on every issue raised with respect to the Commission's laws and policies. However, we have prepared comments outlining specific Commission issues that should be addressed either in the DEIR or through the Commission permitting process. Once we receive more details on the project, we will be able to provide more detailed responses and can work closely with the project sponsors to ensure the project is consistent with the Commission's laws and policies.



Although the Commission itself has not reviewed the NOP and associated materials, the staff comments are based on the McAteer-Petris Act, the Commission's San Francisco Bay Plan (Bay Plan), the Commission's federally approved management program for the San Francisco Bay, and the federal Coastal Zone Management Act (CZMA). The staff comments are based on the preliminary project details presented in the NOP. As more details become available, the staff will provide additional comments of greater specificity and direction.

### **Commission Jurisdiction**

From the NOP, it appears that a portion of the project would be located within the Commission's jurisdiction. The Commission's jurisdiction includes both the Bay itself and the "shoreline band." The shoreline band extends 100 feet inland from and parallel to the Bay shoreline. The Bay is defined as all tidal areas of the Bay up to the line of mean high tide, or in areas of tidal marsh includes all areas up to five feet above mean sea level. The Commission's jurisdiction also includes all areas formerly subject to tidal action that have been filled since September 17, 1965. Additionally, the Commission's Bay jurisdiction on San Rafael Creek was previously determined by Commission Staff to end at the westernmost powerline at the mouth of San Rafael Creek. Within this jurisdiction, Commission permits are required for activities including the placement of fill, substantial changes in use, and dredging. Permits are issued if the Commission finds the activities are consistent with the McAteer-Petris Act and the policies of the Bay Plan. Please note that the McAteer-Petris Act is a State Law and is administered by the Commission, which is a State agency. The Commission has not yet reviewed the details of the project quantities and impacts in the Commission's jurisdiction to make a determination as to whether this project qualifies as an administrative permit, as noted on page 5 of the project description, or as a major permit that requires a public hearing and vote before the Commission. The DEIR should mention both potential types of Commission permits.

Pursuant to the CZMA, the Commission is also required to review federal projects for effects on the coastal zone, whether or not the projects are located within the Commission's coastal zone as defined by state law, and to concur with or object to the federal agency's determination or federal permit applicant's certification that a project is consistent with the Commission's laws and policies. The "Anticipated Regulatory Requirements" section of the NOP project description mentions that a number of federal approvals would be required for the project. These federal actions are also subject to the Commission's regulatory authority under the CZMA. Where a project is subject to both the Commission's state law and federal jurisdictions, the Commission's Coastal Management Plan provides that issuance of a permit under the McAteer-Petris Act will be deemed to be a concurrence with a consistency certification under the CZMA.

The DEIR should provide a detailed and complete project description, clarify where the project would occur within both the Commission's Bay and 100-foot shoreline band jurisdictions, and identify the Commission's permitting role and the federal government's permitting role. The DEIR should also identify the anticipated life of the project.



**Commission Law and Bay Plan Policies Relevant to the Project***Bay Fill*

Section 66605 of the McAteer-Petris Act sets forth the criteria necessary to authorize placing fill in the Bay and certain waterways. It states, among other things, that further filling of the Bay should only be authorized if it is the minimum necessary to achieve the purpose of the fill and if harmful effects associated with its placement are minimized. According to the Act, fill is limited to water-oriented uses or minor fill for improving shoreline appearance or public access and should be authorized only when no alternative upland location is available for such purpose. The DEIR should indicate the amount of fill that would be removed, if any, and the amount of new fill for the project, as well as the uses associated with the proposed new fill for each area. Depending on the amount of net total fill proposed and the uses proposed on fill, the Commission may require that fill be removed elsewhere in the Bay or on the shoreline to mitigate the amount of new fill proposed. Based on the project description in the NOP, it appears that much of the proposed fill would be for habitat purposes, which is consistent with the water-oriented uses allowable in the McAteer-Petris Act.

*Public Access and Recreation*

Section 66602 of the McAteer-Petris Act states, in part, “that maximum feasible public access, consistent with a proposed project, should be provided.” The construction of the restored habitat and improved levee trails will impact the existing public access spaces by reducing the public access area and changing the experience of the existing required public access along the perimeter levee around the diked area and Schoen Park. In addition to minimizing adverse impacts on usability and offsetting losses of existing public access areas, maximum feasible public access consistent with the proposed project must also be provided.

The project includes a new 600-foot setback levee and 1,100 feet of improved levee that will provide flood protection, habitat, and public access. In order to fully evaluate the public access and recreation proposed with the project, the DEIR should include more detailed information regarding existing and proposed public access incorporated in this and other currently proposed City projects within the site area, including the City of San Rafael’s proposed placement of parking at the former Schoen Park. The design of the new and improved public access areas should be fully described in the DEIR to allow the Commission to fully evaluate the public access proposed with the project. The DEIR should also consider the possible impacts, including views to the water, that the project may have on the usability and accessibility at other nearby public spaces.

The Bay Plan Public Access policies also provide that “[p]ublic access to some natural areas should be provided to permit study and enjoyment of these areas,” recognizing that “some wildlife are sensitive to human intrusion... [and, f]or this reason, projects in such areas should be carefully evaluated in consultation with appropriate agencies to determine the appropriate location and type of access to be provided.” The Habitat Assessment references existing sensitive habitats, including tidal marsh, mudflats, native vegetation, and open water area

present on the site as well as proposed creation of new habitat such as, tidal marsh, beach area, transition zone, and wetlands and ponds. The DEIR should discuss how the project will consult with appropriate agencies, including but not limited to California Department of Fish and Wildlife (CDFW), U.S. Department of Fish and Wildlife (USFWS), National Marine Fisheries Service (NMFS), on the question of the compatibility of the proposed public access with aquatic life, wildlife, and plant communities presently at the site, as well as with the habitat creation and enhancement components of the proposed project. To allow the Commission to understand the potential effects of public access on wildlife, the DEIR should also provide information on the species and habitats at the project site, the likely human use of the access, and the potential for significant adverse effects (such as impacts on endangered species, impacts on breeding and foraging areas, or fragmentation of wildlife corridors). Please provide this information both in the site-specific context and within a regional context, identifying any siting, design, or management strategies that could be employed to avoid or minimize adverse effects on wildlife, and how the effects of public access on wildlife may be monitored over time to determine whether revisions of management strategies are needed.

The DEIR should discuss in detail the proposed shoreline trail network, its connections to the Bay Trail, the adjacent community, and its links to other shoreline parks and nearby public access areas. Please indicate whether the public access areas permit barrier-free access for persons with disabilities. Please also provide detail on anticipated public transit use and connections to the project site and the shoreline, as well as the siting and availability of parking for those arriving by car to visit the shoreline. Please also detail the proposed maintenance program for public areas. The project may necessitate review by the Commission's Design Review Board to advise on the adequacy of the proposed public access. This determination will be based upon the size and complexity of the project and the anticipated impacts to existing public access on the site.

#### *Fish, Other Aquatic Organisms and Wildlife*

The Bay Plan policies on Fish, Other Aquatic Organisms and Wildlife address the benefits of fish, other aquatic organisms and wildlife in the Bay, and the importance of protecting the native species, including candidates for listing, threatened, and endangered species, and the Bay's habitats (tidal marshes, tidal flats, and subtidal habitats). Policy No. 1 requires that the Bay's tidal marshes, tidal flats and subtidal habitat are to be conserved, restored, and increased "to the greatest extent feasible." Additionally, Policy No. 4 states that, "[i]n reviewing or approving habitat restoration projects or programs the Commission should be guided by the best available science, including regional goals, and should, where appropriate, provide for a diversity of habitats for associated native aquatic and terrestrial plant and animal species." Additionally, Policy No. 5 allows "fill or a minimum amount of dredging... to enhance or restore fish, other aquatic organisms and wildlife habitat..." And, Policy No. 6 provides conditions for the evaluation of the allowable fill, such as minimizing near term impacts, providing substantial net benefits for Bay habitats and native species, and being appropriately scaled for the project and sea level rise adaptation measures in accordance with the best available science.

