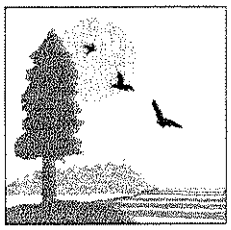
CALIFORNIA STATE LANDS COMMISSION
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August 8, 2011

File Ref: SCH #2006022136

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

Subject: Notice of Preparation (NOP) for the Brisbane Baylands Specific Plan Program Environmental Impact Report (PEIR), Brisbane, San Mateo County

Dear Mr. Swiecki:

Staff of the California State Lands Commission (CSLC) has reviewed the NOP for the Brisbane Baylands Specific Plan PEIR (Project), which is being prepared by the city of Brisbane as the lead agency under the California Environmental Quality Act (CEQA) (Public Resources Code [PRC] § 21000 et seq.). Pursuant to your conversation with CSLC staff member Joan Walter on August 2, 2011, in which we were advised that the city of Brisbane will accept this comment letter after the end of the review period (January 10, 2011), we hereby submit these comments on the Project.

The CSLC staff has prepared these comments as 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 use of sovereign lands, the CSLC will act as a responsible agency.

Project Location and Description

The proposed Project area is generally located between U.S. Highway 101 and Bayshore Boulevard in the city of Brisbane, west of the shoreline of the San Francisco Bay in San Mateo County. The Project site encompasses the 684 to 733 acres of Baylands area, composed of 573 to 622 upland acres and 111 Lagoon-related acres.

The Project is a Specific Plan for mixed-use development, which is proposed to be built beginning (generally) in 2015 with Project buildout anticipated to occur no earlier than 2035. Project development is proposed under two distinct land use scenarios:

Developer-Sponsored Project (DSP)

- Approximately 7 million square feet of non-residential uses (including office, retail, industrial, institutional and public/civic/cultural);
- Approximately 5+ million square feet of residential uses (4,434 residential units);
- Entertainment variant (reduces non-residential uses and adds an arena, theater, multiplex and increases conference and hotel uses); and
- 205 acres of open space and open areas (roughly 30% of the Project site).

Community Preferred Plan (CPP)

- 8+ million square feet of non-residential uses (including office, retail, industrial, institutional and public/civic/cultural);
- No residential uses;
- Recology variant (reduces non-residential uses and expands existing resource recovery site from 49 acres to 73 acres; and
- 330 acres of open space and public use areas (roughly 45% of the Project site).

Both land use scenarios include constructing related infrastructure and resource conservation measures (e.g., water recycling facility (WRF)), restoring open space and public access, establishing a public trail system, grading, and remediating contaminated soil and water (from previous railyard and landfill uses located on the Project site).

CSLC Jurisdiction

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 (PRC §6301 and §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 will occupy:

- Filled or partially filled and sold Board of Tideland Commissioners (BTLC) lots;
- Lands the state did not acquire, however, 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.

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.

Environmental Review

Subsequent Environmental Review and Notice with Later Activities

The NOP indicates that a PEIR is being prepared for the Project. In order to avoid the improper deferral of mitigation, a common flaw in program-level environmental documents, program level 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" (CEQA Guidelines §15126.4(b)).

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)).

To ensure timely comments in the future, please include CSLC as a reviewing agency on all documents submitted through the State Clearinghouse. Copies of public notices and/or Project-related environmental documents transmitted directly to the CSLC should be sent to the attention of CSLC's Division of Environmental Planning and Management (DEPM) at the address shown on the letterhead above.

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 PEIR include an analysis of 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.

Climate Change

A greenhouse gas (GHG) emissions analysis consistent with the California Global Warming Solutions Act (AB 32) and the standards set forth in CEQA Guidelines §15064.4 should be included in the PEIR. This should include, to the extent possible, a quantitative estimate of the GHGs that will be emitted as a result of construction and ultimate build out of the Project, a determination of the significance of impacts resulting from those emissions, and potentially feasible measures that can be incorporated into the Project to avoid or substantially lessen any impacts found to be significant.

The PEIR should also consider the effects of sea level rise on all resource categories potentially affected by the proposed Project. Please note that when reviewing lease applications CSLC staff is directed to (1) request information concerning the potential effects of sea level rise on proposed projects, and (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 each project. For further information, please see "A Report on Sea Level Rise Preparedness, Resurvey" (Report), which the CSLC approved at its meeting on July 23, 2010 (the Report and accompanying staff report can be found on CSLC's website: http://www.slc.ca.gov/). One of the recommendations from the Report is to direct CSLC staff to consider the effects of sea level rise to hydrology, soils, geology, transportation, recreation, and other resource categories in all environmental determinations associated with CSLC leases.

