

*Filed on demand*



**FILED**  
ALAMEDA COUNTY

DEC 28 2012 EB

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

JOHN BRISCOE (053223)  
DAVID IVESTER (076863)  
WILLIAM MOST (279100)  
BRISCOE IVESTER & BAZEL LLP  
155 Sansome Street, Seventh Floor  
San Francisco, CA 94104  
Telephone: (415) 402-2700  
Facsimile: (415) 398-5630  
Email: jbriscoe@briscoelaw.net  
Email: divester@briscoelaw.net

Exec. Off/Clerk  
By *Guia Baker*

Attorneys for Petitioner and Plaintiff  
GOLDEN GATE LAND HOLDINGS LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF ALAMEDA

GOLDEN GATE LAND HOLDINGS LLC, a  
Delaware limited liability company,

Petitioner and Plaintiff,

v.

EAST BAY REGIONAL PARK DISTRICT, a  
special district of the State of California,

Respondent and Defendant.

No. RG11575462

ASSIGNED FOR ALL PURPOSES TO  
JUDGE Evelio Grillo  
DEPARTMENT 31

Opposition to Return to Peremptory Writ

**BY FAX**

TABLE OF CONTENTS

1  
2 INTRODUCTION.....1  
3 I. CODE OF CIVIL PROCEDURE SECTION 916 STAYS  
4 CONSIDERATION OF A RETURN TO A CHALLENGED WRIT  
5 PENDING APPEAL.....1  
6 II. THE DISTRICT HAS NOT COMPLIED WITH CEQA.....2  
7 A. In Its Ill-Advised Rush to Condemn, The District Falls Far Short  
8 Of CEQA Compliance.....3  
9 B. How The District’s EIR Fails To Comply With CEQA .....5  
10 III. REQUEST FOR A HEARING.....9  
11 CONCLUSION .....9  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

**Cases**

*Building Code Action v. Energy Resources Conserv.*  
(1979) 88 Cal.App.3d 913 ..... 1

*City of Carmel-by-the-Sea v. Board of Supervisors*  
(1982) 137 Cal.App.3d 964 ..... 3

*Elsea v. Saberi*  
(1992) 4 Cal.App.4th 625 ..... 2

*Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc.*  
(1996) 43 Cal.App.4th 630 ..... 1

*Sanders v. City of Los Angeles*  
(1970) 3 Cal.3d 252 ..... 3

*Varian Medical Systems, Inc. v. Delfino*  
(2005) 35 Cal.4th 180 ..... 2

**Statutes**

Code Civ. Proc. § 916 ..... 1

**Other Authorities**

Cal. Administrative Mandamus  
(Cont.Ed.Bar Feb. 2012) § 14.46 ..... 3

1 **INTRODUCTION**

2 Because this proceeding is stayed under Code of Civil Procedure section 916 pending  
3 resolution of the appeal, the Court should postpone consideration of the District’s Return to  
4 Peremptory Writ until the appeal is completed. In deciding the issues before it on appeal, the Court  
5 of Appeal may obviate the need to address the District’s Return or resolve pertinent points of law,  
6 such as whether the District can comply with the California Environmental Quality Act (“CEQA”)  
7 by leaving its invalid approval of the project in place and preparing an after-the-fact environmental  
8 impact report for the already approved project.

9 With respect to the substance of the Return, Petitioner Golden Gate Land Holdings LLC  
10 objects to the Return on the basis that the District has failed to comply with the writ of mandate and  
11 CEQA. If and when the Court proceeds to consider the Return, Golden Gate requests a hearing and  
12 suggests holding a case management conference to discuss pertinent procedural steps, including  
13 preparation of the administrative record, further identification or specification of issues by  
14 supplemental petition, and a briefing schedule.

15 **I. CODE OF CIVIL PROCEDURE SECTION 916 STAYS CONSIDERATION OF A**  
16 **RETURN TO A CHALLENGED WRIT PENDING APPEAL**

17 Writ of mandate proceedings are automatically stayed upon the perfection of an appeal.  
18 (Code Civ. Proc. § 916; *Building Code Action v. Energy Resources Conserv.* (1979) 88 Cal.App.3d  
19 913 (“in the traditional mandamus perfecting the appeal automatically stays the effect of the writ”).)  
20 Code of Civil Procedure section 916, subsection (a), provides:

21 Except as provided in Sections 917.1 to 917.9, inclusive, and in Section 116.810,  
22 the perfecting of an appeal stays proceedings in the trial court upon the judgment  
23 or order appealed from or upon the matters embraced therein or affected thereby,  
24 including enforcement of the judgment or order, but the trial court may proceed  
upon any other matter embraced in the action and not affected by the judgment or  
order.

25 The stay covers all proceedings that would “affect the rights of the parties or the condition of  
26 the subject matter” (*Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc.* (1996) 43 Cal.App.4th  
27 630, 641) and “as a matter of logic, policy, and overwhelming precedent, divests the trial court of  
28 jurisdiction over the subject matter on appeal” (*Varian Medical Systems, Inc. v. Delfino* (2005) 35

1 Cal.4th 180, 199). The purpose of the stay “is to protect the appellate court's jurisdiction by  
2 preserving the status quo until the appeal is decided. The [automatic stay] prevents the trial court  
3 from rendering an appeal futile by altering the appealed judgment or order by conducting other  
4 proceedings that may affect it.” (*Varian, supra*, at 189, citing *Elsea v. Saberi* (1992) 4 Cal.App.4th  
5 625, 629 (motion for relief from default would affect enforcement of a default judgment and was  
6 therefore automatically stayed).) For that reason, courts determine whether a matter is “embraced  
7 within or affected by” a judgment by looking to see whether further proceedings “would have any  
8 impact on the ‘effectiveness’ of the appeal” or render the appeal futile. (*Varian, supra*, at 189;  
9 *Elsea, supra*, at 629.)

10 Here, a notice of appeal was filed May 30, 2012, and briefing was completed in the Court of  
11 Appeal on October 30, 2012. (First Appellate District, Division 5, Case Number A135593.) The  
12 appeal addresses whether the remedy provided in the writ of mandate is permissible under CEQA as  
13 well as whether the District complied with the Eminent Domain Law in adopting its Resolution of  
14 Necessity approving the project on April 5, 2011.

15 Because consideration of a return to the challenged writ is a proceeding “embraced within or  
16 affected by” the writ, such consideration is therefore automatically stayed until completion of the  
17 appeal. Even if it were not, prudential considerations of judicial economy would warrant issuing a  
18 specific stay or otherwise scheduling consideration of the District’s Return after the Court of Appeal  
19 has made its decision. Consideration of that Return entails reviewing the District’s voluminous  
20 administrative record and Environmental Impact Report (“EIR”) for compliance with CEQA—no  
21 small undertaking. The Court of Appeal’s decision could obviate the need to consider the Return or  
22 at least inform this Court’s consideration of whether the District’s recent actions comply with  
23 CEQA.

24 For these reasons, this Court should take no action on the District’s Return until after the  
25 appeal is complete.

## 26 **II. THE DISTRICT HAS NOT COMPLIED WITH CEQA**

27 In the Peremptory Writ of Mandate, this Court directed the District to “conduct an  
28 appropriate CEQA review based on an appropriate definition of the project for CEQA purposes

1 under Public Resources Code section 21065” and retained jurisdiction “until the Court has  
2 determined that the EBRPD has complied with the provisions of the California Environmental  
3 Quality Act.”

4 In its Return to Peremptory Writ, the District does not state that it has complied with the writ  
5 or CEQA. Nor does it ask the Court to discharge the writ. Rather, the District merely states that it  
6 certified an EIR for its project and vacated its original Resolution of Necessity and adopted a  
7 substitute resolution,<sup>1</sup> attaches copies of two resolutions, and cites a webpage where the EIR may be  
8 viewed. The District seemingly leaves it to Golden Gate and the Court to discern whatever  
9 pertinence these statements may have to determining its compliance with the writ and CEQA.

10 The District, in any event, has not complied with CEQA. The validity of a return to a writ  
11 may be tested by (1) an objection to the return and request for a hearing on it, (2) a postjudgment  
12 motion, (3) a supplemental petition with the same docket number, or (4) a new petition. (Cal.  
13 Administrative Mandamus (Cont.Ed.Bar Feb. 2012) §§ 14.46, 15.22; *Sanders v. City of Los Angeles*  
14 (1970) 3 Cal.3d 252; *City of Carmel-by-the-Sea v. Board of Supervisors* (1982) 137 Cal.App.3d 964,  
15 971.) By this opposition to the return and request for a hearing, Golden Gate contends that the  
16 District has failed to conduct an appropriate CEQA review, has failed to base its review on an  
17 appropriate definition of the project for CEQA purposes, and has otherwise failed to comply with  
18 CEQA’s procedural and substantive mandates.

19 **A. In Its Ill-Advised Rush to Condemn, The District Falls Far Short Of CEQA**  
20 **Compliance**

21 The District’s recent actions in adopting Resolution 2012-11-285 (certifying an EIR for the  
22 Albany Beach Restoration and Public Access Project), and Resolution 2012-11-286 (approving the  
23 Resolution of Necessity) fall far short of bringing the District into compliance with the provisions of  
24 CEQA and meeting the requirements of this Court’s writ.

25  
26 <sup>1</sup> The resolution attached to the Return does not state that the original Resolution of Necessity was  
27 vacated. Rather it says that the resolution is “superseded and replaced” by the District’s later  
28 resolution. In contrast, the District’s October 25, 2012, notice of intent to adopt a Resolution of  
Necessity indicated that the purpose of the new resolution was to supersede and replace the old  
Resolution “with respect to compliance with [CEQA].” In further contrast, at the public hearing, the  
District staff described the new resolution as an “amendment” to the old.

1 At every step of the legally flawed path the District has chosen to pursue in response to this  
2 Court's writ, Golden Gate has sought without success to steer the District in a CEQA-complaint  
3 direction.

4 In its August 27, 2012 52-page comment letter submitted in response to the District's release  
5 of the Draft EIR (attached as Exhibit A), Golden Gate described the legal deficiencies of the DEIR,  
6 requested that the District prepare a revised DEIR to bring its environmental review into compliance  
7 with CEQA, and called the District's attention to the critical importance and legal imperative of  
8 recirculating the revised DEIR for further public review and comment.

9 Instead of curing the DEIR's fundamental inadequacies and recirculating a revised draft  
10 document to allow for meaningful public review, the District issued a Final EIR ("FEIR") that is  
11 infected with the same fatal flaws as the draft. The FEIR includes a "response" to Golden Gate's  
12 August 27th comments consisting in large part of a restatement of the provisions of the DEIR  
13 followed by a conclusory assertion of the adequacy of the information and analysis already provided.

14 In response to the District's release of the FEIR, Golden Gate submitted two additional  
15 comment letters dated November 13, 2012 and November 19, 2012 (attached as Exhibits B and C,  
16 respectively). As related in these letters, the District's environmental review is fatally flawed and  
17 the District failed to perform its legal duty as a lead agency responsible for assuring compliance with  
18 CEQA. Golden Gate also provided the District with both a summary list of some of the most serious  
19 substantive legal shortcomings of the District's CEQA review (Attachment I to Exhibit C) together  
20 with a procedural "Roadmap to CEQA Compliance," describing steps the District should take in  
21 order to comply with CEQA. (Exhibit C at pp. 7-8.)

22 Finally, Golden Gate presented oral testimony at the public hearing on Resolutions 2012-11-  
23 285 and 2012-11-286, in which Golden Gate again challenged the legal adequacy of the District's  
24 environmental review and objected to its approval of the project.

25 Despite these efforts, the District has failed to comply with CEQA both as a project  
26 proponent and as a lead agency. As a project proponent, the District has failed to determine the  
27 project's full scope and design through the preparation of a proper Project Specific Plan. As a lead  
28 agency, the District has failed by preparing an EIR on a "project" that does not exist outside the

1 DEIR project description and subjecting the project description to a level of environmental review  
2 that is superficial and incomplete with respect to environmental impacts, alternatives, and mitigation.

3 **B. How The District's EIR Fails To Comply With CEQA**

4 The District's EIR fails to comply with CEQA in many respects, including but not limited to  
5 the following:

6 1. The District's EIR is not based on a properly defined project consisting of a Specific  
7 Project Plan which sets forth "the detailed implementation plans needed to accomplish" the Albany  
8 Beach Restoration and Public Access Project ("the Project"), as required by the 2002 Eastshore Park  
9 General Plan ("General Plan"). The DEIR's project description is not an adequate substitute for a  
10 Specific Project Plan. (General Plan at pp. 1-17 through 1-19; Exhibit A at pp. 10-11; Exhibit B at  
11 pp. 3-4.)

12 2. The District fails to undertake the more detailed studies and plans required to prepare  
13 an adequate Specific Project Plan as contemplated by the General Plan.

14 3. Without the more refined design that a Specific Project Plan would provide, the  
15 Project lacks the detail and documentation necessary:

16 a. for conducting meaningful and effective environmental review of project  
17 specific and cumulative impacts, rendering some impacts impossible to  
18 discern and the feasibility of mitigation strategies to address those impacts  
19 impossible to determine; and

20 b. for processing the project-related discretionary permits and approvals which  
21 cannot be granted in the absence of meaningful and effective environmental  
22 review.

23 4. The District's failure to prepare a Specific Project Plan that incorporates a level of  
24 design detail sufficient to determine with reasonable precision what is to be constructed also results  
25 in a failure to adequately define the construction process that is an integral part of the Project's scope  
26 and to adequately analyze the construction-related environmental impacts and the feasibility of  
27 mitigating those impacts.

28



1           5.       Not only does the EIR seek to substitute an inadequate project description for a  
2 Specific Project Plan, but it also fails to provide the project level environmental review required by  
3 CEQA. Instead, it attempts to create the illusion of CEQA compliance by embedding the project  
4 description it puts forward for review in lieu of a Specific Project Plan in a lengthy expository  
5 narrative consisting of page after page of references to:

- 6           a.       the General Plan (of which the Albany Beach Restoration and Public Access  
7 project is but a small part);
- 8           b.       the decade-old program-level environmental analysis contained in the  
9 General Plan EIR (that the District seeks to use as a stand-in for a project-  
10 level review); and
- 11          c.       the background feasibility studies and preliminary design work (which the  
12 District seeks to use as a stand-in for a fully defined project).

13          6.       The EIR improperly tiers off a decade-old program-level EIR prepared for the entire  
14 Eastshore Park System without:

- 15          a.       Performing the analysis required to determine which of the General Plan EIR  
16 studies and reports (all prepared over ten years ago) need to be updated or  
17 redone; or
- 18          b.       Conducting an evaluation of the General Plan EIR itself to determine if  
19 additional analysis is required to address new information and/or changed  
20 circumstances.

21          7.       The EIR fails to include the new studies and reports that were explicitly deferred by  
22 the program-level EIR until Specific Project Plans were developed.

23          8.       The EIR fails to address or assess the impact of changes to the Golden Gate Fields  
24 site that would result from project implementation. Those changes would include changes in the  
25 physical configuration and operational characteristics of the existing on-site circulation system  
26 (Exhibit A at pp. 34-35) and changes in the options available to Golden Gate Fields to address the  
27 impacts of sea level rise where strategies involving shoreline mitigation are no longer available as a  
28 result of the District's condemnation of the Golden Gate Fields bay frontage (Exhibit A at p. 30).