The DEIR should address how the construction and use of the proposed project would meet these policies and avoid or minimize impacts to species and habitat in the Bay. The DEIR should include an analysis of the potential impacts of converting mudflat habitat in the project area to tidal marsh and beach habitat, and include impacts to native species (fish, shorebirds, etc.) and special status species that currently utilize this portion of the Bay. The analysis should evaluate these impacts on the project scale and larger regional scale, and evaluate whether the project would achieve regional goals. The DEIR should include information on how these impacts will be avoided, minimized, and/or mitigated.

#### *Tidal Marshes and Tidal Flats, and Subtidal Areas*

The Bay Plan policies for these sections limit filling, diking and dredging projects that would substantially harm tidal marshes, tidal flats, and subtidal areas. Tidal Marshes and Tidal Flats Policy No. 1 requires that a project “be allowed only for purposes that provide substantial public benefits and only if there is no feasible alternative.” Policy No. 2 requires that “[a]ny proposed filling, diking, or dredging project should be thoroughly evaluated to determine the effect of the project on tidal marshes and tidal flats, and designed to minimize, and if feasible, avoid any harmful effects.” Policy No. 3 establishes the same test for the transition zone present between tidal and upland habitats, and that “[w]here a transition zone does not exist and it is feasible and ecologically appropriate, shoreline projects should be designed to provide a transition zone between tidal and upland habitats.” The DEIR should discuss the project’s potential impacts to tidal marsh and tidal flat habitats. The DEIR should also include information on how these impacts will be avoided, minimized, and/or mitigated.

Tidal Marshes and Tidal Flats Policy No. 6 states that “[a]ny habitat projects should include clear and long-term and short-term biological and physical goals, success criteria, a monitoring program, and as appropriate, an adaptive management plan.” The DEIR should include an evaluation of: the adaptive capacity of the project so that it is resilient to sea level rise and climate change; the project impacts on the Bay and local sediment transport and budget; localized sediment erosion and accretion; the role of tidal flows; potential spread of invasive species; rates of vegetation colonization; expected use of the project by wildlife and other aquatic organisms; appropriate buffer between shoreline development and wildlife habitats on site, and the inclusion of migration space as sea level rises; how the project meets regional restoration goals; whether the project would be sustained by natural processes; and how the project restores, enhances, and creates connectivity across Bay habitats at a local, sub-regional, and/or regional scale. The DEIR should evaluate the design of the proposed tidal channels interior to the site and whether the design allows for sediment accretion on the site to help the marsh keep pace with sea level rise. Additionally, the details of tidal marsh creation and restoration, such as channel sizes and breach locations, should be informed by the best available science and evaluated in the DEIR.

Additionally, Subtidal Areas Policy No. 1 establishes the method of evaluating proposed filling or dredging of subtidal areas, and establishes that “[p]rojects in subtidal areas should be designed to minimize and, if feasible, avoid any harmful effects.” However, there are stricter standards for projects in scarce subtidal areas, and subtidal areas with an abundance and diversity of fish, other aquatic organisms and wildlife, including eelgrass beds. Policy No. 2 states in part that “[f]illing, changes in use, and dredging in these areas should therefore be allowed only if: (a) there is no feasible alternative; and (b) the project provides substantial public benefits.” The DEIR should evaluate whether any scarce subtidal areas occur in the project area, and include information on how impacts to subtidal areas will be avoided, minimized, and/or mitigated. If scarce subtidal areas will be impacted, the DEIR should discuss the public benefits that would accrue from the proposed Bay fill or dredging, and evaluate these benefits against the public detriment from the loss of important habitat values.

The DEIR should quantify all habitat impacts and benefits associated with the project. Habitat monitoring is likely to be required following the completion of the project to ensure success criteria are being met and this monitoring would be consistent with the purpose, size, impact, level of uncertainty, and/or expected life of the project. The DEIR should also include any proposed adaptive management actions or operations that may be necessary. Any proposed mitigation should be included and evaluated in the DEIR.

#### *Water Quality*

The Water Quality policies in the Bay Plan address water quality and require Bay water pollution to be prevented to the greatest extent feasible. New projects are required to be sited, designed, constructed, and maintained to prevent or minimize the discharge of pollutants in the Bay by controlling pollutant sources at the project site, using appropriate construction materials, and applying best management practices. The DEIR should address how the construction and land use of the proposed project would be designed to control pollution to the Bay, including litter management. The DEIR should identify whether any portions of the project site are polluted with toxic or hazardous substances, any anticipated effects associated with such pollution, and the role other agencies will take in the review. The DEIR should include an evaluation of the potential water quality impacts associated with the containment methods used for the dredged sediment, construction methods for of the project, and any potential discharges that may be necessary during the construction of the project. The analysis should include avoidance and minimization measures to reduce impacts to water quality.

Water Quality Policy No. 7 requires that, whenever practicable, native vegetation buffer areas should be used in place of hard shoreline and bank erosion control methods (e.g., rock riprap) where appropriate and practicable. The DEIR should identify the approach the project will take in terms of shoreline armoring at the site, and discuss where the use of vegetation in favor of hard shoreline protection would be appropriate and feasible. The DEIR should also discuss the anticipated performance of the softer shoreline protection measures that are proposed for the project site.

*Climate Change*

Climate Change Policy No. 7 states that, “[u]ntil a regional sea level rise adaptation strategy can be completed, the Commission should evaluate each project proposed in vulnerable areas on a case-by-case basis to determine the project’s public benefits, resilience to flooding, and capacity to adapt to climate change impacts. The following specific types of projects have regional benefits, advance regional goals, and should be encouraged, if their regional benefits and their advancement of regional goals outweigh the risk from flooding...(d) a natural resource restoration or environmental enhancement project.” Additionally, the Tidal Marshes and Tidal Flats Policy No. 6 says that habitat projects should include clear and specific long-term and short-term biological and physical goals and that the “[d]esign and evaluation of the project should include an analysis of: (a) how the project’s adaptive capacity can be enhanced so that it is resilient to sea level rise and climate change...” amongst other criteria used to evaluate the project. If the project is determined to be a larger shoreline project, Climate Change Policy 2 states that, “a risk assessment[s] should be prepared...based on the estimated 100-year flood elevation that takes into account the best estimates of future sea level rise and current flood protection and planned flood protection...for the proposed project or shoreline area. A range of sea level rise projections for mid-century and end of century based on the best scientific data available should be used in the risk assessment.” Policy No. 3 states that where such assessments show vulnerability to public safety, projects “should be designed to be resilient to a mid-century sea level rise projection” and an “adaptive management plan should be developed to address long-term impacts” of sea level rise at the end of century.

The project includes both habitat features and shoreline protection. For the project site, the DEIR should identify the Mean Higher High Water, the 100-year-flood elevation, mid- and end-of-century rise in sea level projections, anticipated site-specific storm surge effects, and a preliminary assessment of the project’s vulnerability to future flooding and sea level rise. The Commission currently uses the OPC 2018 State Guidance on Sea Level Rise, which the Commission considers the best available science on sea level rise. Please use this document when evaluating the project design and potential future flooding and sea level rise impacts. The DEIR should also describe how the project has been designed for adapting to, tolerating, and managing sea level rise and shoreline flooding at the site to ensure the project is resilient to mid-century sea level rise projections, and how it may adapt to end of the century projections. The DEIR should indicate whether any proposed long-term adaptation strategies would adversely affect or reduce in size public access areas, and possible ways to minimize these effects.