Water Quality

Potential impacts to water quality from the proposed Project, such as introduction of non-native plant and animal species, additional storm water runoff, pumping of treated flows from the WRF into canals or wetlands, and increased turbidity and sedimentation, should be analyzed and appropriate measures should be incorporated into the Project to reduce or eliminate those impacts. Additional regulatory and discretionary permits may be required for construction and restoration projects within the purview of the PEIR. Under these conditions permits may include: U.S. Army Corps of Engineers (Sections 408, 404, and Section 10 of the Safe Rivers and Harbors Act), the California

Department of Fish and Game (CDFG) (Fish and Game Code Section 1600), and the Regional Water Quality Control Board (Section 401 of the Clean Water Act).

Biological Resources

The PEIR should disclose and analyze all potentially significant effects on sensitive species and habitats in and around the Project area, including special-status wildlife, fish, and plants. This analysis should include queries of the CDFG Natural Diversity Database (CNDDB) and the U.S. Fish and Wildlife Service (USFWS) Special Status Species Database to identify any special-status plant or wildlife species that may occur in the region and a discussion of consultation with the CDFG and USFWS, including any recommended mitigation measures and required permits.

The PEIR should include an evaluation of noise and vibration impacts on fish and/or marine mammals from development or marsh restoration activities, particularly if the Project involves any pile driving, dredging, or other activities that create underwater noise or sound pressure, or ambient noise that could adversely affect species. While restoration of the Project site is expected to ultimately provide a net benefit, construction of the restored area may result in impacts to biological resources, and mitigation measures may be needed, including species-specific work windows as defined by CDFG, USFWS, and National Oceanic and Atmospheric Administration (NOAA) Fisheries Service.

One of the major stressors to waterways in the Bay and Delta is the introduction of non-native species. Therefore, the PEIR should consider a plan to prevent or slow the introduction of terrestrial and aquatic invasive species, such as the Quagga mussel, into high demand and sensitive areas. The plan should include a range of prevention alternatives (including quarantine, early detection and response) and take into consideration aquatic invasive species prevention programs currently being undertaken or proposed by other agencies. In light of the recent decline of pelagic organisms and in order to protect at-risk fish species, the PEIR should also examine if the objectives of the plan would favor non-native fisheries within the Bay and Delta systems.

The Project is also likely to result in ongoing effects resulting from the increase in the human population and use in the area. For example, Project construction may dramatically increase the number of residences in the area, which could result in an increase in the number of domestic pets (dogs and cats), as well as an increase in opportunistic urban wildlife such as crows and coyotes. An increase in the density of these species resulting from the Project 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 propose a range of feasible measures to avoid or substantially lessen those effects should they be found to be significant. The PEIR should also discuss and propose

measures (e.g., fencing, signage, maintenance fees for cleanup) to reduce or mitigate all other potential impacts associated with increased population in the Project area.

Cultural Resources

The PEIR should disclose and analyze the potential for the Project to impact submerged cultural resources that may be found on the Project site. Any submerged archaeological site or submerged historic resource remaining in state waters for more than 50 years is presumed to be significant. The title to all abandoned shipwrecks and all archaeological sites and historic or cultural resources on or in the tide and submerged lands of California is vested in the state and under the jurisdiction of the CSLC. The CSLC maintains a shipwrecks database of known and potential vessels located on the state's tide and submerged lands; however, the location of many shipwrecks remains unknown. 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.

Mitigation measures should be developed to address any submerged cultural resources that may be affected by the proposed Project and any unanticipated discoveries during the Project's construction. CSLC staff requests that the city of Brisbane consult with CSLC staff, should any cultural resources be discovered during construction of the proposed Project, and that this consultation be included as a mitigation measure.

Recreation

An evaluation of any temporary or permanent loss of access, recreation and other public trust uses (e.g., fishing, bird watching, boating, etc.) in the area as a result of development and remediation/restoration activities should be included in the PEIR.

Cumulative Impacts

The PEIR should carefully and thoroughly evaluate the Project's cumulative impacts on navigation, recreation, public access, air quality and natural resources of the area.

As a potentially responsible agency, it is anticipated that the CSLC will need to rely on this CEQA document or subsequent environmental document(s) for the issuance of a lease. Therefore, we request that you consider our comments during preparation of the draft PEIR. We also request that all future notices, subsequent environmental documents and correspondence relating to environmental review be sent to the CSLC DEPM.

Please send copies of future Project-related CEQA documents or refer questions concerning environmental review to Joan Walter, Environmental Scientist, at (916) 574-1310 or via e-mail at joan.walter@slc.ca.gov. Please contact Grace Kato, Public Land Manager at 916-574-1227 (e-mail: grace.kato@slc.ca.gov) if you have questions concerning CSLC jurisdiction or leases, or Senior Staff Counsel Pam Griggs at (916) 574-1854 (e-mail: pamela.griggs@slc.ca.gov) if you have questions concerning archaeological or historic resources under CSLC jurisdiction.

Sincerely,

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

cc: Office of Planning and Research
J. Lucchesi, Legal, CSLC
G. Kato, LMD, CSLC
J. Walter, DEPM, CSLC
P. Griggs, Legal, CSLC