1           9.     The EIR relies on cumulative air quality thresholds of significance that have been  
2 withdrawn by the Bay Area Air Quality Management District without providing the substantial  
3 evidence required to support the use and reliance upon such thresholds. (Exhibit A at pp. 14-15.)

4           10.    The EIR fails to contain detailed traffic analysis that looks at both project-related  
5 operational impacts and construction-related impacts to affected intersections and roadway  
6 segments. (Exhibit A at pp. 2 and 32-36.)

7           11.    Because its traffic analysis fails to comply with CEQA, the EIR's analysis and  
8 discussion of air quality and climate change impacts is also inadequate for failure to sufficiently  
9 address impacts resulting from traffic-related greenhouse gas emissions. (Exhibit A at pp. 14-17.)

10          12.    The EIR fails to sufficiently address special status species and their respective  
11 habitats, the potential project-related impacts on such species and habitat, and feasible mitigation  
12 strategies for addressing identified impacts, particularly with respect to: burrowing owls (Exhibit A  
13 at pp. 2 and 18), eelgrass (Exhibit A at pp.18-19), and harbor seals and other marine mammals  
14 (Exhibit B at pp. 2-3).

15          13.    The EIR fails to include the site-specific geotechnical evaluation and design called for  
16 by the 2002 General Plan Guidelines OPER – 11, 12 and 13 as well as feasible mitigation strategies  
17 to address identified impacts related to seismic ground shaking; seismic-related ground failure  
18 including liquefaction, soil erosion and topsoil loss; and geologic instability including lateral  
19 spreading and subsidence. (Exhibit A at pp. 22-24.)

20          14.    The EIR fails to include analysis of impacts and mitigation strategies associated with  
21 flooding and sea level rise to take into consideration wave runup and storm surge. (Exhibit A at pp.  
22 25-30.)

23          15.    The EIR fails to include adequate analysis of the impacts associated with bay fill.  
24 (Exhibit B at pp. 1-2.)

25          16.    The EIR fails to incorporate those investigations, studies, and reports referenced in  
26 the 2002 General Plan. (2002 General Plan at pp. III-16 through III-61 and III-78 through III-87;  
27 Exhibit A at pp. 22-24.)  
28

1           17.     The EIR fails to include adequate consideration of feasible alternatives to the project,  
2 including the “East of I-80 Bay Trail” alternative, the “On-Site” alternatives rejected by staff prior to  
3 the preparation of the DEIR, and the “Interim” alternative reflecting a negotiated agreement between  
4 the District and the GGF landowners to formalize continued and new project-related uses of the  
5 GGF site for an interim period while deferring condemnation to a future date. (Exhibit A at pp. 37-  
6 40.)

7           18.     The EIR impermissibly defers analysis of impacts and formulation of mitigation  
8 measures until after certification of the EIR, both explicitly and by failing to perform the required  
9 study and analysis, or by failing to include performance criteria and describe the manner in which  
10 the project would mitigate said impacts.

11           19.     The EIR fails to adequately analyze the Project’s reasonably foreseeable adverse  
12 effects on or with respect to air quality, biological resources, cultural resources, geology and soils,  
13 hydrology and water quality, land use, and transportation and traffic.

14           20.     The EIR lacks substantial evidence to support the determination that the project’s  
15 significant impacts can be and will be mitigated to a less-than-significant level.

16           21.     The EIR fails to adequately disclose, analyze, and mitigate, or consider feasible  
17 mitigation measures for the Project’s significant project-level impacts.

18           22.     The EIR fails to adequately disclose, evaluate, and mitigate, or consider feasible  
19 mitigation measures for the Project’s significant cumulative impacts.

20           23.     The EIR fails to identify and adopt all feasible mitigation measures.

21           24.     The EIR fails to adequately respond to public and agency comments.

22           25.     The EIR fails to include sufficient consideration of a reasonable range of alternatives  
23 or feasible mitigation measures that would avoid or substantially lessen the adverse environmental  
24 effects of the project.

25           26.     The EIR’s findings are not supported by substantial evidence in the record and are  
26 thus inadequate as a matter of law.

27  
28

1 As a result of these deficiencies and the deficiencies identified in each of the public  
2 comments submitted on the EIR during the administrative proceedings, the District prejudicially  
3 abused its discretion and failed to proceed in the manner required by CEQA.

4 **III. REQUEST FOR A HEARING**

5 If and when this Court proceeds to consider the Return, Golden Gate requests a hearing on  
6 the District's Return. It might be appropriate to hold a case management conference to outline a way  
7 forward, including preparation of the administrative record for the purpose of evaluating the EIR's  
8 compliance with CEQA, the filing of a supplemental petition, and a briefing schedule before the  
9 hearing.

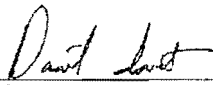
10 **CONCLUSION**

11 For the foregoing reasons, Golden Gate respectfully requests the Court to take no action on  
12 the District's Return to Peremptory Writ until after the Court of Appeal has made its decision and, if  
13 and when the Court proceeds to consider the Return, to hold a hearing (after appropriate review of  
14 the administrative record and briefing) on whether the District has complied with CEQA.

15 DATED: January 4, 2013

BRISCOE IVESTER & BAZEL LLP

16  
17 By: \_\_\_\_\_

  
David Ivester  
Attorneys for Defendants  
GOLDEN GATE LAND HOLDINGS LLC

1 **PROOF OF SERVICE**

2 I declare that I am over the age of eighteen years and not a party to this action. I am  
3 employed in the City and County of San Francisco, and my business address is 155 Sansome  
Street, Suite 700, San Francisco, California 94104.

4 On January 4, 2013, at San Francisco, California, I served the attached document(s):

5 **OPPOSITION TO RETURN TO PEREMPTORY WRIT**

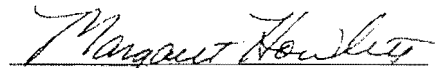
6 on the following parties:

7 Mr. Todd A. Amspoker  
8 Price, Postel & Parma LLP  
9 200 E. Carrillo Street, Suite 400  
10 Santa Barbara, CA 93101  
11 Facsimile: (805) 965-3978  
12 Email: [tamspoker@ppplaw.com](mailto:tamspoker@ppplaw.com)

13 *Attorney for Respondent and Defendant*  
14 *East Bay Regional Park District*

15  **BY OVERNIGHT DELIVERY:** On the date written above, I delivered the Federal Express  
16 package to a location authorized by Federal Express to receive documents for pickup. The  
17 package was placed in a sealed envelope or package designated by Federal Express with  
18 delivery fees paid or provided for, addressed to the persons on whom it is to be served at the  
19 addresses shown above.  
20

21 I declare under penalty of perjury under the laws of the State of California that the  
22 foregoing is true and correct and that this document was executed on January 4, 2013, at San  
23 Francisco, California.  
24

25   
26 Margaret Howlett  
27  
28

**COMMENT LETTER  
ON THE  
ALBANY BEACH RESTORATION AND PUBLIC ACCESS PROJECT  
DRAFT ENVIRONMENTAL IMPACT REPORT  
(SCH#2012032072)**

August 27, 2012

Respectfully Submitted to the EBRPD Board of Directors  
By Golden Gate Land Holdings LLC

**OPENING STATEMENT AND EXECUTIVE SUMMARY**

The fundamental problem with the Albany Beach Restoration and Public Access Project Draft Environmental Impact Report (the "DEIR") is that it is not what it purports to be. It is a draft environmental impact report in name only. If judged by its content and the information it provides regarding (a) project-related environmental impacts, (b) feasible mitigation measures, and (c) alternatives of lesser effect, the DEIR has all the substance of an Initial Study only, and not a DEIR. That is to say, it reflects a level of analysis that would be of best use in determining whether the Proposed Project may potentially have significant impacts on the environment. But it is not a document that provides the information and analysis required to enable decision makers such as the East Bay Regional Park District ("EBRPD" or "Park District") to make informed decisions that take into consideration:

- **the ways in which the Proposed Project will impact the environment,**
- **the significance of those impacts, and**
- **the feasibility of mitigating those impacts by way of:**
  - (i) **changes to the design of the Project,**
  - (ii) **mitigation measures targeting residual impacts, and/or**
  - (iii) **alternatives that avoid or result in reduced impacts.**

If the DEIR is to serve these functions -- which are the essential functions of an EIR -- not only will it need to be rewritten to provide the content and substance it currently lacks, but it will also need to incorporate substantial new studies and analysis that have been impermissibly deferred.

**Critical Deficiencies to be Addressed  
in a Revised DEIR**

In the comment letter of which this Opening Statement is a part, we have identified a host of substantive deficiencies that will need to be addressed in a revised DEIR to bring it into compliance with the requirements of CEQA. By way of example, those deficiencies include the following:

1. **Failure to Identify a "Preferred Project Plan."** The DEIR Project Description makes reference to a "Preferred Project Plan" which purportedly defines the project for purposes

of environmental review but which is not included in the DEIR and is apparently unavailable. The absence of a Preferred Project Plan that provides a comprehensive and integrated understanding of the project parameters and reflects a level of planning and design detail that will enable effective CEQA review represents the omission of a critical prerequisite to a legally adequate DEIR.

2. **Failure to Address Sea Level Rise.** The DEIR acknowledges that sea level rise poses a reasonably foreseeable threat to the physical integrity of the Proposed Project (i.e., its long term survival as a public resource) but the document fails to satisfy CEQA by including:

- a competent examination of the scope and character of the problem;
- an evaluation of alternative strategies to mitigate the problem;
- an assessment of the comparative impacts associated with the alternative mitigation strategies; and
- a mitigation strategy to protect the project from sea level rise and appropriate mitigation measures to protect the environment from the adverse impacts of such a strategy.

As a result, the Project as proposed is designed to fail and the impact analysis is at best deferred resulting in a legally unacceptable piecemeal approach to environmental review under CEQA.

3. **Failure to Identify and Mitigate Impacts to Burrowing Owls.** The DEIR acknowledges the likely presence of burrowing owls on the Proposed Project site but fails to satisfy CEQA by including:

- an appropriate assessment of the scope and character of the burrowing owl presence;
- an analysis of the ways in which the burrowing owls that are present will be negatively impacted by the Proposed Project;
- an analysis of Project impacts to burrowing owl habitat; and
- appropriate mitigation measures to protect the burrowing owl from Project impacts and to mitigate impacts to owl habitat.

4. **Failure to Properly Analyze and Mitigate Traffic Impacts.** Not only is the DEIR legally defective because its analysis of project-related transportation and traffic impacts:

- is based on inadequate information and flawed assumptions;
- is internally inconsistent; and
- is methodologically defective,

but the DEIR is also legally inadequate in that it completely ignores the impacts of the approximately 4,500 heavy truck trips (assuming the use of trucks capable of hauling on average 10 cubic yards of materials per trip) that will be required (a) to haul 22,470 cubic yards of potentially contaminated debris, rubble and other materials to disposal locations at some distance from the project site and (b) to import 22,920 cubic yards of fill material from offsite source locations, all by way of the Buchanan/I-80/I-580 interchange.

5. **Failure to Analyze and Mitigate Impacts Resulting from Changes to GGF Required to Accommodate the Proposed Project.** Although the Proposed Project will likely require substantial changes to the existing Golden Gate Fields (“GGF”) circulation and parking facilities, including reconfiguration and reoperation of the GGF entry roadway off Gilman Street, the DEIR fails to include any analysis:

- of the scope and character of these changes to the physical and operational character of GGF;
- of the impacts of these changes on the environment; and
- of the feasibility of mitigating these impacts by way of changes in the design of the Proposed Project, mitigation measures, and alternatives.

As a result, the DEIR also fails to incorporate appropriate strategies to mitigate the identified impacts associated with these changes to GGF.

#### **Recirculation of the DEIR is Required**

CEQA requires that where “significant new information” is added to an EIR after a draft EIR is circulated for public review and comment, the revised DEIR (or the portions thereof containing the new information) must be recirculated for further public review and comment. Pub.Resources Code, § 29092.1; CEQA Guidelines §15088.5; Laurel Heights Improvement Association v. Regents of the University of California (1993) 6 Cal.4th 1112 (Laurel Heights II); Mountain Lion Coalition v. Fish and Game Commission (1989) 214 Cal.App.3d 1043 (Mountain Lion Coalition). As a result of the deficiencies summarized above and other defects addressed in the discussion that follows, the DEIR is “so fundamentally and basically inadequate and conclusory in nature that public comment on the draft [is] in effect meaningless.” (CEQA Guidelines, §15088.5, subd. (a); Laurel Heights II at p. 1130); Mountain Lion Coalition at p. 1052. As a result, recirculation of a revised draft document with changes to address the inadequacies discussed in this comment letter will be required.



THE LIVINGSTON LAW GROUP  
400 CAPITOL MALL, SUITE 2555  
SACRAMENTO, CA 95814  
(916) 947-6972

BRISCOE IVESTER & BAZEL LLP  
155 SANSOME STREET  
SAN FRANCISCO, CA 94104  
(415) 402-2700

August 27, 2012

Board of Directors  
East Bay Regional Park District  
PO Box 5381  
Oakland, CA 94605  
[cbarton@ebparks.org](mailto:cbarton@ebparks.org)

Delivered by U.S. Mail and e-mail to the addresses listed above.

Re: Comments on the Albany Beach Restoration & Public Access Project Draft  
Environmental Impact Report (SCH#2012032072)

Dear Members of the Board:

This comment letter on the Albany Beach Restoration and Public Access Project Draft Environmental Impact Report ("DEIR") is submitted on behalf of Golden Gate Land Holdings LLC ("GGLH") -- the owner of the Golden Gate Fields ("GGF") property, a portion of which the East Bay Regional Park District ("EBRPD" or "Park District") proposes to convert from its existing racetrack-related uses to public recreation/open space/access uses as part of the Proposed Project. In furtherance of these proposed changes in land use, the Park District adopted a Resolution of Necessity on April 5, 2011 condemning the portions of the GGF property identified in the DEIR as "Area 2" and "Area 3." DEIR at p.1. As a result, GGLH has a fundamental interest in the project-related decisions of the EBRPD and other public agencies which this DEIR is intended to inform and has a direct stake in the legal adequacy of the DEIR.

#### INTRODUCTION

The California Environmental Quality Act (Pub. Resources Code, §21000 et seq.) ("CEQA") requires public agencies such as the EBRPD to both document and give consideration to the impacts of their actions on the environment. See Pub. Resources Code, §§21000, 21001; Friends of Mammoth v. Board of Supervisors (1972) 8 Cal. 3d 247, 254-256. An environmental

Impact Report (“EIR”) prepared pursuant to and in accordance with CEQA has two principal purposes:

1. The first purpose of environmental impact review under CEQA is not only “to inform decision makers” as the DEIR provides at page 1 but also, and perhaps more importantly, to assure that decision making is informed -- that is, “to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences.” CEQA Guidelines Section 15151, emphasis added; see DEIR at p. 5. While this comment letter will focus on the inadequacy of the impact analysis and information provided decision makers by the DEIR, it is important to note that, even if the DEIR reflected an adequate, complete and good faith effort at full disclosure by the District (which it does not), it cannot possibly achieve the first of its two principal purposes -- to enable informed decision making -- because it has been prepared after one of the most important decisions it is intended to inform has already been made.