The low-lying Canal neighborhood adjacent to the project site is currently below the FEMA 100-year flood and may be increasingly susceptible to sea level rise, as stated in the project description. The existing berm around the project site is an un-accredited berm and is below the 100-year base flood elevation plus the required two feet of free board. There is a mention that the current Tiscornia Marsh and Pickleweed Park shoreline levee segments are currently at risk of overtopping during an extreme coastal flood event, and resulting in flooding in some

portions of the Canal neighborhood. The DEIR should include more detail on how the new shoreline protection will meet the flood protection goals of the project and protect the upland land uses from future flooding and sea level rise.

### *Shoreline Protection*

The Bay Plan establishes criteria by which new shoreline protection projects may be authorized and by which existing shoreline protection may be maintained or reconstructed. Shoreline Protection Policy No. 1 requires that shoreline protection be authorized if it is necessary to provide flood or erosion protection for an existing development, use, or infrastructure, or for a proposed development, use, or infrastructure. Further, the policy requires that the shoreline protection be appropriate for the project site, uses to be protected, and the causes or conditions of erosion and flooding at the site. And, that the project is properly engineered to “provide erosion control and flood protection for the expected life of the project based on a 100-year flood event that takes future sea level rise into account.” Additionally, Shoreline Protection Policy No. 4 requires that “shoreline protection projects should include provisions for nonstructural methods such as marsh vegetation and integrate shoreline protection and Bay ecosystem enhancement, using adaptive management,” whenever feasible and appropriate. New shoreline protection projects are also required to avoid adverse impacts to natural resources and public access, and provide mitigation or alternative public access when avoidance is not possible.

The DEIR should catalog the existing shoreline protection structures at the project site and identify where maintenance or reconstruction is required. The DEIR should also discuss in detail the proposed methods for new shoreline protection, including an analysis of the potential to adversely impact natural resources or public access, and an evaluation of the appropriateness of the protection for the project site, including shoreline orientation, wave climate, geotechnical stability, etc. The proposed project includes some traditional methods of shoreline protection, such as levees and the jetty, and softer shoreline protection methods in some areas, such as the beach, marsh, and transitional zone habitats. If there are areas of shoreline protection where softer methods are not proposed, please consider if they would be feasible in those locations. Please also address the stability of the “flexible jetty structure” and the beach in the DEIR. These features would occur near the navigation channel used by boats and the DEIR should analyze the stability of this feature and appropriateness for the site. The DEIR should evaluate the appropriateness of the shoreline protection design for the existing physical and biological conditions at the site and future sea level rise conditions based upon the life of the project.

The project description mentions that construction may occur over a three to four-year period and that the diked marsh area would be restored prior to the construction of the beach and tidal marsh habitat out into the Bay, to the extent feasible. The DEIR should evaluate the timing of this construction with receiving dredged sediment and the construction of the beach, which seems to need to be constructed in phases. The DEIR should clarify the beach construction timing/duration and update the construction timing if necessary.

### *Beneficial Reuse*

The Bay Plan Dredging Policy No. 11(a) requires that a site meet a number of criteria to be approved for beneficial reuse of dredged sediment to create, restore, or enhance natural resources of the Bay. The project needs to: (1) include detailed site specific studies appropriate to the size and potential impact of the project that include, but are not limited to site morphology and physical conditions, biological considerations, the potential for fostering invasive species, dredged sediment stability, and engineering aspects of the project, (2) include adequate monitoring and a management plan to help ensure the success and permanence of the project and that an agency or organization with fish and wildlife expertise will manage and operate the site for the life of the project, (3) use only clean sediment suitable for aquatic disposal and after the input from the Regional Water Quality Control Board, Dredged Material Management Office and other appropriate agencies on sediment suitability has occurred, (4) not place dredged sediment in areas with high or rare existing natural resource values, such as eelgrass beds and tidal marsh and mudflats, unless the material would be needed to protect or enhance habitat, and would not significantly decrease the overall amount of any particular habitat within the embayments of San Francisco Estuary, (5) have at least one of the agencies (CDFW, NMFS, and USFWS) that supports the proposed project, and (6) include designs and goals that incorporate the best available science on the use of dredged sediment for habitat projects. Additionally, if the project is considered a research or pilot project, there are criteria laid out in Policy No. 11(c) to evaluate whether the site should be approved for beneficial reuse.

The DEIR should address the appropriateness of the project design and construction methods to the particular site, and the address the criteria mentioned above in order for the site to be approved for accepting and using dredged sediment to create tidal marsh habitat. The DEIR should also address the site specific and regional context of the habitat conversion from mudflats to tidal marsh that would occur and analyze whether this project alone or cumulatively with other projects would decrease the overall amount of tidal marsh habitat near the site and within the larger regional context. Regarding sediment containment, please include additional detail on how the sediment would be contained in areas where the beach is not being constructed. If other methods of placement may be used, including hydraulic placement of dredged sediment, this method should also be evaluated in the DEIR.

### *Navigational Safety*

The DEIR should include an analysis of the placement of the crane platform and offloading area for barges delivering dredged sediment or equipment and their potential location near the navigation channel within San Rafael Creek and how impacts to navigation can be reduced during the project construction.

### *Environmental Justice*

The Commission adopted policies on Environmental Justice and Social Equity in late 2019, those policies are now in effect. The project site is located adjacent to the Al Boro Community, Pickleweed Park, and the nearby Canal neighborhood in the City of San Rafael. The Canal



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neighborhood is low-lying in elevation and is adjacent to Tiscornia Marsh. The project appears to be located in an area that the Commission's Community Vulnerability Mapping Tool indicates has the highest social vulnerability and high contamination vulnerability. The Bay Plan Environmental Justice and Social Equity Policy No. 4 requires that projects occurring in identified vulnerable communities include the impacted community in discussions of potential disproportionate impacts, and that the project include measures to mitigate for any disproportionate adverse impacts on the vulnerable community that may be identified. The DEIR should provide detail on how the planning process for the project includes environmental justice and social equity considerations in the project designs. This information on the planning process should include details on how the project has included and/or will include equitable, culturally-relevant community outreach and engagement to potentially impacted communities in underrepresented, vulnerable, or disadvantaged communities near the project site. This information should also include how community concerns were addressed.

#### *Public Trust*

The public trust doctrine holds that navigable waters and tidal lands are the property of the state and must be protected for public use and enjoyment. The Bay Plan policies on public trust lands state, in part, that when taking actions on such land, the Commission "should assure that the action is consistent with the public trust needs for the area and, in the case of lands subject to legislative grants, would also assure that the terms of the grant are satisfied and the project is in furtherance of statewide purposes." Public trust uses cited in the Bay Plan include commerce, navigation, fisheries, wildlife habitat, recreation, and open space. The DEIR should indicate where the State's public trust requirements apply to the proposed project, discuss how the project affects the public trust, and indicate that the Commission's determination regarding a project's consistency with the public trust doctrine is done independently and in consultation with the State Lands Commission.

Thank you for providing the staff with an opportunity to review the NOP and associated documents for the Tiscornia Marsh Restoration Project. We recognize the importance and scope of this project and hope these comments aid you in preparation of the DEIR. We look forward to working with you and the project sponsors as the project is developed and through the permitting stage. If you have any questions regarding this letter or the Commission's policies and permitting process, please do not hesitate to contact me at 415/352-3624 or [anniken.lydon@bcd.ca.gov](mailto:anniken.lydon@bcd.ca.gov).

Sincerely,

DocuSigned by:  
  
CA403961512F409...

