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November 21, 2012

File Ref: SCH # 2006022136

John A Swiecki, Principal Planner
City of Brisbane
50 Park Place
Brisbane, CA 94005

Subject: Revised Notice of Preparation (NOP) for a Programmatic Environmental Impact Report (PEIR) for the Brisbane Baylands Project, San Mateo County

Dear Mr. Swiecki,

The California State Lands Commission (CSLC) staff has reviewed the subject NOP for a PEIR for the Brisbane Baylands Project (Project), which is being prepared by the City of Brisbane (City). Because the Project would require the City's approval of a Concept Plan and adoption of a General Plan Amendment, amendments to the Zoning Ordinance, and a Specific Plan, the City is the lead agency under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). The CSLC is a trustee agency because of its trust responsibility for projects that could directly or indirectly affect sovereign lands, their accompanying Public Trust resources or uses, and the public easement in navigable waters. Additionally, if the Project involves work on sovereign lands, the CSLC will act as a responsible agency.

CSLC Jurisdiction and Public Trust Lands

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

As general background, the State of California acquired sovereign ownership of all tidelands and submerged lands and beds of navigable lakes and waterways upon its admission to the United States in 1850. The State holds these lands for the benefit of all people of the State for statewide Public Trust purposes, which include but are not limited to waterborne commerce, navigation, fisheries, water-related recreation, habitat preservation, and open space. On tidal waterways, the State's sovereign fee ownership extends landward to the mean high tide line, except for areas of fill or artificial accretion

or where the boundary has been fixed by agreement or a court. On navigable non-tidal waterways, including lakes, the State holds fee ownership of the bed of the waterway landward to the ordinary low water mark and a Public Trust easement landward to the ordinary high water mark, except where the boundary has been fixed by agreement or a court. Such boundaries may not be readily apparent from present day site inspections.

Based on the information provided in the NOP, it appears the proposed Project would occupy:

- Filled or partially filled and sold Board of Tideland Commissioners (BTLC) lots;
- Lands the state did not acquire, patented as Swamp and Overflow (S&O) Survey 28;
- Lands within Rancho Canada De Guadalupe Visitacion y Rodeo Canal; and
- Ungranted sovereign lands within Guadalupe Canal.

Portions of the Project appear to occupy filled and unfilled tidelands and submerged lands sold into private ownership by the State by its BTLC. Pursuant to the Court's holding in City of Berkeley v. Superior Court, 26 Cal. 3d 515, any such lands which remained submerged or subject to tidal action as of February 22, 1980, are subject to a Public Trust easement retained by the State. A CSLC lease is not required for use of lands underlying the State's Public Trust easement.

As correctly stated in the NOP, any portion of the proposed Project located within the Guadalupe Canal will require a lease from the CSLC. This determination is without prejudice to any future assertion of State ownership or public rights, should circumstances change, or should additional information come to our attention. In addition, this letter is not intended, nor should it be construed as, a waiver or limitation of any right, title, or interest of the State of California in any lands under its jurisdiction.

Project Description

The City proposes four potential Concept Plans for the Brisbane Baylands area to meet the City of Brisbane General Plan pre-requisites for development. From the Project Description, CSLC staff understands that the Project (i.e., the four Concept Plans) would include the following components:

- Developer-Sponsored Plan (DSP). Designates approximately 7 million square feet of office, retail, industrial and institutional uses, 4,434 residential units, and approximately 169.7 acres of "open space" and 135.6 acres of "lagoon" area, all on the 684-acre portion of the Baylands within the city of Brisbane;
- Developer-Sponsored Plan – Entertainment Variant (DSP-V). Similar to the DSP, but replaces the retail and office/research and development uses proposed in the northeast portion of the Project Site with entertainment-oriented uses, including a 17,000- to 20,000-seat sports arena, a 5,500-seat concert theater, a multiple-screen cinema, and more conference/exhibition space and hotel rooms;

- Community Proposed Plan (CPP). Provides for approximately 7.7 million square feet of office, industrial, commercial and institutional uses concentrated in the northerly portion of the site adjacent to transit, along with approximately 330 acres of "open space" and 135.6 acres of "lagoon" area, and involves both the 684-acre area included in the DSP and the 49-acre Recology site, which spans the cities of Brisbane and San Francisco; and
- Community Proposed Plan – Recology Expansion Variant (CPP-V). Similar to the CPP, but would expand Recology southward from its current boundary by 24 acres to a total of 73 acres, replacing the hotel and R&D uses proposed under the CPP.

Supplementary actions to the Project include:

- Amendment to the City's General Plan;
- Development of a Specific Plan for the Project (DSP and DSP-V concepts only);
- Relocation of existing lumber yards on the site;
- Remediation of hazardous materials contamination within the former railyard and landfill; and
- Importation of a water supply for the Project.