As noted above, on April 5, 2011, fully fifteen months before the DEIR was published and made available for public review and comment (July 11, 2012), the Park District adopted the Resolution of Necessity to condemn:

- a 2.8 acre portion of the GGF property adjacent to Albany Beach (referenced in the DEIR as “Area 2”) upon which the Park District proposes to undertake beach and dune enhancement and construct recreation improvements, a restroom, parking, and approximately 800 feet of new San Francisco Bay Trail (“Bay Trail”); and
- an easement on a 4.88 acre portion of the GGF property that runs along the entire length of the GGF waterfront for the purpose of constructing an additional 4,200 feet of new Bay Trail. See DEIR at p. 1.

According to a recent court decision, the Park District approved a project for the purposes of CEQA when it adopted the Resolution of Necessity. CEQA, however, requires that environmental analysis come *before* project approval, so that decision-makers can “intelligently [take] account of environmental consequences.” See CEQA Guidelines Section 15151. As a result, no matter what steps are taken in response to comments which are to be focused on “the environmental impacts and the adequacy of the EIR” (DEIR at p. 5), the DEIR cannot serve its intended purpose unless the Park District vacates and then reconsiders its Resolution of Necessity in light of the information and analysis the EIR will provide. Additionally, since the project has already been approved, the EIR should explain what it means by “the EBRPD Board of Directors will consider whether to . . . approve the project.” DEIR at p. 5.

2. While the DEIR makes reference to the first purpose of environmental review under CEQA (i.e., informed decision making), the DEIR is strangely silent with respect to the second purpose of CEQA. As the California Supreme Court has instructed -- “CEQA compels government first to identify the environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives.” Sierra Club v. State Board of

Forestry (1994) 7 Cal.4th 1215, 1233; see Pub. Resources Code §21002; see also Mountain Lion Foundation v. Fish & Game Commission (1997) 16 Cal.4th 105, 134.

As a result, the analysis required to identify a project's environmental impact is only the first step of a two step process. If the impact analysis identifies significant adverse environmental effects attributable to the proposed project, then the DEIR must thoroughly assess the availability of feasible mitigation measures or feasible alternatives to the project that can either avoid the significant impacts or reduce them to a less than significant level. Where feasible mitigation measures or alternatives can substantially lessen the significant adverse impacts of a project, agencies are prohibited by CEQA from approving the project as proposed. Chapter 1 of the DEIR needs to be revised to inform the public of this "'substantive mandate' that public agencies refrain from approving projects with significant environmental effects if 'there are feasible alternatives or mitigation measures' that can substantially lessen or avoid those effects. Mountain Lion Foundation v. Fish & Game Commission (1997) 16 Cal.4th 105, 134...." Guide to CEQA (Eleventh Edition), Michael H. Remy, Tina A. Thomas, James G. Moose, and Whitman F. Manley (2007) at p. 1.

In recognition of CEQA's dual purpose as described above, our comments will focus on:

1. the adequacy of the impact analysis contained in the DEIR; and
2. the extent to which the DEIR contains an adequate assessment of feasible mitigation measures and alternatives.

**PROJECT DESCRIPTION**  
**(DEIR Section 3 at pp. 25-64)**

An accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR. County of Inyo v. City of Los Angeles (1977) 71 Cal.App.3d 185, 193. The “Albany Beach Restoration and Public Access Project at Eastshore State Park,” as proposed by EBRPD, is described in the DEIR as “consisting of shoreline repair and reconstruction, (optional) habitat enhancement, beach renovation, recreational amenities, and construction of approximately 1.3 miles of the San Francisco Bay Trail (the “Bay Trail”) public access improvements consistent with the Eastshore State Park General Plan at Albany Beach” (the “Proposed Project” or “Project”). DEIR at p. 25. In describing the Proposed Project, the DEIR also notes that:

- the Eastshore Park General Plan (the “General Plan”) is the “Master Plan for development of Eastshore Park” (DEIR at p. 25);
- the environmental impacts of this General Plan were analyzed at a “program” level by the Eastshore Park Project General Plan EIR (the “General Plan EIR”) (DEIR at p. 25); and
- the General Plan and General Plan EIR both contemplate that a “‘tiered’ approach [will be] used for environmental review of subsequent development of specific components of the master plan, such as the Albany Beach Restoration and Public Access Project . . . , in which the environmental document for the subsequent project focuses on project-specific impacts that were not covered in the Eastshore Park Project General Plan.” DEIR at p. 25.

While it is certainly the case that the General Plan and General Plan EIR contemplate a “tiered” approach to the subsequent environmental review of project-specific components of the General Plan program,<sup>1</sup> the master plan framework established by the General Plan and General Plan EIR had a very different approach to project-specific implementation in mind than the approach currently being taken by the Park District as reflected in the DEIR.

The General Plan itself describes at some length the process by which the master park program it establishes for the Eastshore State Park is to be implemented through specific project initiatives such as the Albany Beach Restoration and Public Access Project. (See General Plan at pp. I-17 through I-19.) The General Plan’s self-subscribed principal purpose is to serve as “the primary management document” for the Eastshore State Park, “establishing its purpose and management direction of the future.” General Plan at p. I-17. As such, the General Plan provides “a defined purpose and vision, long term goals, and guidelines” and “defines the broadest management framework for the development, ongoing management, and public use” of the Eastshore State Park. General Plan at p. I-17.

---

<sup>1</sup> Although the General Plan and General Plan DEIR contemplated a tiered approach to future environmental analysis, almost ten years have passed since the General Plan environmental review was completed. Presumably, circumstances have changed in the intervening period and such changed circumstances present new issues that will need to be addressed in a new EIR on a specific project. If the DEIR is to be “tiered” off the 2002 GP EIR, it should include a discussion of such changed circumstances and the issues they present.

“Specific objectives and strategies for implementation of the general plan are intended to be developed in subsequent planning efforts as they are needed, including preparation of management plans and specific project plans. . . . ‘Management Plans’ define the specific objectives, methodologies and/or designs for accomplishing management goals. . . . ‘Specific Project Plans’ are the detailed implementation plans needed to accomplish specific projects or management plans.” General Plan at p. I-18.

The General Plan Guidelines make it clear that “Specific Project Plans” (or “Area-Specific Projects,” as they are also called) are to be developed through a “planning and design process” that is carved out at a level of specificity and detail sufficient to accomplish two overriding objectives:

1. to assure that the defined purpose and vision, long term goals, and guidelines established by the General Plan are implemented at the project- and area-specific level; and, more importantly for purposes of this letter, and
2. to enable a thorough CEQA analysis and disclosure of the “potential environmental impacts associated with implementing the proposed project” such that (a) “the project can be modified to avoid or minimize potential impacts” and (b) mitigation measures can be developed to address “impacts that cannot be reduced to a less than significant level” by project modification. DEIR Appendix H, “Implementation Approach, Albany Beach Restoration and Public Access Feasibility Study, Eastshore State Park, California,” June 16, 2011 (the “Feasibility Study Implementation Plan” or “Implementation Plan”), at p. 7.

In evaluating the legal adequacy of the DEIR, two major points of inquiry arise:

1. Is the Proposed Project defined in such a way and does it reflect a level of planning and design detail that will enable effective CEQA review?
2. Does the CEQA review reflect a level of analysis that will enable (a) appropriate modifications to be made to the project to avoid or minimize potential impacts and (b) appropriate mitigation measures to be developed to reduce to a less than significant level those project impacts that cannot be addressed through project modifications?

The Albany Beach Restoration and Public Access DEIR falls short of legal adequacy in both regards.

## **The Proposed Project Is Inadequately Defined to Make Effective Environmental Review Possible**

The Proposed Project's Main Components. The DEIR describes the Proposed Project as consisting of "three main components"<sup>2</sup>:

1. "Shoreline repair and reconstruction, including potential habitat enhancement (optional), and accessibility improvements to 2,000 feet of existing trail (San Francisco Bay Trail Spur) along the Albany Neck shoreline (Area 1); and northern beach access;
2. Beach and dune enhancement, recreation improvements, restroom, parking and construction of 800 feet of new San Francisco Bay Trail at Albany Beach (Area 2); and
3. Construction of 4,200 feet of new San Francisco Bay Trail between Albany Beach and Gilman Street (Area 3)." DEIR at p. 1.

Project Components Applicable to Areas 1 and 2. In further describing those components of the Proposed Project applicable to Areas 1 and 2, the DEIR makes reference to the four part Albany Beach Restoration and Public Access Feasibility Study (the "Feasibility Study") that was prepared in 2010-2011 to identify and conceptualize habitat restoration and public access improvements at Albany Beach, consistent with the vision of the adopted General Plan to include:

- restoring and protecting Albany Beach and dune habitats;
- expanding dune areas behind the beach;
- installing compatible public access improvements and other park facilities;
- enhancing water access to San Francisco Bay; and
- closing a key gap in the San Francisco Bay Trail.

According to the DEIR, this Feasibility Study and the public input received in response thereto "formed the basis for the Preferred Project Plan for Restoration and Public Access for Albany Beach" (the "Preferred Project Plan") that "is the subject of [the DEIR] environmental analysis." DEIR at p. 42.

Project Component Applicable to Area 3. In describing the component of the Proposed Project applicable to Area 3, the DEIR refers to the "[d]evelopment of concepts for the Bay Trail along Golden Gate Fields (Area 3) [that] were separately prepared by Questa Engineering, in consultations with EBRPD, over the period from 2006 through 2010." DEIR at p. 42. The DEIR is silent, however, regarding the existence of a preferred project plan which transforms these Bay Trail "concepts" into a project proposal for purposes (a) of processing the discretionary approvals that will be required to proceed with project implement and (b) of conducting the requisite environmental review required before such approvals can be granted.

---

<sup>2</sup> In addition to the three main components, the DEIR also notes a fourth component consisting of repairs to "an approximately 2-acre area on the east end of the Plateau, which has been damaged by metal scavenging and uneven landfill ground settlement." DEIR at p. 28.

Status of Preferred Project Plans Applicable to Areas 1, 2, and 3. It seems reasonable to assume from the absence of any mention of a preferred project plan proposed for Area 3 that such a formal, stand-alone plan does not exist. Indeed, although (as noted above) reference is made in the DEIR to the existence of a Preferred Project Plan applicable to Areas 1 and 2 (e.g. DEIR at pg. 3), the DEIR neither includes such a plan in the Appendix nor provides directions with respect to where such a plan is made available for public review. These omissions suggest that such a Preferred Project Plan for Areas 1 and 2 also has not yet been prepared.

Absence of Preferred Project Plan Results in Fatally Flawed Environmental Review. If, in point of fact, a Preferred Project Plan applicable to Areas 1, 2, and 3 does not exist separate and apart from the purported description of such a proposed project in the DEIR, then the environmental review done to date is fatally flawed. The DEIR cannot bypass the heavy lifting required to transform the Feasibility Study, the Bay Trail concepts, the related public input, and the other supporting documentation into an actual project proposal by using the DEIR project description to create an illusory Preferred Project Plan that in point of fact has no life outside the covers of the DEIR.

Preparation of Preferred Project Plan Required to Cure Legal Deficiency. If EBRPD, as lead agency, is to correct this fundamental deficiency with both its CEQA review process and the DEIR this process has produced, its first order of business must be to prepare a formal, well-documented, integrated, stand-alone Preferred Project Plan applicable to Areas 1, 2, and 3 which can serve to define the Proposed Project both for purposes of securing the discretionary approvals that are required to proceed with project implementation and for purposes of conducting the environmental review under CEQA that is required to support those approvals.

### **The Proposed Project Appears to Be Missing the Design Work Required to Make Effective Environmental Review Possible**

The fourth part of the Feasibility Study entitled “Implementation Approach” (the “Implementation Plan”) lists the tasks that will need to be undertaken in order to implement the Proposed Project. Implementation Plan at p. 7. These tasks include more refined project design to “provide the detail necessary for CEQA analysis” as well as for regulatory review and approval. Implementation Plan at p. 7.

It should be noted, of course, that there is a close relationship between the CEQA review process and the regulatory approval process. Because the CEQA analysis will provide the “needed documentation for [project-related] discretionary approvals (permits),” any project design detail that is required for purposes of processing project approvals will also be required for purposes of CEQA analysis.

In identifying the crucial role that further project design will play in providing “the detail necessary for CEQA analysis” (Implementation Plan at p. 7), the Implementation Plan echoes a common refrain of the General Plan Guidelines that make frequent reference to the importance of “the planning and design process for area-specific projects.” Both the General Plan and the Implementation Plan place great emphasis on design refinement and detail precisely because the design process offers a unique opportunity to introduce design solutions to address potential

environmental impacts and to reduce uncertainty leading to more reliable project impact analysis and better informed decision making.

The Implementation Plan's call for additional design refinement and detail raises the following points of inquiry:

- Has the more detailed design work called for by both the General Plan and the June 2011 Feasibility Study Implementation Plan been undertaken? If so, please describe any and all design work undertaken during the time period extending from June 2011 to the present.
- If undertaken but not yet completed, what is the status of the design work currently underway?
- What additional design work remains to be done?
- Has the remaining design work been scheduled and, if so, when is it projected to be completed?
- To the extent such more detailed design work has been completed:
  - Has it been incorporated in the Proposed Project as described in the DEIR?
  - Has it resulted in any changes to the Proposed Project that either avoid or reduce the Project's environmental impacts?
  - Was it made available to EBRPD when the decision was made to proceed with the Preferred Project Plan?
  - Was it considered in reviewing the Preferred Project Plan's environmental impacts and in evaluating the feasibility of measures to mitigate identified impacts under CEQA?
  - Is it presently available for public review and comment?

#### **Explanation of Decision to Reject Feasibility Study Determination to Exclude Bay Trail Improvements from Proposed Project**

Among the "improvements analyzed and not included in the Proposed Project" as recommended by the Feasibility Study are improvements located "along the shoreline south of Albany Beach abutting Golden Gate Fields," including construction of the extension of the Bay Trail to Gilman Street, installation of a vegetated buffer between the Bay Trail and the Golden Gate Fields property, and shoreline stabilization and protection south of Albany Beach to lower the risk of erosion and shoreline failure. Implementation Plan at pp. 14-17. The Implementation Plan concludes:

"These improvements would be more effectively addressed by a separate effort to close a gap in the San Francisco Bay Trail between Buchanan Street and Gilman Street. Additional factors for not extending proposed project improvements south of Albany Beach include: substantial costs, permitted efforts, high potential for unearthing hazardous materials, potential cultural/historic resource impacts, and property ownership constraints on construction staging." Implementation Plan at p. 16.



At some point following the June 2011 completion of the Feasibility Study, however, a decision was apparently made to reject the recommendations of the study and to include as part of the Preferred Project Plan “[c]onstruction of 4,200 feet of new San Francisco Bay Trail between Albany Beach and Gilman Street (Area 3).” DEIR at p. 25, 43.

The DEIR fails to acknowledge this inconsistency between the project as proposed by the Feasibility Study and the Proposed Project as described in the DEIR. As a result, there is no discussion in the DEIR regarding how and why the decision was made to reject the determination of the Feasibility Study that the public access and shoreline improvements applicable to Area 3, including a 4,200 foot segment of the Bay Trail, “would be more effectively addressed by a separate effort.” Implementation Plan at p. 16. Nor does the DEIR address “the additional factors for not extending proposed project improvements south of Albany Beach” as referenced above. Implementation Plan at p. 16. The project EIR needs to provide the missing discussion in response to these points of inquiry.