ANNIKEN LYDON

Senior Environmental Scientist (Specialist)

AL/ra

cc: State Clearinghouse

Ms. Barbara Salzman, Marin Audubon



State of California – Natural Resources Agency

DEPARTMENT OF FISH AND WILDLIFE

**Bay Delta Region**

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**GAVIN NEWSOM, Governor**  
**CHARLTON H. BONHAM, Director**



March 22, 2021

Mr. Paul Jensen, Development Director

City of San Rafael, Community Development Department

1400 Fifth Avenue

San Rafael, CA 94901

[Paul.Jensen@cityofsanrafael.org](mailto:Paul.Jensen@cityofsanrafael.org)

**Subject:** Tiscornia Marsh Restoration Project, Notice of Preparation of a Draft Environmental Impact Report, SCH No. 2021020362, City of San Rafael, Marin County

Dear Mr. Jensen:

The California Department of Fish and Wildlife (CDFW) has reviewed the Notice of Preparation (NOP) of a draft Environmental Impact Report (EIR) for the Tiscornia Marsh Restoration Project (Project) pursuant to the California Environmental Quality Act (CEQA) (Pub. Resources Code, §21000 et seq.; hereafter CEQA; Cal. Code Regs., §15000 et seq.; hereafter CEQA Guidelines).

Thank you for the opportunity to provide comments and recommendations regarding those activities involved in the Project that are within CDFW's area of expertise and relevant to its statutory responsibilities (Fish and Game Code, §1802), and/or which are required to be approved by CDFW (CEQA Guidelines, §§15086, 15096 and 15204).

## **CDFW ROLE**

CDFW is a Trustee Agency with responsibility under the California Environmental Quality Act (CEQA; Pub. Resources Code, §21000 et seq.) pursuant to CEQA Guidelines §15386 for commenting on projects that could impact fish, plant, and wildlife resources (e.g., biological resources). CDFW is also considered a Responsible Agency if a project would require discretionary approval, such as permits issued under the California Endangered Species Act (CESA), the Native Plant Protection Act, the Lake and Streambed Alteration (LSA) Program, and other provisions of the Fish and Game Code that afford protection to the state's fish and wildlife trust resources.

## **REGULATORY REQUIREMENTS**

### **California Endangered Species Act**

Please be advised that a CESA Incidental Take Permit (ITP) should be obtained pursuant to Fish and Game Code §2081(b) if the Project has the potential to result in

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take of plants or animals listed under CESA, either during construction or over the life of the Project. Take, as defined by Fish and Game Code §86 is to “hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill”. Issuance of a CESA ITP is subject to CEQA documentation. The CEQA document must specify impacts, mitigation measures, and a mitigation monitoring and reporting program. If the Project will impact CESA listed species, early consultation is encouraged, as significant modification to the Project and mitigation measures may be required in order to obtain a CESA ITP.

CEQA requires a Mandatory Finding of Significance if a project is likely to substantially impact threatened or endangered species (CEQA §§21001(c), 21083, and CEQA Guidelines §§15380, 15064, 15065). Impacts must be avoided or mitigated to less-than-significant levels unless the CEQA Lead Agency makes and supports Findings of Overriding Consideration (FOC). The CEQA Lead Agency’s FOC does not eliminate the Project proponent’s obligation to comply with Fish and Game Code §2080.

### **Lake and Streambed Alteration Agreement**

CDFW requires an LSA Notification, pursuant to Fish and Game Code §1600 et. seq., for Project activities affecting lakes or streams. Notification is required for any activity that may substantially divert or obstruct the natural flow; change or use material from the bed, channel, or bank including associated riparian or wetland resources; or deposit or dispose of material where it may pass into a river, lake, or stream. Work within ephemeral streams, washes, watercourses with a subsurface flow, and floodplains are subject to notification requirements. CDFW will consider the CEQA document for the Project and may issue an LSA Agreement. CDFW may not execute the final LSA Agreement until it has complied with CEQA as a Responsible Agency.

### **Migratory Birds and Raptors**

CDFW also has authority over actions that may disturb or destroy active nest sites or take birds without authorization. Fish and Game Code §§3503, 3503.5, and 3513 protect birds, their eggs, and nests. Fully protected bird species may not be taken or possessed at any time, except for necessary scientific research, including efforts for recovery (Fish and Game Code, §3511). Migratory birds are also protected under the federal Migratory Bird Treaty Act.

### **PROJECT LOCATION**

The Project is an approximately 20-acre site consisting of tidal marsh and bay lands located north and outboard of East Canal Street (APN 009-142-01). The marsh/bay lands property is owned by the Marin Audubon Society and is surrounded on the south by a shoreline levee, Schoen Park (small, city-owned park and playground), and Canal

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Street; on the west by the city-owned Albert J. Boro Community Center and Pickleweed Park; on the east by San Rafael Bay; and on the north by San Rafael Creek.

## **PROJECT DESCRIPTION**

The Project includes restoration of tidal marsh and mudflats north and outboard of Canal Street, as well as restoration of the city-owned diked marsh north of the Community Center and Pickleweed Park playfields. Major elements of the Project include restoring the Tiscornia Marsh site to its former extent by beneficially reusing dredged material from local sources, restoring tidal action to the diked marsh, constructing a coarse beach along the bayward edge of the restored marsh to resist future erosion, constructing a new 600-foot setback levee, development of an ecotone slope, and improving approximately 1,100 feet of shoreline levee to achieve flood protection, public access, and habitat benefits. The overall Project will reconstruct approximately four acres of eroded tidal marsh, preserve and protect approximately eight acres of Tiscornia Marsh, and restore approximately five acres of diked marsh by reconnecting it to tidal inundation.

The CEQA Guidelines (§§15124 and 15378) require that the draft EIR incorporate a full project description, including reasonably foreseeable future phases of the Project, and that contains sufficient information to evaluate and review the Project's environmental impact. Please include a complete description of the following Project components in the Project description: footprint of permanent Project features and temporarily impacted areas, including staging areas and access routes; quantification of any habitat type conversion, such as conversion of tidal mudflat to tidal marsh; encroachment into wetland habitat, mudflat habitat, San Rafael Creek, eelgrass beds, or other sensitive areas; description of dredging methodology (i.e., mechanical dredging versus hydraulic dredging); potential sources of dredged material, including use of material dredged from San Rafael Creek; methods of importing, offloading, and placement of any dredged material; public access elements including trails or overlooks and anticipated level of human presence; phasing/timing of Project; any short-term or long-term use of artificial lighting; and construction schedule, activities, equipment, and crew sizes.

## **ENVIRONMENTAL SETTING**

### **Marine Biological Significance**

The San Francisco Bay-Delta is the second largest estuary in the United States and supports numerous aquatic habitats and biological communities. It encompasses 479 square miles, including shallow mudflats. This ecologically significant ecosystem supports both state and federally threatened and endangered species and sustains important commercial and recreational fisheries.

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CDFW therefore offers the comments and recommendations below to assist the City of San Rafael in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on special-status species and their habitats.

### **Special-Status Species**

Sufficient information regarding the environmental setting is necessary to understand the Project's and its alternatives' significant impacts on the environment (CEQA Guidelines, §§15125 & 15360). CDFW recommends that the draft EIR provide baseline habitat assessments for special-status plant, fish, and wildlife species located and potentially located within the Project area and surrounding lands, including all rare, threatened, or endangered species (CEQA Guidelines, §15380).