Environmental Review

CSLC staff requests that the following potential impacts be analyzed in the PEIR.

General Comments

1. Project Description: A thorough and complete Project Description should be included in the PEIR in order to facilitate meaningful environmental review of potential impacts, mitigation measures, and alternatives. The Project Description should be as precise as possible in describing the details of all allowable activities (e.g., types of equipment or methods that may be used, maximum area of impact or volume of sediment removed or disturbed, seasonal work windows, locations for material disposal, etc.), as well as the details of the timing and length of activities. Thorough descriptions will facilitate CSLC staff's determination of the extent and locations of its leasing jurisdiction, make for a more robust analysis of the work that may be performed, and minimize the potential for subsequent environmental analysis to be required.

   As such, the PEIR should make an effort (to the extent feasible) to distinguish which activities and mitigation measures are being analyzed in sufficient detail to be covered under the PEIR without additional project specific environmental review, and which later activities will trigger the need for subsequent environmental analysis (See CEQA Guidelines §15168(c)).

2. Public Trust Lands: The CSLC supports the proposed Project's efforts to remediate contaminated soil and water, restore open space and public access, and establish a public trail system, because enhancing those uses is consistent

with Public Trust values. However, construction related to these efforts could affect and/or further degrade public trust uses and values in and around the site. Consequently, the CSLC recommends that the analyze any potentially significant impacts to surrounding public trust lands from the development and increased public use resulting from Project construction. In particular, the PEIR should evaluate both direct and indirect effects related to the intensity of these development activities adjacent to tidal wetlands and waterways.

3. Programmatic Document: Because the Project is being proposed as a "Programmatic" rather than a "Project-level" EIR, the CSLC expects the Project will be presented as a series of distinct but related sequential activities. The State CEQA Guidelines, section 15168, subdivision (c)(5)[1] states that a program EIR will be most helpful in dealing with subsequent activities if it deals with the effects of the program as specifically and comprehensively as possible. In order to avoid the improper deferral of mitigation, a common flaw in program-level environmental documents, mitigation measures should either be presented as specific, feasible, enforceable obligations, or should be presented as formulas containing "performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way" (State CEQA Guidelines, § 15126.4, subd. (b)). As such, the PEIR should make an effort to distinguish what activities and their mitigation measures are being analyzed in sufficient detail to be covered under the PEIR without additional project specific environmental review, and what activities will trigger the need for additional environmental analysis (See State CEQA Guidelines, § 15168, subd.(c)).

Climate Change

4. Greenhouse Gases (GHGs): A GHG emissions analysis consistent with the California Global Warming Solutions Act (AB 32) and required by the State CEQA Guidelines should be included in the PEIR. This analysis should identify a threshold for significance for GHG emissions, calculate the level of GHGs that will be emitted as a result of construction and ultimate build-out of the Project, determine the significance of the impacts of those emissions, and, if impacts are significant, identify mitigation measures that would reduce them to less than significant.

5. Sea Level Rise: The PEIR should also consider the effects of sea level rise on all resource categories potentially affected by the proposed Project. At its meeting on December 17, 2009, the CSLC approved the recommendations made in a previously requested staff report, "A Report on Sea Level Rise Preparedness" (Report), which assessed the degree to which the CSLC's grantees and lessees have considered the eventual effects of sea level rise on facilities located within the CSLC's jurisdiction. (The Report can be found on the CSLC's website, http://www.slc.ca.gov). One of the Report's recommendations

[1] The State "CEQA Guidelines" are found in Title 14 of the California Code of Regulations, commencing with section 15000.

directs CSLC staff to consider the effects of sea level rise on hydrology, soils, geology, transportation, recreation, and other resource categories in all environmental determinations associated with CSLC leases.

Please note that, when considering lease applications, CSLC staff is directed to (1) request information from applicants concerning the potential effects of sea level rise on their proposed projects, (2) if applicable, require applicants to indicate how they plan to address sea level rise and what adaptation strategies are planned during the projected life of their projects, and (3) where appropriate, recommend project modifications that would eliminate or reduce potentially adverse impacts from sea level rise, including adverse impacts on public access.

Water Quality

6. Potential impacts to water quality from the proposed Project, such as introduction of non-native plant and animal species, additional storm water runoff, and increased turbidity and sedimentation, should be analyzed and appropriate, feasible measures should be incorporated into the Project to reduce or eliminate any significant impacts.