#### **Failure to Include As a Component of the Proposed Project Changes to Golden Gate Fields Land Uses and Site Plan**

In order to accommodate the Proposed Project, significant changes will be required with respect to the Golden Gate Fields site plan and related land use. In particular (and as further addressed in the discussion of “Transportation and Traffic” below), construction of the segment of the Bay Trail extending from Gilman Street to the base of Fleming Point will likely require significant changes in the physical configuration and/or operational characteristics of the existing on-site circulation system. Any changes to the physical character or operational characteristics of the Golden Gate Fields site that are occasioned by the Proposed Project must be treated as an integral component of the Proposed Project no different than the “three main components” listed on page 25 of the DEIR. The Proposed Project must include both an analysis of the physical and operational changes that will be required of Golden Gate Fields and a plan for implementing such accommodations, including sufficient design detail to allow for effective environmental impact analysis and to enable feasible modifications to the Proposed Project which will eliminate or reduce potential impacts. Once the Proposed Project has been amended to include this additional component, the CEQA analysis must be redone to include a review of the environmental impacts of the Proposed Project as amended.

#### **Failure to Include Construction Activities As Part of the Proposed Project**

Another critical component of the Proposed Project that has not been adequately addressed in the DEIR is the work that will be required to construct the Project improvements. One of the reasons detailed design plays a critical role in defining the Proposed Project for purposes of environmental review and project approval is that, with greater design specificity, a more accurate assessment can be made of the character and scope of the construction work that will be required to build the Project improvements. This assessment in turn allows the Proposed Project to be amended to include such construction-related activities.

While the DEIR includes a cursory discussion of the construction-related aspects of the Proposed Project, it fails to assign to this Project component an importance that is commensurate

with the potential impacts it generates. It is often the case that construction-related environmental impacts can be of greater concern than the impacts of the improvements being constructed. For example, as further addressed in the Transportation and Traffic discussion that follows later in this comment letter, the DEIR includes no consideration of the number of truck trips (and the related impacts that will be generated by the earthwork requirements of the Proposed Project including the import and export of a combined total of approximately 45,000 cubic yards of rock, sand, soil, rubble, demolition debris, and other materials). Dump trucks typically range in sizes capable of carrying from five to twenty tons of material; depending on the size(s) of trucks used, it appears that the Project will entail approximately 2,250 to 9,000 truck trips. A much more careful assessment of the construction-related component of the Proposed Project is required.

This more thorough assessment needs to begin with a more detailed project design. Once the design detail is completed, the construction-related requirements of each project improvement will need to be evaluated and the Proposed Project will need to be amended to include such requirements before it is subjected to environmental review.

#### **Mischaracterization of Existing Bay Trail Connection**

The DEIR asserts that the proposed project would “close a major gap in the San Francisco Bay Trail to allow transit on foot and bicycle from Richmond on the north to Berkeley and Emeryville to the south.” (DEIR at p. 40.) Diagrams on pages 309 and 310, however, show an existing informal Bay Trail connection between Richmond and Berkeley along existing paths and streets. This existing informal Bay Trail connection is further described as part of the DEIR discussion of the “Bay Trail East of I-80 Alternative” at page 332. In addition, the DEIR makes note of the existing informal Bay Trail connection that makes use of the public access provided by GGF to the paved onsite travelways that extend the length of the GGF waterfront. To characterize these informal Bay Trail alignments as “a major gap” in the Bay Trail is to leave the impression that they do not currently exist. And to represent that the Proposed Project would “close” this “gap” by “allow[ing] transit on foot and bicycle from Richmond on the north to Berkeley and Emeryville to the south” is to leave the impression that existing conditions do not presently allow such transit. The project description needs to be revised to rectify these misimpressions.

**AIR QUALITY**  
(DEIR Section 4.2 at pp. 91-109)

The DEIR discussion of air quality impacts is legally deficient in the following regards.

**Standards of Significance  
Cumulative Impacts**

The DEIR discussion of cumulative air quality impacts references the Bay Area Air Quality Management District's ("BAAQMD's") guidelines for CEQA analysis:

"By its very nature, air pollution is largely a cumulative impact. No single project is sufficient in size to, by itself, result in [regional] nonattainment of ambient air quality standards. Instead, a project's individual emissions contribute to existing cumulatively significant adverse air quality impacts. If a project's contributions to the cumulative impact is considerable, then the project's impact on air quality would be considered significant." See DEIR at p. 108.

In implementing these guidelines, the DEIR employs standards of significance that include an evaluation of whether the project would "[r]esult in a cumulatively considerable net increase of any criteria pollutant for which the project region is non-attainment under an applicable federal or state ambient air quality standard (including releasing emissions which exceed quantitative thresholds for ozone precursors)." DEIR at p. 100. To determine whether the Proposed Project would have such significant cumulative air quality impacts, the DEIR relies on "BAAQMD's thresholds for the regional significance for project construction and operational criteria air pollutant emissions" as such criteria are described in DEIR Table 4.2-4 at page 101 (the "BAAQMD Thresholds" or the "2010 Thresholds").

In a footnote commenting on the BAAQMD Thresholds, the DEIR explains its continued reliance on these proposed standards of significance in spite of the fact that an "Alameda Superior Court recently ordered that BAAQMD set aside its approval of the 2010 Thresholds and not disseminate them as officially sanctioned air quality standards until BAAQMD conducts CEQA review of them" (DEIR at p. 101):

"[T]he court did not rule that the 2010 Thresholds lacked substantive evidence to support them or that they were substantially flawed or scientifically unsound. Rather, it simply held that BAAQMD is required to conduct further environmental review of the Thresholds before it can readopt them. Accordingly, the basis for using the Thresholds remains valid and use of the Thresholds is supported by substantial evidence." DEIR at p. 101.

This footnoted reading of the Alameda Court's recent ruling fundamentally misses the point of the Court's decision. Underlying and grounding the Court's order prohibiting

dissemination of the 2010 Thresholds is an implicit determination that, in the absence of an adequate CEQA review, BAAQMD had failed to establish the validity of the 2010 Thresholds as standards of significance and had failed to provide an adequate evidentiary basis supporting use of the 2010 Thresholds as measures of environmental impact. If the Court had intended to endorse continued third party reliance on these 2010 Thresholds pending completion of the CEQA process by BAAQMD, it would not have closed the door to their continued distribution. BAAQMD's own website echoes this point:

“In view of the court's order, the Air District is no longer recommending that the Thresholds be used as a generally applicable measure of a project's significant air quality impacts. Lead agencies will need to determine appropriate air quality thresholds of significance based on substantial evidence in the record.”

(Available online at [www.baaqmd.gov/Divisions/Planning-and-Research/CEQA-GUIDELINES.aspx](http://www.baaqmd.gov/Divisions/Planning-and-Research/CEQA-GUIDELINES.aspx))

All of which is not to suggest that the DEIR for the Albany Beach Restoration and Public Access Project is prohibited from using the 2010 Thresholds as a measure of significant impact. But until the 2010 Thresholds have been readopted by BAAQMD following the Court-prescribed CEQA review, the validity of their use and any reliance placed upon them by the DEIR must be supported by substantial evidence contained within the DEIR itself. That is to say, if the DEIR makes use of the 2010 Thresholds, *it* must explain why these thresholds constitute a valid measure of “cumulatively considerable” incremental environmental effect (see CEQA Guidelines, §15064, subd. (h)(3)) and it must be revised to provide the evidentiary basis to support such use of the BAAQMD Thresholds as the applicable standards of significance. The DEIR does neither.

### **Air Quality Impact Analysis**

The DEIR examines both construction and operational air quality impacts of the Proposed Project.

Construction-Related Air Quality Impacts. The daily construction-related emissions from equipment and motor vehicles are shown on Table 4.2-5 at page 104. The validity of these estimates of daily emissions depends to a large extent on the assumptions that are made relative to the type and scope of the construction activities that will generate the emissions. In this regard, the DEIR indicates “[a]ir pollution emissions estimates were based on the project-specific construction schedule, construction equipment use, soil/material haul data provided by Questa Engineering, and the air quality features for the Project (Control of Fugitive Dust and Use of Newer Construction Equipment) described in 3.8 Avoidance and Minimization Measures.” The DEIR does not include any of the data referenced above or any further discussion of the assumptions that have been made regarding the construction activities that generate the emissions. While the assumptions referenced by the DEIR are reflected in spreadsheets that are appended to the DEIR (see DEIR Appendix D), they are presented in a form that is

understandable only to readers with considerable expertise in air quality analysis. If the DEIR is to afford an opportunity for true public review and comment and is to provide a basis for informed decision making, it must explain and summarize these assumptions using text and figures that can be understood by decision makers and the interested public alike. For example, the “soil/material haul data” and related assumptions should be described in terms of:

- the types and volumes of the materials being hauled;
- for each type of material being imported to or exported from the Project site, the type or equipment to be used in transporting the materials, including the load capacity of the transport vehicle;
- for each type of material being imported to the site, the source location of the material and the related number of trips and trip lengths generated by the import requirements; and
- for each type of material being exported from the site, the destination location for the exported material and the related number of trips and trip lengths generated by the export requirements.

Operations-Related Air Quality Impacts. The DEIR’s analysis of the operations-related cumulative air quality impacts of the Proposed Project is based on the motor vehicle trip generation characteristics of the project:

“Operational criteria air pollutant emissions associated with the maximum estimated Project trips (775 Saturday trips) were estimated using URBEMIS Software.” DEIR at p. 105.

As with all modeling, the URBEMIS output estimates of air pollutant emissions are only as good as the input assumptions regarding estimated Project trips. The estimated daily trips for the project “were calculated using the Institute of Transportation Engineers (ITE) Trip Generation Handbook, (Eleventh Edition)” and assuming a “County Park” land use. DEIR at p. 292.

As discussed in more detail in our comments on Section 4.12 Transportation and Traffic of the DEIR, trip generation estimates based on actual parking counts collected on-site indicate that the ITE “County Park” based estimates of weekday AM and PM peak hour trips dramatically underestimates the actual number of trips generated by the Proposed Project. Although actual parking counts were apparently not analyzed during weekend use, there is no reason to believe that the ITE “County Park” based estimate of 775 Saturday trips used to estimate operational-related criteria air pollutant emissions is any more accurate than the ITE “County Park” based estimates of AM and PM peak hour use. As further discussed at pages \_\_\_ - \_\_\_ below, the apparent lack of applicability of ITE “County Park” based standards to the Proposed Project makes it imperative that a detailed traffic study be performed for the purpose of analyzing the Transportation and Traffic impacts of the Proposed Project, with the trip generating characteristics of the Proposed Project estimated based on actual parking and traffic counts. Once this detailed traffic study is completed, the URBEMIS model needs to be rerun using a more accurate estimate of the maximum estimated daily trips generated by the Proposed Project.

It is also important to note that, for the reasons discussed above in our comments on the DEIR's analysis of the construction-related air quality impacts, in the wake of the recent Alameda court's ruling vacating the adoption of and prohibiting the dissemination of BAAQMD's 2010 Thresholds, if the DEIR is to use the BAAQMD 2010 Thresholds as standards of significance for measuring the cumulative air quality impacts of the Proposed Project's operations, it must explain why these Thresholds are valid and must provide a substantial evidentiary basis in support of such use. In making determinations regarding the Proposed Project's air quality impacts, in general, and standards of significance, in particular, the DEIR should make special note (a) of the fact that the Proposed Project is located in a nonattainment area both ozone and particulate matter ("PM") (DEIR at p. 97) and (b) of the need to produce substantial evidence to support a determination that, in spite of the nonattainment status of the air basin in which it is located, the project's emission of ozone precursors and PM, in combination with the emissions of other projects, should not be found to be cumulatively significant even though they will make attainment more difficult to achieve.

#### **Applicability of Air Quality Comments to Discussion of Greenhouse Gas Impacts**

The comments which are set forth above relative to Air Quality are equally applicable to the DEIR's discussion of Greenhouse Gas Impacts.

#### **Sensitive Receptors**

Although acknowledging that older population groups "are considered to be more sensitive to air pollution's effects" (DEIR at p. 98) and that "senior centers and retirement facilities" are among the receptors that "are considered to be the most sensitive to air pollution's effects" (DEIR at p. 98), the DEIR fails to include (a) the high number of seniors and retirees who frequent the Golden Gate Fields racetrack as among the population groups to be accorded particular attention and (b) the Golden Gate Fields facilities as among the "local sensitive receptors of most concern." In addition, the GGF racetrack is used by athletes -- both horses and riders -- for whom aerobic and anaerobic function is a major factor in performance and who should also be considered sensitive receptors. Because of the proximity of the GGF facilities to the project site, the DEIR needs to be revised to evaluate the air quality impacts of the Proposed Project on the population of seniors and retirees who make use of the track for entertainment and of the horses and riders who use the track for sport.

**BIOLOGICAL RESOURCES**  
(DEIR Section 4.3 at pp. 110-114)

The bulk of our comments on the provisions of the DEIR that address biological resources are contained in the comment letter prepared by ECORP Consulting Inc. and dated August 27, 2012 which is attached as Exhibit 1 and incorporated by this reference.

Although ECORP points out particular key areas where the DEIR “lacks sufficient specificity and detail,” ECORP also notes the DEIR’s most serious deficiencies involve a failure to adequately analyze impacts of the Proposed Project on biological resources and to formulate mitigation strategies to adequately address identified impacts. The way in which the DEIR approaches potential Project impacts to burrowing owls and eelgrass beds provides examples in this regard.

**Burrowing Owl**

The DEIR acknowledges the Burrowing Owl, a special status species, is likely present on the Project site and may be impacted by both the construction and operation of the Proposed Project. When such an acknowledgement is made in a Draft EIR, it is incumbent upon the project proponent:

- to determine whether the biological resource of concern is actually present on the project site and, if so, to determine the scope and character of that presence;
- to determine the scope and character of any adverse project-related n the biological resource of concern and its habitat; and
- to determine a feasible mitigation strategy for addressing the project-related impacts that have been identified, with such a mitigation strategy to include consideration of changes to the design of the project, mitigation measures to address impacts that have not been mitigated by changes in design, and alternatives to the project that has been proposed.

These are precisely the tasks an environmental impact report prepared pursuant to and in compliance with CEQA is suppose to perform and precisely the tasks the DEIR fails to perform in its approach to the Burrowing Owl.

Our review of the DEIR indicates there are a number of additional occasions where the DEIR acknowledges that adverse impacts are likely to occur if not mitigated but fails to make the determinations listed above. The DEIR should be thoroughly reviewed by its authors to make certain that these deficiencies are corrected.

**Eelgrass Beds**

The ECORP comment letter also points out that the DEIR proposes to mitigate for Project-related impacts to Eelgrass Beds (and to the Pacific Herring that frequent the habitat provided by the Eelgrass Beds) through the preparation of eelgrass delineation surveys, the implementation of unspecified water quality control measures during construction, and the post-construction monitoring of Eelgrass habitat that does not specify either monitoring protocols or

the corrective and compensatory measures that will be taken if monitoring determines the habitat has been adversely affected by the Project. As ECORP points out:

- studies are not mitigation measures;
- vague commitments to undertake undefined mitigation measures that are described in terms of their objectives (i.e., protect water quality) as opposed to the means that will be employed to achieve those objectives are not acceptable mitigation under CEQA; and
- post-construction monitoring programs are also flawed as mitigation measures if they do not specify the monitoring protocols that will be employed and the corrective/compensatory actions that will be taken if adverse impacts are found.