Fully protected, threatened or endangered, candidate, and other special-status and sensitive species that are known to occur, or have the potential to occur in or near the Project site, include, but are not limited to:

- California Ridgway's rail (*Rallus obsoletus obsoletus*), federally and State endangered and State fully protected,
- California black rail (*Laterallus jamaicensis coturniculus*), State threatened and State fully protected,
- Brown Pelican (*Pelecanus occidentalis californicus*), State fully protected,
- Salt-marsh harvest mouse (*Reithrodontomys raviventris*), federally and State endangered and State fully protected,
- Longfin smelt (*Spirinchus thaleichthys*), federal candidate and State threatened,
- Chinook salmon (*Oncorhynchus tshawytscha*), federally and State threatened (Spring-run), federal and State endangered (Winter-run),
- Steelhead (*O. mykiss*), federally threatened (Central California Coast and Central Valley Evolutionarily Significant Units),
- Green sturgeon (*Acipenser medirostris*), federally threatened and State species of special concern (southern Distinct Population Segment),
- White sturgeon (*A. transmontanus*), State species of special concern,
- Western snowy plover (*Charadrius nivosus nivosus*), federally threatened and State species of special concern,
- Burrowing owl (*Athene cunicularia*), State species of special concern,
- Saltmarsh common yellowthroat (*Geothlypis trichas sinuosa*), State species of special concern,

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- San Pablo song sparrow (*Melospiza melodia samuelis*), State species of special concern,
- Yellow rail (*Coturnicops noveboracensis*), State species of special concern,
- Western pond turtle (*Emys marmorata*), State species of special concern,
- Nesting and foraging migratory birds.

Several species with important commercial and recreational fisheries value that could potentially be impacted by Project activities include:

- Dungeness crab (*Cancer magister*),
- Pacific herring (*Clupea pallasii*),
- Rockfish (*Sebastes* spp.),
- California halibut (*Paralichthys californicus*),
- Surfperches (*Embiotocidae*).

Habitat descriptions and species profiles should include information from multiple sources such as aerial imagery, available historical and recent survey data, field reconnaissance, scientific literature and reports, and findings from “positive occurrence” databases such as California Natural Diversity Database (CNDDB). Based on the data and information from the habitat assessment, the CEQA document can then adequately assess which special-status species are likely to occur in the Project vicinity.

CDFW recommends that during Project planning and prior to Project implementation, surveys be conducted for special-status species with potential to occur, following recommended survey protocols if available. Survey and monitoring protocols and guidelines for some species are available at:

<https://wildlife.ca.gov/Conservation/Survey-Protocols>.

Botanical surveys for special-status plant species, including those listed by the California Native Plant Society (<http://www.cnps.org/cnps/rareplants/inventory/>), should be conducted during the appropriate blooming period for all sensitive plant species potentially occurring within the Project area and require the identification of reference populations. Please refer to CDFW protocols for surveying and evaluating impacts to rare plants available at: <https://www.wildlife.ca.gov/Conservation/Plants>.

## **IMPACT ANALYSIS AND MITIGATION MEASURES**

The CEQA Guidelines (§15126.2) necessitate that the draft EIR discuss all direct and indirect impacts (temporary and permanent) that may occur with implementation of the Project. This includes evaluating and describing impacts such as:

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- Potential for “take” of special-status species;
- Loss or modification of breeding, nesting, dispersal, and foraging habitat, due to Project activities including, but not limited to, vegetation removal, alteration of soils and hydrology, and removal of habitat structural features;
- Permanent and temporary habitat disturbances associated with ground disturbance, noise, lighting, reflection, air pollution, traffic, or human presence; and
- Obstruction of movement corridors, fish passage, or access to water sources and other core habitat features.

The CEQA document also should identify reasonably foreseeable future projects in the Project vicinity, disclose any cumulative impacts associated with these projects, determine the significance of each cumulative impact, and assess the significance of the Project’s contribution to the impact (CEQA Guidelines, §15355). Although a project’s impacts may be insignificant individually, its contributions to a cumulative impact may be considerable. Contribution to a significant cumulative impact (e.g., reduction of available habitat for a listed species) should be considered cumulatively considerable without mitigation to minimize or avoid the impact.

Based on the comprehensive analysis of the direct, indirect, and cumulative impacts of the Project, the CEQA Guidelines (§§15021, 15063, 15071, 15126.2, 15126.4 and 15370) direct the Lead Agency to consider and describe all feasible mitigation measures to avoid potentially significant impacts in the draft EIR, and/or mitigate significant impacts of the Project on the environment. This includes a discussion of take avoidance and minimization measures for special-status species, which are recommended to be developed in early consultation with the U.S. Fish and Wildlife Service (USFWS), the National Marine Fisheries Service and CDFW. These measures can then be incorporated as enforceable Project conditions to reduce potential impacts to biological resources to less-than-significant levels.

Measures recommended by CDFW to avoid and minimize impacts to special-status species include, but are not limited to, clearly marking suitable habitat for the species; minimizing ground disturbance and the removal of vegetation suitable for the species; utilizing seasonal work windows; and having a CDFW-approved qualified biologist present during Project activities.

### **Impacts to State Fully Protected Species**

State fully protected species such as California Ridgway’s rail, California black rail, brown pelican, and salt-marsh harvest mouse may occur within the Project area. State fully protected species may not be taken or possessed at any time except for necessary scientific research, including efforts for recovery (Fish and Game Code §§3511 and



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4700). Therefore, the draft EIR should include measures to ensure complete take avoidance of these fully protected species.

Measures to avoid impacts to rails may include, but are not limited to, having a CDFW-approved qualified biologist conduct surveys for both California Ridgway's rail and California black rail using protocols in coordination with staff from CDFW and the USFWS; avoiding Project activities during the rail breeding season (extends from February 1 to August 31); implementing a no-work buffer within a minimum 700 feet of breeding rail call centers; and utilization of portable acoustic and/or visual barriers between Project activities and rails.

Measures to avoid impacts to salt-marsh harvest mouse may include, but are not limited to, conducting removal of vegetation suitable for the species with non-motorized hand tools; limiting the number of workers conducting vegetation removal per qualified biologist on-site; conducting vegetation removal in the direction of large, contiguous suitable habitat that will remain undisturbed; placing stockpiled vegetation outside of areas where they may be recolonized by the species; and staging equipment and materials away from suitable habitat for the species.

### **Impacts to Other State Special-Status Species and Commercially/Recreationally Important Species**

State threatened or endangered fish and wildlife species, State species of special concern, and commercially/recreationally important species may occur within the Project area. Depending on the proposed methods and time of year work is conducted, and without appropriate mitigation measures, the Project could potentially have a significant impact on these species. Potential impacts to special-status and commercially/recreationally important species include, but are not limited to, hydroacoustic impacts caused from impact pile driving during crane platform construction; potential for entrainment and/or impingement of fish and invertebrates from suction dredging and placement of dredged material via slurry pumping; impacts to Pacific herring spawning habitat; injury to aquatic species due to decreased dissolved oxygen; inability of aquatic species to forage due to increased turbidity; reduced reproductive success; nest abandonment; loss of nesting and foraging habitat; impacts to wetland and tidal mudflat habitat; loss of habitat due to habitat type conversion; and direct mortality. Unauthorized take of species listed as threatened or endangered pursuant to CESA is a violation of Fish and Game Code.

If State species of special concern are found within or adjacent to the Project site, a qualified biologist should establish a no-disturbance buffer appropriate for the species and conduct on-site monitoring during all Project-related activities. The draft EIR should include additional minimization and mitigation measures for each State species of special concern that could be potentially impacted by Project activities.

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### **Impacts to Nesting Birds**

CDFW recommends that Project implementation occur during the bird non-nesting season. However, if ground-disturbing or vegetation-disturbing activities must occur during the breeding season [February through early-September (see above under State Fully Protected Species regarding the rail breeding season)], the Project applicant is responsible for ensuring that implementation of the Project does not result in violation of the Migratory Bird Treaty Act or Fish and Game Code.