Biological Resources

7. Sensitive Species: The City should conduct queries of the California Department of Fish and Game's (DFG) California Natural Diversity Database (CNDDB) and U.S. Fish and Wildlife Service's (USFWS) Special Status Species Database to identify any special-status plant or wildlife species that may occur in the Project area. The PEIR should analyze the potential for such species to occur in the Project area and, if impacts to special-status species are found to be significant, identify adequate mitigation measures.

8. Construction Noise: The PEIR should also evaluate noise and vibration impacts on fish and birds from construction or restoration activities in the water and for land-side supporting structures. Mitigation measures could include species-specific work windows as defined by DFG, USFWS, and the National Oceanic and Atmospheric Administration's Fisheries Service (NOAA Fisheries). Again, staff recommends early consultation with these agencies to minimize the impacts of the Project on sensitive species.

9. Indirect Impacts from Growth: Because all of the concept scenarios involve increased use of the site for work, recreation or residential use, the PEIR should analyze the reasonably foreseeable indirect impacts that such growth could have on biological resources. For example, the DSP and DSP-V concept plans would increase the number of residences in the area, which could introduce domestic pets (dogs and cats) into the area and invite opportunistic urban wildlife such as crows and coyotes. Increases in the populations of these species could adversely affect sensitive local biological resources such as ground-nesting birds and small mammals. Additional potential impacts could include degradation of

sensitive habitats along the Bay edge from trampling (walking, riding, dogs, etc.), an increase in trash and debris, and an increased potential for pollutants to be released or spilled into the water surrounding the development areas (pesticides/herbicides, paints, etc.). The PEIR should evaluate the potential effects associated with the introduction of domestic pets and urban wildlife, and, if should impacts be found significant, propose a range of feasible measures to avoid or substantially lessen those effects. Mitigation measures could include fencing, signage, or residential maintenance fees for cleanup.

Cultural Resources

10. Submerged Resources: Should the Project involve in-water construction, the PEIR should evaluate potential impacts to submerged cultural resources in the Project area. The CSLC maintains a shipwrecks database that can assist with this analysis. CSLC staff requests that the City contact Senior Staff Counsel Pam Griggs at the contact information noted at the end of this letter to obtain shipwrecks data from the database and CSLC records for the Project site. The database includes known and potential vessels located on the State's tide and submerged lands; however, the locations of many shipwrecks remain unknown. Please note that any submerged archaeological site or submerged historic resource that has remained in State waters for more than 50 years is presumed to be significant.

    The recovery of objects from any submerged archaeological site or shipwreck requires a salvage permit under Public Resources Code section 6309. On statutorily granted tide and submerged lands, a permit may be issued only after consultation with the local grantee and a determination by the CSLC that the proposed salvage operation is not inconsistent with the purposes of the legislative grant.

11. Title to Resources: The PEIR should also mention that the title to all abandoned shipwrecks, archaeological sites, and historic or cultural resources on or in the tide and submerged lands of California is vested in the State and under the jurisdiction of the CSLC. CSLC staff requests that the City consult with Senior Staff Counsel Pam Griggs at the contact information noted at the end of this letter, should any cultural resources on state lands be discovered during construction of the proposed Project.

Recreation

12. Recreation and the Public Trust: The PEIR should evaluate the significance of any temporary or permanent loss of access, recreation and other Public Trust uses (e.g., fishing, bird watching, boating, etc.) of sovereign lands that may result from the Project's development and remediation/restoration activities. If impacts are found to be potentially significant, the PEIR should identify feasible mitigation, such as creation of facilities that promote Public Trust uses or construction of alternative public access points to the Bay.

Thank you for the opportunity to comment on the NOP for the Project. As a potentially responsible agency, the CSLC will need to rely on the Final PEIR for the issuance of any new or amended lease as specified above and, therefore, we request that you consider our comments prior to certification of the PEIR. Please send copies of future Project-related documents, including electronic copies of the Final PEIR, Mitigation Monitoring and Reporting Program (MMRP), Notice of Determination (NOD), CEQA Findings and, if applicable, Statement of Overriding Considerations when they become available, and refer questions concerning environmental review to Sarah Sugar, Environmental Scientist, at (916) 574-2274 or via e-mail at Sarah.Sugar@slc.ca.gov. For questions concerning archaeological or historic resources under CSLC jurisdiction, please contact Senior Staff Counsel Pam Griggs at (916) 574-1854 or via email at Pamela.Griggs@slc.ca.gov. For questions concerning CSLC leasing jurisdiction, please contact Grace Kato, Public Land Manager, at (916) 574-1227, or via email at Grace.Kato@slc.ca.gov.

Sincerely,

Cy R. Oggins, Chief
Division of Environmental Planning
and Management

cc: Office of Planning and Research
Grace Kato, LMD, CSLC
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