Our review of the DEIR indicates that these are examples of studies, vague commitments to pursue mitigation objectives and monitoring programs that are masquerading as mitigation measures and that will need to be rethought and reconstituted if they are to qualify as mitigation under CEQA.

### **Failure of DEIR to Accurately Describe the Reach of BCDC's Regulatory Role**

The DEIR begins its discussion of Regional and Local Regulations and Policies with the statement that “[t]he California Coastal Commission acts carry out its mandate locally through the San Francisco Bay Area Conservation and Development Commission<sup>3</sup>(BCDC).” (DEIR at 115.) Because BCDC regulates filling of the San Francisco Bay, which the DEIR indicates may be part of the Proposed Project, the role of BCDC in this Project is critical. It is important, therefore, to understand that BCDC’s jurisdictional authority is completely independent from that of the Coastal Commission and that the Coastal Commission in no way acts through BCDC.

Similarly, the DEIR does not accurately capture the role of the State Lands Commission when it says that the Commission “has jurisdiction and management authority over all ungranted tidelands, submerged lands, and the beds of navigable lakes and waterways.”

There are at least two aspects of the Proposed Project in addition to bay fill, that will involve BCDC and the State Lands Commission: floodplain and sea level rise.

Flood Plain. The DEIR suggests that project structures will be a minimum of one foot above the current, nine foot FEMA flood elevation. (DEIR at 209.) In the same section, however, the DEIR points out that the flood elevation will rise significantly due to anticipated sea level rise, and elsewhere suggests that parts of the project area may subside by several feet. (Appendix G page 44.)

BCDC policy requires the bottom floor level of structures to be above the highest estimated tide elevation. (DEIR at 217.) The proposed project structures should therefore be situated one foot above the anticipated flood elevation (incorporating both sea level rise and land subsidence), rather than the current flood elevation.

---

<sup>3</sup> The correct name of this regulatory agency is the San Francisco Bay Conservation and Development Commission.



Sea Level Rise. The DEIR's discussion of sea level rise is brief and contains little or no discussion of the impacts of anticipated sea level rise on the project over its supposed 25 year lifespan. Because the proposed project is "at low elevation and close to the Bay" (DEIR at 202), the DEIR should include more than a cursory discussion of sea level rise.

The DEIR uses the *Cayan et al.* estimate of 55 inches of sea level rise in California by 2100. This is no longer the most current and reliable estimate. In June 2012 the National Research Council published a report updating earlier assessments of sea level rise. The new estimate is that sea level along the California coast south of Cape Mendocino may rise as much as 65.5 inches by 2100. The FEIR should use the NRC's new estimates.

The FEIR should also show the anticipated mean higher high water line (incorporating both the NRC's sea level rise estimate and expected land subsidence) on the DEIR's diagrams at pages 48, 50, 51, and 56.

**CULTURAL RESOURCES**  
(DEIR Section 4.4 at pp. 142-155)

Our comments on the provisions of the DEIR that address cultural resources are contained in the comment letter prepared by ECORP Consulting, Inc. and dated August 27, 2012 which is attached as Exhibit 1 and incorporated by this reference.

ECORP's comments on the DEIR's discussion of Cultural Resources questions whether the DEIR reflects a good faith effort to meet CEQA or NHPA Section 106 standards "for identification of significant cultural resources." ECORP cites to a number of examples where the DEIR fails to "definitively identify historical resources within the project area, when there is a reasonable opportunity to do so. As ECORP also points out, where the DEIR acknowledges that significant cultural resources may be present within the project area but does not perform the analysis required to determine (a) if cultural resources that are known to be significant and potentially present on the Project site are in fact present or (b) if potentially significant cultural resources that are known to be present on-site have historical significance. Such a deferral of a significance evaluation is not acceptable under CEQA. See CEQA Guidelines, Section 15126.4(b).

ECORP also found that the DEIR fails in two other respects. First, the mitigation measures it offers to mitigate Project-related impacts to cultural resources are in effect nothing more than Best Management Practices ("BMPs"). Even if these measures had been determined based on a proper analysis of impacts (which they were not), they do not qualify as mitigation measures under CEQA. Second, the conclusion that there are no significant impacts to cultural resources is legally indefensible because the significance determinations, impact analysis, and mitigation strategy required to support such a conclusion are all either lacking or fundamentally flawed.

**GEOLOGY AND SOILS**  
(DEIR Section 4.5 at pp. 156-172)

The DEIR indicates that without mitigation the Proposed Project would have the following significant impacts on geology and soils:

- a. Expose people or structures to potential substantial adverse effects, including the risk of loss, injury or death involving:
  - i. ...
  - ii. strong seismic ground shaking [(see DEIR at pages 164-166)],
  - iii. seismic-related ground failure, including liquefaction [(see DEIR at pages 166-167)].
  - iv. landslides [(see DEIR at page 167)].
- b. Result in substantial soil erosion or the loss of topsoil [(see DEIR at pages 167-169)].
- c. Be located on a geologic unit or soil that is unstable, or that would become unstable as a result of the project, and potentially result in on- or off-site landslide, lateral spreading, subsidence, liquefaction or collapse [(see DEIR at pages 169-170)].” DEIR at p. 162.

With respect to each of the significant impacts listed above, however, the DEIR references “guidelines” included in the Eastshore State Park General Plan “that would avoid or minimize to a less-than-significant level” the Proposed Project’s adverse effects. These guidelines include:

- “Capacity-2: Prior to site-specific development or development of management plans, survey and review areas of potential impacts, employing appropriate personnel and responsible agencies, in accordance with the California Environmental Quality Act (CEQA).” General Plan at p. III-61.
- “OPER-11: Consider surface conditions at each of the sites during the conceptual design phase to evaluate the potential for soil loss by erosion and to develop means (by grading, structural measures and/or other improvements) to control site erosion.” General Plan at p. III-51.
- “OPER-12: Perform site-specific geotechnical investigations at the conceptual design phase of individual projects including:
  - Review and update geologic hazard data such as seismic site response, liquefaction potential, hazard from flood and inundation, and potential for earthquake-induced ground failure (lurching);
  - Evaluate potential settlements as a result of loads imposed by new buildings and structures, placement of new fills including landscape berms, mounds, levees, trails, roadways, bulkheads, ramps and slope protection measures;
  - Evaluate the impact improvements may have on static and seismic slope stability of existing fill slopes, and wetland slopes;
  - Prepare specific geotechnical recommendations for: seismic hazard mitigation including effects of liquefaction, placement of new fills, reworking of existing fills, placement of slope protection measures, provide geotechnical parameters for

foundation design including estimates of differential settlements of underlying fills and soft clays, and effects of potentially liquefiable soils, and seismic lateral loads;

- Prepare recommendations for construction-related issues including de-watering and temporary excavation support as required for construction of the proposed improvements and remediation activities.” General Plan at pp. III-51/52.
- “OPER-13: Prepare a comprehensive, detailed geotechnical design including slope geometries that provide adequate stability during short and long term static conditions and seismic ground shaking, slope stabilization/shoreline protection measures, grading of new habitat enhancement areas, bulkheads, ramps, and structures such as viewing platforms and interpretive centers.” General Plan at p. III-52.
- “OPER-14: Perform a geotechnical review of final design documents to check conformance with recommendations of the detailed geotechnical investigations.” General Plan at p. III-52.
- “OPER-15: Provide geotechnical engineer oversight for any construction that involves significant re-configuring or grading of the site, including projects such as creek day-lighting and shoreline stabilization or re-configuration.” General Plan at p. III-52.

In treating these “guidelines” as “sufficient to address” the significant impacts listed above, the DEIR confuses the investigations, studies and reports that are the subject of the guidelines with the mitigation measures they recommend. Quite simply, investigations, studies, and reports cannot and do not themselves mitigate Project impacts. They are undertaken for the dual purpose of (1) defining the scope, character, and reach of potential Project impacts and (2) identifying mitigation measures that are both feasible and, at the same time, capable of either avoiding the project-related impacts that have been determined to be significant or reducing such impacts to a less-than-significant level. Put simply, it is not the investigations, studies, and reports called for by the General Plan guidelines that mitigate the Proposed Project’s significant impacts but rather the measures they recommend for inclusion in the DEIR as conditions of Project approval. Moreover, the success of these investigations, studies, and reports in identifying mitigation measures that are both feasible and effective cannot be assumed. There is always the very real possibility that they will conclude that mitigation to eliminate significant impacts or reduce such impacts to a less-than-significant level is simply not feasible and that the impacts are unavoidable.

Accordingly, it is imperative that these investigations, studies, and reports be undertaken as an integral part of the environmental impact review the results of which (including, in particular, the recommended mitigation measures) are then incorporated in the DEIR. But unless and until feasible mitigation measures (a) have been identified, (b) have been shown to be capable of eliminating or substantially reducing the project-related significant impacts at issue, (c) have been incorporated in the DEIR and made subject to public review and comment, and (d) have been made a part of the Project being approved or a condition of Project approval, the DEIR cannot conclude that the significant impacts under review are avoidable and have been addressed. And if feasible mitigation measures have not been identified and incorporated in the DEIR because the appropriate investigations, studies, and reports (as called for by the General

Plan guidelines) have not been completed in a timely manner, then the environmental impact analysis is fatally flawed and the DEIR legally inadequate.

In particular, the site-specific geotechnical evaluation and design called for by General Plan Guidelines OPER-11, 12 and 13 must be completed and the DEIR discussion of "Geology and Soils" (DEIR Section 4.5 at pp. 156-172) substantially revised to incorporate the resulting impact analysis and recommended mitigation measures. The DEIR must then be recirculated, with its revised content made available to the public for further review and comment. Otherwise, there is no legal justification or basis for finding that the significant impacts of the Proposed Project with respect to seismic ground shaking, seismic-related ground failure including liquefaction, landslides, soil erosion and topsoil loss, and geologic instability including lateral spreading and subsidence, have been either avoided or reduced to a less-than-significant level.

## HYDROLOGY AND WATER QUALITY (DEIR Section 4.8 at pp. 196-212)

The DEIR's determination that the hydrology and water quality impacts of the Proposed Project are less than significant is in part based on findings that the Proposed Project does not "[e]xpose people or structures to a significant risk of loss, injury or death involving flooding . . . ." DEIR at pp. 205, 209-210. The analysis supporting this finding is fundamentally flawed and legally deficient in that it fails to give adequate consideration to the risks posed by the flood hazards resulting from (a) the location of a substantial portion of the Project site, including the entire shoreline area, within the 100-year coastal floodplain and (b) the effects of projected increases in sea level resulting from climate change.

### **Failure to Adequately Assess and Mitigate for Flood Risks**

A significant portion of the Project site, including the entire Project shoreline area, is located within Zone VE, as shown on the Federal Emergency Management Agency ("FEMA") Flood Insurance Rate Map (2009) ("FIRM"). See DEIR discussion at pp. 196 and 202-203 and Figure 4.8-1, FEMA FIRM (2009) at p. 197. Zone VE "is the 100-year coastal flood zone with velocity hazard (wave action)." DEIR at p. 196. "A base flood elevation of 9 feet is given for this zone." DEIR at p. 196.

The DEIR states that impacts associated with flooding will be less than significant because "structures associated with the Project would be elevated a minimum of one foot above the 100 year flood elevation." DEIR at p. 209. Curiously, the DEIR analysis of the existing hydrology and water quality impacts resulting from the Proposed Project's location within the 100-year coastal floodplain and the steps being taken to mitigate these impacts makes no mention of the Coastal Engineering Report ("CER") attached to the DEIR as Appendix F. Perhaps this omission is a result of the fact that a careful reading of this coastal engineering analysis paints a very different picture of the risks associated with coastal flooding than does the DEIR.

As the Coastal Engineering Report points out, coastal flooding is principally caused by extreme tides "with a 100-year predicted still water level at the site of approximately 9.2 ft (NAVD88)." CER at p. 3. Such extreme tides are often associated with extreme storm events also involving high winds. These winds, in turn, generate a wave runup that can create "total water levels" ("TWLs") (water levels which incorporate consideration of wave action runup) substantially higher than the "still water levels" which the DEIR uses to determine flood-related impacts.

The Coastal Engineering Report estimates that when wave runup is included, the total water level during the 100-year storm would reach 15.1 feet (CER, Table 2 at p. 10), approximately six feet above the still water level of 9± feet which the DEIR and CER use to assess flood-related impacts and approximately five feet above Project structures that are elevated at one foot above the 100 year flood elevation (a level the DEIR contends is sufficient to mitigate for flood impacts). As a result, these structures are extremely likely to be subjected

to intense wave action and overtopping during a 100-year event. Yet the DEIR includes no recognition of this impact and no assessment of whether “people or structures [are exposed] to a significant risk of loss, injury or death” as a result of such 100-year total water levels.

Moreover, because total water levels impacting the Project substantially exceed still water levels, the analysis of TWL impacts should not be limited to an examination of impacts associated with a 100-year event. Improvements that are elevated to a level that is one foot above the 100-year still water level will be impacted by total water levels associated with flood events that have a much higher likelihood of occurring in any given year than the 1% likelihood of a 100-year event. The coastal engineering analysis should include a table which examines the correlation between total water levels (particularly those ranging from 9.02 feet to 15.10 feet) and the frequency of the flood events generating such TWLs.

In addition, the DEIR impact analysis needs to examine the effect of wave runup and TWLs not only on the Proposed Project, but also on the host environment, including Golden Gate Fields. For example, if the elevation of the Bay Trail is lower than the 100-year TWL but higher than the elevation of the inboard GGF property, how will the overtopping resulting from wave runup impact the inboard property and environment? How will site drainage be affected? Will the Bay Trail, in effect, act as a dam preventing or slowing the return to the Bay of the flood waters that have overtopped the Bay Trail as a result of wave runup.

As New Orleans’s experience with Katrina in 2005 suggests, these are very serious issues that raise very serious concerns and they need to be given very serious attention. A three sentence paragraph asserting without any supporting discussion that elevating structures “a minimum of one foot above the 100 year flood elevation” will result in a less than significant impact (DEIR at p. 209) is hardly sufficient.

It should also be noted that the geographic scope of the coastal engineering analysis reflected in the CER is limited to the Albany Beach and the south Albany Neck. It does not cover the shoreline reach from the Albany Beach to the southern terminus of Project Area 3, all of which is in the 100-year coastal floodplain (and, as will be discussed next, is subject to sea level rise). To be adequate, the Coastal Engineering Report will need to be revised to collect, process and analyze “bathymetry/topography data, tides, winds, wind-waves, tidal currents, wave-generated longshore currents, sea level rise, wave runup and coastal flooding” (CER at p. 1), to the extent applicable to those portions of the Project site south of the Albany Beach (together with those portions of the GGF site that also may be affected).

### Failure to Adequately Assess and Mitigate for Sea Level Rise

As the DEIR acknowledges, the risks associated with flooding will be increased by sea level rise, “including potentially more frequent occurrences and with greater flood depths.” DEIR at p. 210. In analyzing the increased flood risk associated with sea level rise, the DEIR uses the FEMA “designated” 100-year flood elevation of “9.0 feet, NAD88” and a projected sea level rise “over the next 40 to 50 years” of “1.0 to 1.5 feet, depending on the source of the sea level rise projection used.” DEIR at p. 210. (The CER analysis is more precise using 9.02 feet as the 100-year still water level and 1.48 as the predicted sea level rise by 2050 (CER at pp. 9-10).)