To evaluate and avoid potential impacts to nesting bird species, CDFW recommends that a qualified avian biologist conduct surveys for active nests no more than seven (7) days prior to the start of Project activities involving ground or vegetation disturbance and every fourteen (14) days during Project activities to maximize the probability that active nests within the construction area are detected. CDFW also recommends that surveys cover a sufficient area around the Project site to identify nests and determine their status. A sufficient area means any area potentially affected by the Project. Prior to initiation of ground or vegetation disturbance, CDFW recommends that a qualified biologist conduct surveys to establish a behavioral baseline of all identified nests. Once Project activities begins, CDFW recommends having the qualified biologist continuously monitor nests to detect behavioral changes resulting from the Project. If behavioral changes (e.g., alertness, sitting up from brooding position, flying off the nest, alarm calling, etc.) occur, CDFW recommends halting the work causing that change and consulting with CDFW for additional avoidance and minimization measures.

If continuous monitoring of identified nests by a qualified avian biologist is not feasible, CDFW recommends implementing appropriate buffers around active nests based on species, behavior of birds, ambient noise levels, type of construction activities, topography, and other site-specific factors that may affect nesting bird disturbance levels (see above under State Fully Protected Species regarding buffers for rails). Buffers are advised to remain in place until the breeding season has ended or until a qualified biologist has determined that the birds have fledged and are no longer reliant upon the nest or on-site parental care for survival. Variance from these buffers is possible when there is compelling biological or ecological reason to do so, such as when the Project site would be concealed from a nest site by topography. CDFW recommends that a qualified avian biologist advise and support any variance from these buffers.

### **Impacts to Special-Status Plant Species**

State threatened, endangered or rare plant species may occur within the Project location. Without appropriate mitigation measures, the Project could potentially have a significant impact on these species. Potential impacts to special-status plants include inability to reproduce and direct mortality. Unauthorized take of plant species listed as

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threatened, endangered, or rare pursuant to CESA or the Native Plant Protection Act is a violation of Fish and Game Code.

Special-status plants are typically narrowly distributed endemic species. These species are susceptible to habitat loss and habitat fragmentation resulting from construction activities, vehicle and foot traffic, and introduction of non-native plant species.

Special-status plant species should be avoided through delineation and establishment of appropriate buffers from the outer edge of the plant population or specific habitat type required by special-status plant species. Buffers may be determined based on factors including, but not limited to, plant species, type of construction activities, and topography.

### **Dredged Material as Marsh Fill**

CDFW supports the beneficial reuse of dredged material within San Francisco Bay. However, the type of sediment used and the analysis of whether the material is free of potentially harmful substances will determine whether it is suitable at this location to create marsh habitat. Additionally, CDFW has concerns about how the material is dredged and subsequently placed at the site. CDFW recommends that the material be dredged and placed using mechanical methods such as a clamshell dredge or excavator to avoid and minimize potential impacts to sensitive species.

### **Habitat Conversion**

The Project proposes to convert mudflat habitat to a functioning marsh and cobble beach. CDFW has concerns about the loss of mudflat habitat which is utilized by a number of listed and commercially/recreation important species including longfin smelt, chinook salmon, green sturgeon, Dungeness crab, and California halibut. The draft EIR should provide sufficient discussion and analysis on the potential impacts to these species by the loss of habitat. Additionally, the alternatives analysis should contain a range of options, including a reduced marsh and beach size, and whether the Project could still achieve the necessary flood protection by balancing the construction of new marsh/beach habitat and limiting the loss of existing mudflat.

### **In-Water Work Window**

The marine in-water work window is June 1 through November 30. All in-water work should occur within this timeframe. The draft EIR should discuss the proposed Project timeline in detail and highlight whether any conflicts could arise with this work window. CDFW recommends reaching out to CDFW staff with any questions on work windows prior to the release of the draft EIR.

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## **Construction of Overwater Structures**

There may be potential impacts from the construction of any overwater structure related to the Project such as the crane platform. CDFW recommends that materials and methods used to construct any overwater structures be discussed in the draft EIR. Fish and Game Code states that it is unlawful to deposit into, permit to pass into, or place where it can pass into waters of the state any substance or material deleterious to fish, plant life, or bird life [Fish and Game Code Section §5650(6)]. CDFW recommends avoiding the use of treated wood materials in or above the waters of San Francisco Bay. CDFW also recommends that overwater structures use materials that will limit light penetration to the waters of the bay. This can be achieved by spacing deck boards one-inch apart or using slated/grated decking made of metal or composite materials. The draft EIR should discuss the preferred alternatives for pile and decking materials as well as the ability to include decking which allows light penetration.

## **Sea Level Rise**

The State of California Sea-Level Rise Guidance/2018 Update (California Natural Resources Agency 2018) provides a science-based methodology for state and local governments to analyze and assess the risks associated with sea-level rise and incorporate sea-level rise into their planning, permitting, and investment decisions. The Marin Shoreline Sea Level Rise Vulnerability Assessment/Bay Waterfront Adaptation & Vulnerability Evaluation (BayWAVE) (Marin County 2017) provides context and estimates of the physical and fiscal impacts across Marin County's bayside shoreline over the coming decades. It includes sea level rise scenarios ranging from 10 inches in the near-term (15 years) to 20 inches in the medium-term (mid-century) and to 60 inches in the long-term (end of century). Since the Project intends to restore tidal marsh and mudflats that have been lost to erosion over the last 30 years, and that under current conditions, erosion is expected to continue and increase due to sea level rise, CDFW recommends incorporating the long-term (end of century) scenarios for sea level rise to fully evaluate Project impacts.

## **FILING FEES**

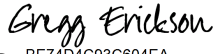
CDFW anticipates that the Project will have an impact on fish and/or wildlife, and assessment of filing fees is necessary (Fish and Game Code, §711.4; Pub. Resources Code, §21089). Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW.

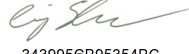
If you have any questions for staff in the Bay Delta Region, please contact Ms. Tami Schane, Senior Environmental Scientist (Specialist), at (415) 831-4640 or [Tami.Schane@wildlife.ca.gov](mailto:Tami.Schane@wildlife.ca.gov); or Ms. Brenda Blinn, Senior Environmental Scientist (Supervisory), at (707) 944-5541 or [Brenda.Blinn@wildlife.ca.gov](mailto:Brenda.Blinn@wildlife.ca.gov). For questions for

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March 22, 2021  
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staff in Marine Region, please contact Mr. Arn Aarreberg, Environmental Scientist, at (707) 576-2889 or [Arn.Aarreberg@wildlife.ca.gov](mailto:Arn.Aarreberg@wildlife.ca.gov); or Mr. Eric Wilkins, Senior Environmental Scientist (Supervisory), at (805) 594-6172 or [Eric.Wilkins@wildlife.ca.gov](mailto:Eric.Wilkins@wildlife.ca.gov).

Sincerely,

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Mr. Paul Jensen  
City of San Rafael  
March 22, 2021  
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Valary Bloom, U.S. Fish and Wildlife Service  
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## REFERENCES

- California Natural Resources Agency. 2018. State of California Sea-level Rise Guidance. [https://opc.ca.gov/webmaster/ftp/pdf/agenda\\_items/20180314/Item3\\_Exhibit-A\\_OPC\\_SLR\\_Guidance-rd3.pdf](https://opc.ca.gov/webmaster/ftp/pdf/agenda_items/20180314/Item3_Exhibit-A_OPC_SLR_Guidance-rd3.pdf)
- Marin County. 2017. Marin Shoreline Sea Level Rise Vulnerability Assessment/Bay Waterfront Adaptation & Vulnerability Evaluation. Prepared by BVB Consulting LLC for Marin County Department of Public Works, June 2017. [https://www.marincounty.org/-/media/files/departments/cd/planning/slr/baywave/vulnerability-assessment-final/final\\_allpages\\_bvbconsulting\\_reduced.pdf?la=en](https://www.marincounty.org/-/media/files/departments/cd/planning/slr/baywave/vulnerability-assessment-final/final_allpages_bvbconsulting_reduced.pdf?la=en)