In evaluating Project-related flood hazards associated with sea level rise, however, the DEIR again ignores wave runup and total water level effects. This omission is made in spite of the fact that the Coastal Engineering Report contains an analysis of both the 100-year still water level and the 100-year total water level when adjusted to reflect projected sea level rise by 2050 and 2100. While the projected 2050 and 2100 100-year still water levels are 10.50 feet and 13.83 feet, respectively, the projected 2050 and 2100 total water levels are an alarming 18.85 feet and 23.84 feet, respectively – rendering the DEIR’s proposed mitigation measures entirely insufficient. Just as the flood risks resulting from 100-year total water levels far in excess of 100-year still water levels need to be analyzed assuming existing tidal elevations, TWL-related flood risks also need to be analyzed taking into consideration projected sea level rise.

In the absence of a DEIR assessment of TWL-related flood risks that takes sea level rise into consideration, the DEIR reaches the conclusion that “the impacts of sea level rise on project facilities is *less than significant*” based on the following rationale:

“The design elevations of Proposed Project facilities and improvements have been established in consideration of BCDC policies regarding the effects of sea level rise on a project, including those policies specific for recreational and open space facilities that have an estimated 25 year design life. Based on the Coastal Engineering Analysis of the potential effects of sea level rise on project improvements, the top or crest elevation of the shoreline revetment was set at 12 feet (NAD88), and this elevation was also used as the minimum elevation for the Bay Trail and other recreational facilities that may be substantially damaged or require extensive maintenance with sea level rise over the next 25-30 years.” DEIR at p. 210.

Not only is this rationale flawed, but it is also misleading for the following reasons:

1. The extent to which “the design elevations of the Proposed Project facilities and improvements have been established in consideration of BCDC [sea level rise] policies” cannot be determined from the information and analysis provided by the DEIR. What can be determined is that the DEIR analysis of the impacts of sea level rise on project facilities does not comply with BCDC policies. Even if we assume that the Proposed Project is among the types of



projects BCDC policies are intended to “encourage” (see DEIR at p. 223), the Proposed Project is in a “vulnerable” area (i.e., a coastal floodplain) and the adequacy of the Project’s approach to addressing climate change issues including sea level rise will be evaluated by BCDC “on a case by case basis to determine the project’s public benefits, resilience to flooding, and capacity to adapt to climate change impacts.” See DEIR at p. 223. As discussed in this comment letter and notwithstanding the DEIR’s assertions to the contrary (see DEIR at p. 223), the DEIR fails to provide BCDC with the information or analysis required to determine the extent to which the Proposed Project:

- is “resilien[t] to flooding”;
- “has the capacity to adapt to climate change”;
- is “at risk from flooding”;
- “negatively impact[s] the Bay”; or
- “increase[s] risk to public safety.” See DEIR at p. 223.

If the DEIR is to comply with BCDC policies, it will need to be revised to provide this information and analysis.

2. Treating the site improvements as having a 25 year design life is little more than an attempt to avoid having to plan and design for sea level rise beyond 2050. One of the reasons BCDC policies are intended to encourage “natural resource restoration or environmental enhancement project[s]” and “public parks” (see DEIR at p. 223) is that it is assumed the public benefits that accrue from these projects will be a legacy to be enjoyed by future generations, not simply a limited term gift of the present generations to themselves. While it is certainly true that public facilities on public lands that have been taken for public use have a finite design life and will need to be replaced at the end of their useful life, they need to be designed so they can be replaced.

In other words, when parklands (and Bay Trail easements) are acquired by the Park District to be improved and put to park use, they are acquired not for 25 years, but in perpetuity. Having invested public funds in and used public authority to acquire, on behalf of the public, lands for public use, it is incumbent upon the Park District to make certain the life of the public parklands so acquired and the public uses to which the parklands are put are protected from loss in the long term. To seek to ignore the long term threat of loss posed by sea level rise to shoreline parklands and parkland uses by characterizing the parkland improvements as having a limited 25 year “design life” is not only unacceptable from the perspective of CEQA, but it is also inappropriate from a park planning perspective.

3. In considering the feasibility of mitigating the impacts of sea level rise, it is important to keep in mind that strategies to mitigate against loss resulting from sea level rise can be “adaptive” in character. Adaptive strategies are features of the initial project design that can be incorporated at a later date when the degree of sea level rise is more certain. Because the DEIR apparently takes the position that the assertion of a 25 year design life for the Proposed Project obviates the need to plan for sea level rise beyond 2050, no consideration is given to adaptive mitigation strategies.

4. The single strategy that has been incorporated in project design to address 2050 sea level rise is to “set at 12 feet (NAD88)” the “top or crest elevation of the shoreline revetment” as well as “the minimum elevation for the Bay Trail and other recreational facilities that may be substantially damaged or require extensive maintenance with sea level rise over the next 25-30 years.” DEIR at p. 210. The DEIR concludes that this design strategy alone is sufficient to reduce the impacts of sea level rise on Project facilities to a less than significant level.

This conclusion, however, ignores the findings of the Coastal Engineering Report upon which it is purportedly “based.” DEIR at p. 210. The CER found that sea level rise projections “should be considered during revetment design to ensure that rock stability remains as predicted during coastal engineering analysis for present-day conditions.” CER at p. 4. The analysis of 100-year flood elevations contained in the CER further indicates that when sea level rise and wave runup are considered, the 2050 100-year total water level is projected to be at 18.85 feet, almost seven feet above the 12 foot minimum design elevation for the revetment and upland improvements. Applying this projected 18.85 foot TWL to its analysis of “existing trail elevations” the CER concludes:

“that wave runup and overtopping will effect the areas upland of the revetment, and that preventing this runup and overtopping with the revetment design (i.e., utilizing a higher crest elevation) is not practical. Therefore the effects of runup and overtopping are not considered further in revetment design. However, effects of wave runup and overtopping should be considered in design of upland features such as the landscaping and public access trail.”  
CER at p. 9.

As already noted, the DEIR does not discuss “the effect of runup and overtopping” on any aspects of the Proposed Project including the design of upland features such as the Bay Trail. Without an analysis and understanding of what these effects would be, it is not possible to develop effective mitigation strategies. Indeed, by setting the minimum elevation of the “upland features” of the Project at the same level as the revetment (i.e., 12 feet) -- a level that the CER acknowledges will not mitigate for runup and overtopping, the DEIR implicitly acknowledges that the 12 foot minimum design elevation of the upland features is not the effective mitigation strategy the DEIR claims and that consideration has not been given to the “effects of wave runup and overtopping in design of upland features such as the landscaping and public access trail” as the CER recommends. CER at p. 9.

5. And again, it is important to emphasize the need to include in an evaluation of the impacts of sea level rise, an analysis of the residual impacts that remain after all feasible mitigation strategies have been implemented both to the environment and to the Proposed Project (including the natural resource restoration and environmental enhancements the are features of the Project itself). For example, where the CER asserts that it is “impractical” to construct the revetment with a crest elevation capable of protecting the inboard environment from significant inundation resulting from wave runup and overtopping during a 100-year event, the extent of the flooding that is expected to occur and the impact of the flooding on the inboard environment

must also be analyzed. Until such an analysis has been completed, the DEIR is not in a position to determine whether the impacts associated with sea level rise have been reduced to a less than significant level.

6. Finally, the DEIR needs to acknowledge the extent to which the strategies that are developed to mitigate the impacts of sea level rise on the Proposed Project may limit the strategies that are available to GGF to mitigate the impacts of sea level rise on the GGF property. The shoreline is in most instances the first line of defense in protecting the inland environment from the impacts of sea level rise. If the Park District does not use the shoreline property it is proposing to acquire from GGF to fully mitigate for sea level rise impacts, then GGF will have to develop an inland based mitigation strategy to address the residual impacts the District fails to mitigate. Where the DEIR concludes that it is not feasible for the Proposed Project to fully mitigate the impacts associated with sea level rise, it needs also to assess the extent to which the residual impacts will affect the GGF property, the feasibility of fully mitigating those residual impacts on the GGF site, and the strategies that would be required to do so.

**LAND USE AND PLANNING**  
(DEIR Section 4.9 at pp. 213-248)

**Property Ownership**

The DEIR's description of land ownership at the project site is inaccurate. Figure 4.9-1 does not represent true ownership of the various parcels of land, tideland, and open water. For example, the State of California granted all its interest in tidelands within the boundaries of the City of Albany in 1919 to the City. Although the grant was subsequently revoked by the State, it was revived in part in 1977. Similarly, the State conveyed its interest in tidelands in the City of Berkeley by various statutes. These grants specify the uses to which the tide and submerged lands in Albany and Berkeley may be put. The DEIR, however, includes no discussion of whether the proposed project comports with the uses allowed in the State grants.

The DEIR does point out that Public Trust Doctrine applies to these lands, but it neglects to mention that the cities of Albany and Berkeley may hold title to the public trust easement. The District may therefore need to obtain leases from the cities for all work done below the mean high water line. The environmental review of the Proposed project should include discussion of this requirement.

## TRANSPORTATION AND TRAFFIC

(DEIR Section 4.12 at pp. 280-298)

1. Inadequacy of “Existing Conditions” Analysis. DEIR at pp. 287-291. The DEIR analysis of existing conditions fails to provide information that is essential to an understanding of:

- (b) the existing vehicular and bicycle circulation network,
- (c) the public access issues presented by the existing conditions,
- (d) the ways in which the Proposed Project purports to address those public access issues,
- (e) the changes in the existing conditions that will be required to accommodate the Proposed Project, and
- (f) the environmental impacts that will result from those changes.

In particular, the DEIR fails to provide:

- a narrative description with an illustrative exhibit showing the presently available alternative bicycle routes (both formal and informal) connecting the existing Bay Trail north of the Buchanan/ I-80 interchange with the existing Bay Trail south of the Gilman/I-80 interchange; and
- a narrative description with an illustrative exhibit showing the circulation system currently in use by GGF to provide vehicular ingress and egress to the racetrack facilities.

The Bay Trail is currently in use by bicycle commuters and recreational bicyclists. The DEIR estimates that a daily average of approximately 232 bicyclists make use of the project site. DEIR at p. 40. An unspecified number of these bicyclists apparently make use of the public access that is informally provided by GGF through the proposed Bay Trail area (Area 3) to bridge the so-called “gap” in the Bay Trail between the northern and southern boundaries of the GGF site. See DEIR at p. 40. It is also reasonable to assume that an unspecified number of bicycle commuters make use of formal and informal routes on surface streets to the east of the I-80 corridor to link the completed segments of the Bay Trail to the north and south of the GGF site. Where the Park District and other public agencies are considering a Proposed Project which would replace these existing linkages with a new 5,000 foot Bay Trail segment to be constructed along the GGF shoreline, a well considered assessment of the Proposed Project’s environmental impacts must start with a more thorough understanding by the decision makers (a) of the alignments currently in use to connect the completed segments of the Bay Trail and (b) of the number of bicyclists currently making use of each of the existing alternative alignments.

Existing Bay Trail Connections East of I-80. The DEIR includes a perfunctory description of “Bicycle and Pedestrian Access” which notes:

“There are several bicycle and pedestrian facilities in and near the project site, most notably the paved section of the San Francisco Bay Trail which connects to both sides of the project area. Additionally, a bike/pedestrian Class 1 path runs

underneath I-180/I-580, allowing cyclists and pedestrians to traverse the freeway.” DEIR at p. 290.

There is no description or discussion of the routes east of I-80 currently used by existing bicycle commuters to get from the Buchanan/I-80 interchange to the Gilman/I-80 interchange. There is not even a map showing the “several bicycle and pedestrian facilities in and near the project site.”

Existing Bay Trail Connections West of I-80. The DEIR also acknowledges that bicyclists currently make use of an informal route “along and through the Golden Gate Fields access road and parking lot” to connect the Bay Trail at the northern and southern boundaries of the GGF site. DEIR at p. 295; see DEIR at p. 39. Although the DEIR fails to provide further detail regarding the location of this informal route, the document does suggest that the lack of separation between bicycle and pedestrian traffic, on the one hand, and vehicular traffic, on the other, creates “safety conflicts” (DEIR at p. 295). In addition, the DEIR indicates the informal route “contains slopes as steep as 9 or 10% and therefore does not meet the standards of the Americans with Disabilities Act (ADA).” DEIR at p. 39. Without a more detailed narrative description and/or an illustrative exhibit showing the informal route across the GGF waterfront and its relation to the onsite circulation network, the extent of the “safety conflicts” and ADA compliance issues are very difficult if not impossible to assess.

Without knowledge and information concerning these offsite and onsite, formal and informal routes linking the built segments of the Bay Trail to the north and south of the GGF property and without a better understanding of the functional issues they raise, decision makers are in no position:

- to determine the need for the new Bay Trail alignment,
- to assess the advantages and disadvantage of proceeding with the construction of a new Bay Trail segment along the GGF waterfront,
- to make a comparative assessment of the environmental impacts of the Proposed Project versus the no-project alternative, and
- to consider alternative ways in which the existing conditions could be modified to address the issues they raise in lieu of constructing a new Bay Trail segment adjacent to the shoreline.

2. Inadequacy of “Project Vehicle Trip Generation Analysis.” DEIR at pp. 292-293. The DEIR does not include a detailed traffic study. This omission has the effect of leaving decision makers with an inadequate appreciation and understanding of the impacts of the trips generated by the Proposed Project on both the existing circulation system and the environment. The DEIR defends the decision to forego the preparation of a detailed traffic study by using Institute of Transportation Engineers (“ITE”) trip generation rates for “County Park” land uses to contend that the Proposed Project will generate an estimated 37 PM Peak Hour trips and by arguing that this “increase in PM Peak trips are [sic] below the threshold of 100 that Alameda CTC uses as a criteria that triggers a detailed traffic study.” DEIR at p. 292. The DEIR even suggests the ITE based trip generation estimates “are a conservative overestimate because they do not subtract out existing trips.” DEIR at p. 292. The problem with this analysis is that it flies

in the face of the actual measured trip generation characteristics of the project site as well as with projections of project-related trips that are based on the actual existing conditions. The parking utilization survey and analysis prepared in 2010 as part of the Existing and Future Conditions Report (see pp. 24-26) determined (based on first person observations and data generated by a pneumatic counting tube) that the existing conditions generated approximately 48 AM Peak Hour and 112 PM Peak Hour roundtrips into and out of the project site by way of Buchanan. The Existing and Future Conditions Report then used the actual 2010 trip counts to project future trip generation and concluded that the Proposed Project would result in an additional 69 AM Peak Hour roundtrips and 133 PM Peak Hour roundtrips.<sup>4</sup> The following table summarizes the project-related trip generation estimates based on the actual 2010 counts and analysis:

|                            | <b>Weekday<br/>AM Peak<br/>Roundtrips</b> | <b>Weekday<br/>PM Peak<br/>Roundtrips</b> | <b>Weekday AM<br/>Peak Single<br/>Direction Trips</b> | <b>Weekday PM<br/>Peak Single<br/>Direction Trips</b> |
|----------------------------|---|---|---|---|
| <b>Existing Conditions</b> | 48  | 112                                       | 96  | 224   |
| <b>Proposed Project</b>    | 69  | 133                                       | 138   | 266   |
| <b>Totals</b>              | 117                                       | 245                                       | 234   | 490   |

With the actual 2010 trip counts in hand showing existing conditions at the project site generating AM and PM Peak Hour single direction trips numbering 96 and 224, respectively, and with the single direction AM and PM Peak Hour trips generated by the existing plus project condition projected to number 234 and 490, respectively, it is more than a little misleading to contend that the existing plus project conditions would only generate 33 AM Peak trips and 37 PM Peak trips based on ITE rates that are clearly inapplicable to both the existing site conditions and the Proposed Project. Moreover, there would seem to be little question that the trip generating characteristics of the Proposed Project itself will result in new PM Peak trips substantially in excess of the number (100) required to trigger the Alameda CTC criteria for a detailed traffic study.

3. Inadequacy of "Future Conditions" Analysis. The DEIR contains no analysis that evaluates the changes to the configuration of the onsite GGF circulation system that will be required to accommodate the construction of the new segment of the Bay Trail in its proposed alignment along the GGF shoreline. Nor does the DEIR analyze the potential effect of those changes on the operations of the Gilman/I-80 interchange and the Gilman/Frontage Road intersection. The entry roadway which provides access to the stable area, the grandstand/

<sup>4</sup> The Existing and Future Conditions Report states at page 26 that the "forecasts used to determine future trip generation as a result of the Albany Beach Restoration and Public Access Feasibility Study (i.e., full utilization of a new parking lot east of Albany Beach and the doubling of existing parking utilization) represent a conservative, worst case scenario." See DEIR at p. 293. These forecasts do not in fact represent a "worst case" scenario. In forecasting AM Peak trips, the projections assume only 28 of the 103 existing parking spaces are in use; in forecasting PM Peak trips, they assume 66 of the 103 existing spaces are in use. A "worst case" scenario would have assumed full utilization of all 103 existing parking spaces as well as the 21 new spaces. In the event the DEIR proposes to base its worst case forecast on less than full utilization of existing parking, the justification for such a proposal must be explicitly provided. Whether or not the forecasts represent a "conservative" scenario cannot be determined by the underlying analysis. Indeed, the determination to base the forecast on a "doubling of existing parking utilization" appears to be an arbitrary assumption unsupported by any analysis.

clubhouse and other GGF facilities from Gilman Street consists of a three lane private roadway with two inbound lanes and a single outbound lane. The roadway is bordered on its western edge by a narrow paved shoulder and the San Francisco Bay shoreline. Its eastern edge is bounded by a tree-lined landscaped shoulder. In order to accommodate the Bay Trail easement as proposed, it appears likely that one of the two inbound lanes will be eliminated which would, in turn, dramatically affect the functionality of both the private entry roadway and its interface with the Gilman/I-80 interchange. Where the Proposed project will require changes in the physical configuration and/or operational characteristics of the existing circulation system serving the GGF site, it is incumbent upon the project proponent to undertake a thorough analysis:

- of the changes that will be required to accommodate the Proposed Project;
- of the site access issues and environmental impacts that will be raised by those changes; and
- of the measures that will be required to address these site access issues and mitigate those environmental impacts.

Put simply, any physical changes to the GGF site that are made in response to the Proposed Project must be considered part and parcel of the Proposed Project and must be subjected to the same level of environmental scrutiny as any other feature of the Proposed Project.

4. Inadequacy of “Cumulative” Transportation Impact Analysis. The DEIR proposes to rely on the cumulative transportation impact analysis contained in the 2002 East Shore Park Project General Plan EIR which

“found that the General Plan would generate a small number of vehicle trips in the project area, which would have a corresponding small effect on levels of service at local intersections and roadway segments. For these reasons, the EIR determined that implementation of the *General Plan* in combination with other planned projects in the vicinity, would not result in significant adverse cumulative impacts on Transportation and Circulation.”

There are two fundamental problems with the decision to rely on the 2002 East Shore Park Project General Plan EIR in lieu of preparing a new detailed study of project-related cumulative transportation/traffic impacts. First, the General Plan EIR assumptions relative to the trip generation characteristics of the Albany Lands (consisting of the Albany bulb, neck, plateau and beach) are clearly in error. The General Plan EIR assumes the Albany Lands will generate a total of 5 AM Peak Hour trips and 7 PM Peak Hour trips. As already discussed above, project-related trip generation projections derived from actual counts estimate that existing plus project conditions will generate single direction AM and PM Peak Hour trips of 234 and 490, respectively. Second, the intersection level of service (“LOS”) analysis that serves as the baseline for the General Plan traffic study and that is the defining measure of significant impact did not include LOS calculations for the Buchanan Street/I-580/I-80 interchange. Third, the 2002 cumulative impact analysis prepared for the General Plan EIR was based on the Alameda County Congestion Management Agency’s Countywide Travel Demand Model forecasted Year 2025 traffic levels. The cumulative analysis of project-related traffic impacts should be based on 2035 traffic levels.



5. Inadequacy of "Construction Conditions" Analysis. Remarkably, the DEIR includes no analysis of the traffic/circulation impacts of construction conditions and the trips generated by the process of constructing the Proposed Project, including (as noted in 3 above) changes to the existing condition of the GGF circulation system to accommodate particular features of the Proposed Project such as the new Bay Trail alignment along the GGF shoreline. Of particular note in this regard is the project-related earth work involved in the excavation and offhand of rubble, demolition debris and other unsuitable fill materials previously deposited on the project site and the import and placement of rock, sand, soil, and other clean fill materials on the project site. See DEIR at pp. 57-59. The DEIR estimates that construction of the Proposed Project will require approximately 22,470 cubic yards of material be removed from the project site and approximately 22,920 cubic yards of material be imported to the project site. A determination needs to be made regarding the number of truck trips that will be generated by this project-related earthwork and the impact of these truck trips on the traffic/circulation system needs to be evaluated.

6. Detailed Traffic Analysis Required. For the reasons set forth above, the DEIR needs to be revised to include a detailed traffic analysis. This analysis should include all intersections and roadway segments that will be used by the traffic generated by the Proposed Project. Traffic impacts should be evaluated under existing plus project conditions and cumulative plus project conditions. The cumulative analysis should be based on forecasted Year 2035 traffic levels. The analysis should also be based on traffic conditions assuming Golden Gate Fields is in operations as a live racing facility.

**ALTERNATIVES**  
(DEIR Section 5 at pp. 305-339)

In response to scoping comments on the Notice of Preparation submitted on behalf of Golden Gate Land Holdings LLC, the following two alternatives were added to the range of potentially feasible alternatives to be evaluated in the DEIR:

- “5) Bay Trail Through Golden Gate Fields and Codornices Creek Alternative, and  
6) Bay Trail East of I-80 Alternative.” DEIR at p. 305.

**Bay Trail through Golden Gate Fields and Codornices Creek Alternative**

Bay Trail through Golden Gate Fields and Codornices Creek Alternative. As shown on Figure 5-5, the Bay Trail Through GGF Alternative Bay Trail East of GGF Along Codornices Creek Alternative includes two Bay Trail alignments. The Bay Trail Through GGF alignment runs roughly parallel to the Proposed Project alignment but is set back from the shoreline a distance that appears to be 100-300 feet. The Bay Trail Along Codornices Creek alignment follows the Codornices Creek corridor located at the eastern edge of the GGF property. While the DEIR does include an evaluation of the Bay Trail Through GGF alignment, it does not include a comparable assessment of the Bay Trail along Codornices Creek alignment. The DEIR needs to be revised to include (a) a description of this Codornices Creek alignment and the improvements that would be required to accommodate it, and (b) a comparative analysis of this alignment relative to environmental impacts and project objectives.

Bay Trail East of I-80 Alternative. As the DEIR notes, bicyclists (and pedestrians) currently using the Bay Trail have two options to connect the existing built segments of the Bay Trail located to the north of Buchanan Street and to the south of Gilman Street. They can make use of an existing informal access route along the Golden Gate Fields shoreline frontage using paved travelways that are part of the GGF onsite circulation network or they can use the offsite “East of I-80” alternative alignment described in the DEIR at p. 332. Those bicyclists currently using the East of I-80 route rather than the more scenic GGF shoreline route presumably do so because it provides a more direct (and therefore expeditious) means of traversing the distance between the built segments of the Bay Trail north of Buchanan Street and south of Gilman Street. If this presumption is correct, there is good reason to question whether the replacement of the informal Bay Trail alignment along the GGF shoreline frontage with a formal bike trail facility will result in a shift in use from the existing informal route East of I-80 to the new dedicated Bay Trail alignment along the GGF waterfront. And if little or no shift in use is occasioned by the construction of a new formal segment of the Bay Trail where an informal route already exists, then the DEIR’s contention that the “Bay Trail east of I-80 Alternative would have *worse* impacts on Transportation than the Proposed Project” may be unfounded and incorrect.

This contention relative to alignment-related transportation impacts is based on a determination that the East of I-80 Bay Trail alignment, even with the safety improvements, would have “significantly higher potential vehicle-trail user conflicts” than the Proposed Project. But the reduction in traffic and safety conflicts occasioned by the Proposed Project as compared to the East of I-80 alternative will only result in safer trail use to the extent that bicyclists who

would otherwise chose the East of I-80 route shift their allegiance to the safer facilities. If this shift in use does not occur, then the safety of those bicyclists who would chose to make use of the East of I-80 alignment in spite of the existence of a newly improved, safer (but longer) alternative route along the GGF shore, would be better served by the safety improvements that would be made as part of the East of I80 Alternative. Accordingly, the DEIR needs to reconsider its comparative assessment of the Transportation Impacts of the Proposed Project and the East of I-80 Alternative based on reasonable expectations relative to use.

The first step in determining the likely characteristics of future Bay Trail use is to develop a clearer understanding (a) of how many existing Bay Trail users currently chose the informal Bay Trail alignment East of I-80 as opposed to the informal Bay Trail alignment along the GGF shoreline and (b) the reasons underlying the choices that are being made.

In addition, as applied to the Bay Trail alignment, the DEIR analysis of comparative impacts should include a category that evaluates the “Transit” benefits of the East of I-80 Alternative when compared to the Proposed Project. While the East of I-80 Alternative may “be worse than the Proposed Project for Recreation” (DEIR at p. 334), it may be better for “Transit.” And if it is determined that significantly more use is being and will be made of either the Proposed Project or East of I-80 Bay Trail alignment for transit than for Recreation, it may well be appropriate to assign a higher value to the transit benefits of this segment of the Bay Trail than to the recreation benefits.

Table 5-1 which compares the extent to which the project alternatives meet the “Project Objectives” (DEIR at p. 307) appears to evaluate the East of I-80 Bay Trail alignment as if it is intended to be an alternative not simply to the GGF shoreline alignment of the Bay Trail as contemplated by the Proposed Project, but to the Proposed Project as a whole. If the East of I-80 Alternative consists of replacing the shoreline alignment of the Proposed Project (extending from the southern boundary of Area 2 to Gilman Street) with the East of I-80 alignment (extending from Buchanan Street to Gilman Street) but otherwise leaving the Proposed Project intact, then the capacity of the Proposed Project to meet the following “Project Objectives” would not be affected:

- “Improve and expand the quality and function of existing visitor facilities.” DEIR Table 5-1, #3, at p. 307.
- “Comply with the California Regional Water Quality Control Board’s Order to maintain the stability of the Albany Landfill at South Albany Neck.” DEIR Table 5-1, #4, at p. 307.
- “Provide habitat enhancement and public access while providing a multi-purpose, net beneficial project.” DEIR Table 5-1, #5, at p. 307.
- “Develop improvements that can be permitted and completed in 5 years.” DEIR Table 5-1, #7, at p. 307.
- “Phase project implementation with the highest priority placed on stabilizing the eroding landfill along the South Albany Neck.” DEIR Table 5-1, #8, at p. 307.

Table 5-1 needs to be revised to reflect these findings with respect to Project Objectives.

### **Minimal Improvements Alternative**

According to DEIR Table 5-1 at page 307, the Minimal Improvements Alternative would not:

- “Comply with the California Regional Water Quality Control Board’s Order to maintain the stability of the Albany Landfill at South Albany Neck.” DEIR Table 5-1, #3, at p. 307.
- “Provide habitat enhancement and public access while providing a multi-purpose, net-beneficial project.” DEIR Table 5-1, #5, at p. 307.
- “Provide connections to other local trails and circulation systems.” DEIR Table 5-1, #6, at p. 307.
- “Phase project implementation with the highest priority placed on stabilizing the eroding landfill along the South Albany Neck.” DEIR Table 5-1, #8, at p. 307.

Nowhere does the DEIR explain why the determination was made to find the Minimal Improvements Alternative as not in accord with these project objectives. This determination is particularly difficult to understand given a description of the Minimal Improvements Alternative that includes a trail connection along the GGF shoreline and “a focus... on stabilization along the most seriously eroding areas of the Albany Neck shoreline.” DEIR at p. 323. In this regard, it is important to note that, while the Minimal Improvements Alternative may not promote or advance the project objectives to the same degree as other alternatives, the measure of accord between project alternative and project objectives as reflected in Table 5-1 is not a question of degree. It involves a yes or no assessment. The Table 5-1 assessments need to be redone with this distinction in mind and the DEIR needs to include a narrative explanation whenever an alternative is determined not to be in accord with a particular project objective.

### **Consideration of Alternatives Rejected Prior To Resolution of Necessity**

The DEIR should also include analysis of the two alternatives the Park District staff rejected prior to presenting the project to the Board of Directors in April 2011. In March of 2006, the Park District contracted with Questa Engineering to design a Bay Trail connection across Golden Gate Fields. On September 8, 2007, Questa Engineering sent a letter to the Park District entitled “Alternative Site Plans for San Francisco Bay Trail at Golden Gates Fields, Albany, CA.” The letter presented three alternative site plans for a proposed interim Bay Trail with varying costs and levels of impact.

By June 2009, without holding a public Board meeting on the topic, the Park District decided to move forward with one of the three alternatives, involving a “Cliffside” trail alignment. Without any CEQA analysis or public Board decision, this alternative became the basis for the Park District’s eminent domain complaint.

Nowhere in the DEIR does the District discuss the two rejected alternatives, or explain why they were rejected. The DEIR should be revised to remedy these omissions and provide analysis of the rejected alternatives.

### **Consideration of an Interim Measures Alternative**

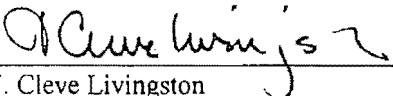
In addition to the seven alternatives to the Proposed Project that are addressed in the DEIR, an "Interim Measures Alternative" should also be developed and subjected to environmental review. This Interim Measures Alternative would be designed to implement those components of the Proposed Project that involve improvements to the Albany beach, neck, bulb, and plateau but defer those components of the Proposed Project that involve the public use of GGF property.

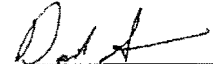
The Interim Measures Alternative could be a negotiated arrangement between the District and the racetrack owners, avoiding the need for condemnation proceedings. The agreement could allow the bulk of project improvements on the neck, plateau, and beach, and could allow for certain interim improvements to the shoreline trail along Golden Gate Fields' shoreline that would meet the District's needs until the site can be comprehensively planned in the future as part of a redevelopment project. The agreement could formalize and ensure continued public access, could address the District's public safety concerns, and could allow the racetrack owners to retain ownership of the shoreline. Such an agreement might time the more significant southern trail construction activities to coincide with redevelopment of Golden Gate Fields, thus minimizing environmental impacts by ensuring that the southern trail area will only undergo reconfiguration and construction at one time.