## NATIVE AMERICAN HERITAGE COMMISSION

February 22, 2021

Paul Jensen  
City of San Rafael  
1400 5<sup>th</sup> Avenue  
San Rafael, CA 94901

**Re: 2021020362, Tiscornia Marsh Restoration Project, Marin County**

Dear Mr. Jensen:

The Native American Heritage Commission (NAHC) has received the Notice of Preparation (NOP), Draft Environmental Impact Report (DEIR) or Early Consultation for the project referenced above. The California Environmental Quality Act (CEQA) (Pub. Resources Code §21000 et seq.), specifically Public Resources Code §21084.1, states that a project that may cause a substantial adverse change in the significance of a historical resource, is a project that may have a significant effect on the environment. (Pub. Resources Code § 21084.1; Cal. Code Regs., tit.14, § 15064.5 (b) (CEQA Guidelines § 15064.5 (b)). If there is substantial evidence, in light of the whole record before a lead agency, that a project may have a significant effect on the environment, an Environmental Impact Report (EIR) shall be prepared. (Pub. Resources Code §21080 (d); Cal. Code Regs., tit. 14, § 5064 subd.(a)(1) (CEQA Guidelines § 15064 (a)(1)). In order to determine whether a project will cause a substantial adverse change in the significance of a historical resource, a lead agency will need to determine whether there are historical resources within the area of potential effect (APE).

CEQA was amended significantly in 2014. Assembly Bill 52 (Gatto, Chapter 532, Statutes of 2014) (AB 52) amended CEQA to create a separate category of cultural resources, "tribal cultural resources" (Pub. Resources Code §21074) and provides that a project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment. (Pub. Resources Code §21084.2). Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource. (Pub. Resources Code §21084.3 (a)). **AB 52 applies to any project for which a notice of preparation, a notice of negative declaration, or a mitigated negative declaration is filed on or after July 1, 2015.** If your project involves the adoption of or amendment to a general plan or a specific plan, or the designation or proposed designation of open space, on or after March 1, 2005, it may also be subject to Senate Bill 18 (Burton, Chapter 905, Statutes of 2004) (SB 18). **Both SB 18 and AB 52 have tribal consultation requirements.** If your project is also subject to the federal National Environmental Policy Act (42 U.S.C. § 4321 et seq.) (NEPA), the tribal consultation requirements of Section 106 of the National Historic Preservation Act of 1966 (154 U.S.C. 300101, 36 C.F.R. §800 et seq.) may also apply.

The NAHC recommends consultation with California Native American tribes that are traditionally and culturally affiliated with the geographic area of your proposed project as early as possible in order to avoid inadvertent discoveries of Native American human remains and best protect tribal cultural resources. Below is a brief summary of portions of AB 52 and SB 18 as well as the NAHC's recommendations for conducting cultural resources assessments.

**Consult your legal counsel about compliance with AB 52 and SB 18 as well as compliance with any other applicable laws.**

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AB 52 has added to CEQA the additional requirements listed below, along with many other requirements:

**1. Fourteen Day Period to Provide Notice of Completion of an Application/Decision to Undertake a Project:**

Within fourteen (14) days of determining that an application for a project is complete or of a decision by a public agency to undertake a project, a lead agency shall provide formal notification to a designated contact of, or tribal representative of, traditionally and culturally affiliated California Native American tribes that have requested notice, to be accomplished by at least one written notice that includes:

- a. A brief description of the project.
- b. The lead agency contact information.
- c. Notification that the California Native American tribe has 30 days to request consultation. (Pub. Resources Code §21080.3.1 (d)).
- d. A "California Native American tribe" is defined as a Native American tribe located in California that is on the contact list maintained by the NAHC for the purposes of Chapter 905 of Statutes of 2004 (SB 18). (Pub. Resources Code §21073).

**2. Begin Consultation Within 30 Days of Receiving a Tribe's Request for Consultation and Before Releasing a Negative Declaration, Mitigated Negative Declaration, or Environmental Impact Report:**

A lead agency shall begin the consultation process within 30 days of receiving a request for consultation from a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project. (Pub. Resources Code §21080.3.1, subds. (d) and (e)) and prior to the release of a negative declaration, mitigated negative declaration or Environmental Impact Report. (Pub. Resources Code §21080.3.1 (b)).

- a. For purposes of AB 52, "consultation shall have the same meaning as provided in Gov. Code § 65352.4 (SB 18). (Pub. Resources Code §21080.3.1 (b)).

**3. Mandatory Topics of Consultation If Requested by a Tribe:** The following topics of consultation, if a tribe requests to discuss them, are mandatory topics of consultation:

- a. Alternatives to the project.
- b. Recommended mitigation measures.
- c. Significant effects. (Pub. Resources Code §21080.3.2 (a)).

**4. Discretionary Topics of Consultation:** The following topics are discretionary topics of consultation:

- a. Type of environmental review necessary.
- b. Significance of the tribal cultural resources.
- c. Significance of the project's impacts on tribal cultural resources.
- d. If necessary, project alternatives or appropriate measures for preservation or mitigation that the tribe may recommend to the lead agency. (Pub. Resources Code §21080.3.2 (a)).

**5. Confidentiality of Information Submitted by a Tribe During the Environmental Review Process:** With some exceptions, any information, including but not limited to, the location, description, and use of tribal cultural resources submitted by a California Native American tribe during the environmental review process shall not be included in the environmental document or otherwise disclosed by the lead agency or any other public agency to the public, consistent with Government Code §6254 (r) and §6254.10. Any information submitted by a California Native American tribe during the consultation or environmental review process shall be published in a confidential appendix to the environmental document unless the tribe that provided the information consents, in writing, to the disclosure of some or all of the information to the public. (Pub. Resources Code §21082.3 (c)(1)).

**6. Discussion of Impacts to Tribal Cultural Resources in the Environmental Document:** If a project may have a significant impact on a tribal cultural resource, the lead agency's environmental document shall discuss both of the following:

- a. Whether the proposed project has a significant impact on an identified tribal cultural resource.
- b. Whether feasible alternatives or mitigation measures, including those measures that may be agreed to pursuant to Public Resources Code §21082.3, subdivision (a), avoid or substantially lessen the impact on the identified tribal cultural resource. (Pub. Resources Code §21082.3 (b)).



- 7. Conclusion of Consultation:** Consultation with a tribe shall be considered concluded when either of the following occurs:
- The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource; or
  - A party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached. (Pub. Resources Code §21080.3.2 (b)).
- 8. Recommending Mitigation Measures Agreed Upon in Consultation in the Environmental Document:** Any mitigation measures agreed upon in the consultation conducted pursuant to Public Resources Code §21080.3.2 shall be recommended for inclusion in the environmental document and in an adopted mitigation monitoring and reporting program, if determined to avoid or lessen the impact pursuant to Public Resources Code §21082.3, subdivision (b), paragraph 2, and shall be fully enforceable. (Pub. Resources Code §21082.3 (a)).
- 9. Required Consideration of Feasible Mitigation:** If mitigation measures recommended by the staff of the lead agency as a result of the consultation process are not included in the environmental document or if there are no agreed upon mitigation measures at the conclusion of consultation, or if consultation does not occur, and if substantial evidence demonstrates that a project will cause a significant effect to a tribal cultural resource, the lead agency shall consider feasible mitigation pursuant to Public Resources Code §21084.3 (b). (Pub. Resources Code §21082.3 (e)).
- 10. Examples of Mitigation Measures That, If Feasible, May Be Considered to Avoid or Minimize Significant Adverse Impacts to Tribal Cultural Resources:**
- Avoidance and preservation of the resources in place, including, but not limited to:
    - Planning and construction to avoid the resources and protect the cultural and natural context.
    - Planning greenspace, parks, or other open space, to incorporate the resources with culturally appropriate protection and management criteria.
  - Treating the resource with culturally appropriate dignity, taking into account the tribal cultural values and meaning of the resource, including, but not limited to, the following:
    - Protecting the cultural character and integrity of the resource.
    - Protecting the traditional use of the resource.
    - Protecting the confidentiality of the resource.
  - Permanent conservation easements or other interests in real property, with culturally appropriate management criteria for the purposes of preserving or utilizing the resources or places.
  - Protecting the resource. (Pub. Resource Code §21084.3 (b)).
  - Please note that a federally recognized California Native American tribe or a non-federally recognized California Native American tribe that is on the contact list maintained by the NAHC to protect a California prehistoric, archaeological, cultural, spiritual, or ceremonial place may acquire and hold conservation easements if the conservation easement is voluntarily conveyed. (Civ. Code §815.3 (c)).
  - Please note that it is the policy of the state that Native American remains and associated grave artifacts shall be repatriated. (Pub. Resources Code §5097.991).
- 11. Prerequisites for Certifying an Environmental Impact Report or Adopting a Mitigated Negative Declaration or Negative Declaration with a Significant Impact on an Identified Tribal Cultural Resource:** An Environmental Impact Report may not be certified, nor may a mitigated negative declaration or a negative declaration be adopted unless one of the following occurs:
- The consultation process between the tribes and the lead agency has occurred as provided in Public Resources Code §21080.3.1 and §21080.3.2 and concluded pursuant to Public Resources Code §21080.3.2.
  - The tribe that requested consultation failed to provide comments to the lead agency or otherwise failed to engage in the consultation process.
  - The lead agency provided notice of the project to the tribe in compliance with Public Resources Code §21080.3.1 (d) and the tribe failed to request consultation within 30 days. (Pub. Resources Code §21082.3 (d)).

The NAHC's PowerPoint presentation titled, "Tribal Consultation Under AB 52: Requirements and Best Practices" may be found online at: [http://nahc.ca.gov/wp-content/uploads/2015/10/AB52TribalConsultation\\_CalEPAPDF.pdf](http://nahc.ca.gov/wp-content/uploads/2015/10/AB52TribalConsultation_CalEPAPDF.pdf)

## SB 18

SB 18 applies to local governments and requires local governments to contact, provide notice to, refer plans to, and consult with tribes prior to the adoption or amendment of a general plan or a specific plan, or the designation of open space. (Gov. Code §65352.3). Local governments should consult the Governor's Office of Planning and Research's "Tribal Consultation Guidelines," which can be found online at: [https://www.opr.ca.gov/docs/09\\_14\\_05\\_Updated\\_Guidelines\\_922.pdf](https://www.opr.ca.gov/docs/09_14_05_Updated_Guidelines_922.pdf).

Some of SB 18's provisions include:

1. **Tribal Consultation:** If a local government considers a proposal to adopt or amend a general plan or a specific plan, or to designate open space it is required to contact the appropriate tribes identified by the NAHC by requesting a "Tribal Consultation List." If a tribe, once contacted, requests consultation the local government must consult with the tribe on the plan proposal. **A tribe has 90 days from the date of receipt of notification to request consultation unless a shorter timeframe has been agreed to by the tribe.** (Gov. Code §65352.3 (a)(2)).
2. **No Statutory Time Limit on SB 18 Tribal Consultation.** There is no statutory time limit on SB 18 tribal consultation.
3. **Confidentiality:** Consistent with the guidelines developed and adopted by the Office of Planning and Research pursuant to Gov. Code §65040.2, the city or county shall protect the confidentiality of the information concerning the specific identity, location, character, and use of places, features and objects described in Public Resources Code §5097.9 and §5097.993 that are within the city's or county's jurisdiction. (Gov. Code §65352.3 (b)).
4. **Conclusion of SB 18 Tribal Consultation:** Consultation should be concluded at the point in which:
  - a. The parties to the consultation come to a mutual agreement concerning the appropriate measures for preservation or mitigation; or
  - b. Either the local government or the tribe, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached concerning the appropriate measures of preservation or mitigation. (Tribal Consultation Guidelines, Governor's Office of Planning and Research (2005) at p. 18).

Agencies should be aware that neither AB 52 nor SB 18 precludes agencies from initiating tribal consultation with tribes that are traditionally and culturally affiliated with their jurisdictions before the timeframes provided in AB 52 and SB 18. For that reason, we urge you to continue to request Native American Tribal Contact Lists and "Sacred Lands File" searches from the NAHC. The request forms can be found online at: <http://nahc.ca.gov/resources/forms/>.

### NAHC Recommendations for Cultural Resources Assessments

To adequately assess the existence and significance of tribal cultural resources and plan for avoidance, preservation in place, or barring both, mitigation of project-related impacts to tribal cultural resources, the NAHC recommends the following actions:

1. Contact the appropriate regional California Historical Research Information System (CHRIS) Center ([http://ohp.parks.ca.gov/?page\\_id=1068](http://ohp.parks.ca.gov/?page_id=1068)) for an archaeological records search. The records search will determine:
  - a. If part or all of the APE has been previously surveyed for cultural resources.
  - b. If any known cultural resources have already been recorded on or adjacent to the APE.
  - c. If the probability is low, moderate, or high that cultural resources are located in the APE.
  - d. If a survey is required to determine whether previously unrecorded cultural resources are present.
2. If an archaeological inventory survey is required, the final stage is the preparation of a professional report detailing the findings and recommendations of the records search and field survey.
  - a. The final report containing site forms, site significance, and mitigation measures should be submitted immediately to the planning department. All information regarding site locations, Native American human remains, and associated funerary objects should be in a separate confidential addendum and not be made available for public disclosure.
  - b. The final written report should be submitted within 3 months after work has been completed to the appropriate regional CHRIS center.

**3. Contact the NAHC for:**

- a.** A Sacred Lands File search. Remember that tribes do not always record their sacred sites in the Sacred Lands File, nor are they required to do so. A Sacred Lands File search is not a substitute for consultation with tribes that are traditionally and culturally affiliated with the geographic area of the project's APE.
- b.** A Native American Tribal Consultation List of appropriate tribes for consultation concerning the project site and to assist in planning for avoidance, preservation in place, or, failing both, mitigation measures.

**4. Remember that the lack of surface evidence of archaeological resources (including tribal cultural resources) does not preclude their subsurface existence.**

- a.** Lead agencies should include in their mitigation and monitoring reporting program plan provisions for the identification and evaluation of inadvertently discovered archaeological resources per Cal. Code Regs., tit. 14, § 15064.5(f) (CEQA Guidelines § 15064.5(f)). In areas of identified archaeological sensitivity, a certified archaeologist and a culturally affiliated Native American with knowledge of cultural resources should monitor all ground-disturbing activities.
- b.** Lead agencies should include in their mitigation and monitoring reporting program plans provisions for the disposition of recovered cultural items that are not burial associated in consultation with culturally affiliated Native Americans.
- c.** Lead agencies should include in their mitigation and monitoring reporting program plans provisions for the treatment and disposition of inadvertently discovered Native American human remains. Health and Safety Code § 7050.5, Public Resources Code § 5097.98, and Cal. Code Regs., tit. 14, § 15064.5, subdivisions (d) and (e) (CEQA Guidelines § 15064.5, subds. (d) and (e)) address the processes to be followed in the event of an inadvertent discovery of any Native American human remains and associated grave goods in a location other than a dedicated cemetery.

If you have any questions or need additional information, please contact me at my email address: [Nancy.Gonzalez-Lopez@nahc.ca.gov](mailto:Nancy.Gonzalez-Lopez@nahc.ca.gov).

Sincerely,



Nancy Gonzalez-Lopez  
Cultural Resources Analyst

cc: State Clearinghouse