### Conclusion

Thank you for providing us with an opportunity to review the Albany Beach Restoration and Public Access Project DEIR. We hope the comments that we have provided will prove helpful to you in revising the DEIR to cure the deficiencies we have identified and to bring the draft document into compliance with CEQA. As stated in our Opening Statement, the conclusory character of the DEIR's determinations of significance (or lack of significance) together with the fundamental inadequacies of the information and analysis it provides as well as its pervasive failure to provide mitigation strategies that are legally sufficient, all combine to make revision of the DEIR and recirculation an essential part of a CEQA-compliant review process. We look forward to providing further comments on the revised DEIR. If you have any questions or would like to discuss any of the comments contained in this correspondence, please feel free to call J. Cleve Livingston at (916) 947-6972.

Respectfully Submitted

  
\_\_\_\_\_  
J. Cleve Livingston  
The Livingston Law Group

  
\_\_\_\_\_  
David Ivester  
Briscoe, Ivester & Bazel LLP



27 August 2012

J. Cleve Livingston  
The Livingston Law Firm  
400 Capitol Mall, Suite 2555  
Sacramento, California 95814

**RE: *Biological and Cultural Resources Technical Review for the Albany Beach Restoration and Public Access Draft EIR (DEIR), Eastshore State Park***

Dear Mr. Livingston:

At your request, we have performed a review of the biological and cultural resources analyses provided in the DEIR for the above-referenced project. The purpose of this review is to analyze the existing biological and cultural resources setting with respect to proposed project impacts and mitigation measures required by CEQA as well as applicable laws, regulations, policies and guidelines governing biological and cultural resources.

Overall, the sections in the DEIR lack sufficient specificity and detail in several key areas that can better help decision makers make informed decisions regarding the project's potential effects on biological and cultural resources on the project site. These key areas are discussed below as are individual comments that are directly referenced to the DEIR. As part of this analysis, we reviewed the biological and cultural resources sections of related EIRs and supporting documentation for compliance with applicable biological and cultural resources laws, regulations, policies, and guidelines. The documents reviewed include:

- Eastshore Park Project General Plan: Final Environmental Impact Report (Public Review Draft, July 2002),
- Existing and Future Conditions Report: Albany Beach Restoration and Public Access Feasibility Study (January 2011),
- Archaeological Reconnaissance and Literature Search for the Proposed Bay Trail, Albany Beach Restoration and Public Access at Eastshore State Park Project, Alameda County, California (April 2010), and
- Cultural resources inventory report for the proposed Bay Trail prepared by Jeffery Fentress, PhD, for Questa Engineering Corporation to assist the ERPD in its compliance with Section 106 of the National Historic Preservation Act (2010).

The Eastshore General Plan DEIR was prepared by LSA Associates, Inc. to assist the California Department of Parks and Recreation (DPR) in developing a general plan for the Eastshore State Park, the property for which was acquired in 2002. The Albany Beach Restoration and Public Access DEIR (Albany Beach DEIR) was prepared by Questa Engineering Corporation to assist the Eastbay Regional Park District (ERPD) in assessing the potential environmental

consequences of the proposed Albany Beach restoration and public access project on the Albany Peninsula and the bay shoreline between Buchanan and Gilman Streets, in the cities of Albany and Berkeley, California. This DEIR was prepared as a tiered environmental impact report, meaning that it is a separate environmental report tiered from the broader Eastshore General Plan DEIR because it is a project that could have separate environmental impacts that were not fully addressed in the Eastshore General Plan EIR. The Existing and Future Conditions Report was prepared by LSA Associates, Inc. for ERPD as a precursor to the Albany Beach DEIR to examine the feasibility of implementing improvements identified in the General Plan guidelines and to provide resource information on the environmental conditions of the Albany Beach study area. These three documents, both DEIRs and the existing and future conditions report, were written to assist the DPR and the ERPD in their compliance with the CEQA process. The cultural resources inventory report for Area 3 of the proposed Bay Trail was prepared by Jeffery Fentress, PhD, for Questa Engineering Corporation to assist the ERPD in its compliance with Section 106 of the National Historic Preservation Act (Section 106).

The peer review of the above-referenced cultural resources documentation was performed by ECORP Senior Archaeologist Katherine Knapp, MS, RPA, while the biological review was completed by Brian Mayerle (ECORP Senior Biologist). Ms. Knapp has 18 years of professional experience in cultural resources management, archaeology, and anthropology, and meets the Secretary of the Interior's Professional Qualifications Standards for prehistoric archaeology. Mr. Mayerle has over 22 years of professional consulting experience in biological resources management and regulatory compliance.

## **BIOLOGICAL RESOURCES**

As discussed, this section 4.3 beginning on page 110 lacks sufficient specificity and detail in several key areas. Given this lack of comprehensiveness, the section fails in its attempt to help decision makers make informed decisions regarding the project's potential effects on biological resources on the project site. These key areas are discussed below as are individual comments that are directly referenced to the DEIR biological resources section.

### **Methodology**

Overall, the existing setting starting on page 118 in the DEIR with respect to the vegetation and wildlife appears to adequately integrate relevant information from a review of existing documentation and findings of recent studies. However, no discrete methodology subsection is provided within the biological resources section of the DEIR. The referenced feasibility study provides this information as an introduction, as does the DEIR. However, given the extensive literature available that is relevant to the proposed project, as well as the extent of field assessment/survey conducted for the DEIR, the DEIR biological resources section should specifically describe the actual literature review and survey methodology in a more detailed and concise format. Moreover, the DEIR references a tiered approach to analyzing the project's effects, specifically deriving information from the programmatic General Plan EIR. This EIR also lacks a subsection on methods and, as such, should not form the basis for methods used in this project EIR.



## **Existing Conditions**

As described above, the existing conditions portion of the document describes the existing vegetation and wildlife resources. It also addresses special-status species and sensitive resources. However, the section does not include a table of special-status species that were considered for the project analysis. A table that was included in the feasibility analysis is referenced as an attachment, but should be integrated into the actual DEIR section.

## **Impacts/Mitigation Discussion**

The biological resources impact discussion starting on page 130 in the DEIR lacks sufficient specificity and detail necessary to ensure adherence to federal and state regulations and local provisions regarding biological resources. In general, the impacts discussion needs to fully assess the project design's effects on the biological resources in the project area. Although the existing setting considers the biological resources that may be affected by the project, the impacts discussion does not fully determine the extent of biological resource impacts associated with the project's implementation.

Although the DEIR includes a bulleted list of permits or consultations that may be required, the DEIR fails to accurately identify if, in fact, the permits would be required for the project through a more comprehensive impacts analysis. Furthermore, in the impacts "project analysis" section, this DEIR applies certain provisions set forth in the General Plan EIR to essentially mitigate for certain species. This tiered approach is certainly understandable given the extensive history of environmental review in the project area, however somewhat confusing given the level of inconsistency and uncertainty with individual impact conclusions. The following impact comments that are discussed below further explain the need for consistency and comprehensiveness.

### **Impact BIO-1: Burrowing Owl and Other Nesting Birds**

Although the DEIR on page 132 acknowledges that burrowing owls may be present on the project site and could be impacted by the proposed project, the DEIR fails to provide the survey results that would help determine if this species is in fact present on the site and, if so, where they are located. Lacking this information, the DEIR also fails to analyze how the proposed project may impact this species if present on the site and the steps needed to mitigate these impacts. These are studies and analyses that need to be included as part of the DEIR, not as subsequent tasks. Burrowing owls could likely be nesting in an area that will be impacted by construction. The DEIR states that consultation with the California Department of Fish and Game (CDFG) shall occur. However, according to CDFG's own mitigation guidance for project effects to burrowing owl, the DEIR should more fully delineate the steps to dealing with known burrowing owl burrows in the construction zone (e.g. relocation, exclusionary burrow devices, etc.). Furthermore, the DEIR fails to explain what shall occur once surveys are completed and documented nests are vacated. According to CDFG guidance, these measures could include collapsing vacated burrows or relocation.

### **Impact BIO-2: California Least Tern**

As stated in the DEIR, “project-related impacts to least terns may include equipment noise and human activity that disrupts access to foraging areas, increased turbidity which could hinder foraging, and increased exposure to contaminants released from sediments during debris removal”. The proposed mitigation for potential impacts to California least terns (BIO 2a and BIO 2b) are focused on water quality protection measures (i.e., turbidity and toxicity protection measures). While these measures are warranted, additional measures to protect this species should be implemented to address potential construction-related impacts to California least tern foraging success.

California least terns are known to forage in the vicinity of the project and potential project related impacts that may limit or discourage California least tern foraging in or near the project area could be considered a significant impact. Additional mitigation measures to protect California least tern foraging success should include timing restrictions that limit construction activities in potential foraging habitat (aquatic habitats: tidal, subtidal, and eel grass beds) during the breeding season for this species (April – September).

### **Impact BIO-5: Eelgrass Beds**

As stated in the DEIR on page 136, eelgrass beds are a sensitive resource that supports fish habitat and could be harmed during construction of the shoreline revetment and optional habitat enhancement components of the project. However, the project states that “eelgrass is known to serve as spawning and nursery habitat for Pacific herring (*Clupea pallasii*), the primary commercial fishery species in the Bay”, and that no direct impacts to eelgrass are anticipated. Pacific herring are known to occur in the vicinity of the project and are known to use eelgrass as spawning substrate. The proposed mitigation for potential impacts to eelgrass (BIO 5a - BIO 5e) include eelgrass delineation surveys, water quality protection measures (i.e., turbidity and toxicity protection measures) during construction, and post-construction monitoring of eelgrass distribution and quality of habitat. While these measures are warranted, they should be part of the original project design, not identified as subsequent measures following project approval. Furthermore, additional measures to protect this species should be implemented to address potential construction-related impacts to Pacific herring spawning success including timing restrictions that limit construction activities near potential spawning habitat (aquatic habitats: tidal, subtidal, and eel grass beds) during the spawning season for this species (fall-winter).

### **Impact BIO-6: Seasonal Wetlands**

As stated in the DEIR, the project would temporarily impact seasonal wetlands. The shoreline stabilization work would also potentially result in indirect effects to the tidal zone. Again, this impact analysis is not sufficiently conclusive as to the requirement for permits with the respective agencies. The proposed mitigation for potential impacts to wetlands include monitoring and water quality protection measures (i.e., turbidity and toxicity protection measures) during construction. While these measures are warranted, the impact analysis needs to accurately identify whether the project as designed would require a federal Clean Water Act permit and not simply conclude that it may require permits. Furthermore, it is unclear in the

DEIR whether the wetland delineation has been verified by the U.S. Army Corps of Engineers. The current status of the delineation needs to be clearly stated in the DEIR.

## **CULTURAL RESOURCES**

The purpose of this review was to identify any potential flaws in the cultural resources analysis that could negatively affect project approval or other adjacent proposed projects. As part of this review, ECORP consulted: the official project descriptions, as presented in the DEIR or cultural resource inventory report; Project Description sections within the larger reports provided to ECORP on 25 July 2012; the California Environmental Quality Act (CEQA), Title 14, CCR, Article 5, Section 15064.5 and related sections; and Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations in 36 CFR Part 800.

The standards to which Fentress's cultural resources inventory report was measured include: for General Comments, the *Archaeological Resource Management Reports (ARMR): Recommended Contents and Format* (February 1990), published by the California Office of Historic Preservation (hereafter, ARMR Guidelines); and *Instructions for Recording Historical Resources* (March 1995), published by the Office of Historic Preservation (hereafter, IRHR). Both publications were available to the author at the time of the submission of the report.

The standards to which the DEIRs and the Existing and Future Conditions Report were measured were CEQA guidelines; specifically CCR Title 14, Sections 15126.4 and 15064.5 and a variety of Public Resource Codes relied upon during the CEQA process and within the CEQA guidelines; CCR Title 14, Sections 5024.5, 5097.8, and 2108.2.

A summary of the key issues with the documents reviewed include:

- The project-specific EIR does not definitively identify historical resources within the project area, when there is a reasonable opportunity to do so. Historical resources, by definition, are those that are determined eligible for inclusion in the California Register of Historic Resources or National Register of Historic Places, or are listed in an officially adopted historic resources inventory or survey. For example, the lack of Fleming Point Pier significance determination opens the issue of deferral of significance, which the courts have found to be in violation of CEQA. Madera Oversight Coalition, Inc. v. County of Madera and Tesoro Viejo Inc. et. al., 199 Cal. App. 4th 48; 131 Cal. Rptr. 3d 626 (2011 Cal. App.). The Fleming Point Piers shoreline is within Area 3 of the project area, but the remainder of it is outside of the project area.
- The documentation does not specify the methods used in identifying historical resources. In particular, the lack of a specific mention of survey coverage or the inclusion of the Eastshore Park Project Resource Inventory report as an attachment brings into question the legal defensibility of fieldwork performed. There is question as to whether or not a good faith effort was made to meet CEQA or Section 106 standards for identification of significant cultural resources. The lack of specific reference to personnel qualifications also calls into question the legal defensibility of the analysis, which supports the CEQA documentation.

## 2002 Eastshore Park Project General Plan EIR (Public Review)

1. The qualifications of the personnel that conducted the archaeological and historic resources studies and literature reviews is not provided, which calls into question whether or not the data presented within the 2002 General Plan EIR is legally defensible.
2. The only mention of the fieldwork conducted for the 2002 General Plan EIR was found in the January 2011 Albany Beach Existing and Future Conditions Report. In the 2011 report, it lists fieldwork that was completed for the 2002 General Plan EIR by LSA Associates, Inc. Fieldwork is listed as a reconnaissance survey that is described as, 'visual or cursory pedestrian review of filled areas' and a 'more intensive survey, in 10-meter wide zig-zag transects, conducted within areas that had not been filled (i.e. Fleming Point)', (LSA 2011). In this same 2011 report, there is no other mention of fieldwork methods or results. In regard to the 2002 General Plan EIR, although CEQA guidelines do not require a survey coverage map in an environmental report, one showing the areas that were subjected to varying intensities of coverage, would have eliminated any doubt of whether LSA's fieldwork was sufficient enough to gather the necessary data to make the required resource assessments of the property beyond the basic literature review. Archival research was completed, but there is no indication as to when it took place, i.e. one year or more ago. In general, literature reviews should not be more than 2 years old, and depending upon the project, pedestrian surveys should not exceed 25 meter transect intervals and are generally considered obsolete after 5 to 10 years

Without a more detailed explanation of the actual areas covered during the reconnaissance survey, including the methods used in the survey and records search, there is an outstanding question as to whether the survey coverage was adequate enough to be legally defensible. Additionally, if the authors of the 2002 General Plan EIR based their evaluations of significance on an archival review as well as the less than adequate survey coverage, there is an issue of deferral of analysis.

The 2002 General Plan EIR includes a relatively unstructured and unfocused discussion on whether the Fleming Point Piers have historical significance but fails to make a determination in this regard. The discussion relies too heavily on archival research for the Fleming Point Piers, does not have the resource evaluation necessary for a significance determination, and states that 'further study is necessary.' Such an approach raises an issue of deferral of significance, which according to CEQA Guidelines (CCR Title 14, Section 15126.4(b)), Mitigation Measures Related to Impacts on Historic Resources, and recent CEQA case law, Madera Oversight Coalition, Inc. v. County of Madera, is unacceptable.

3. Additionally, as per Public Resource Code Section 5024.5, if a project will affect State-owned property, consultation with the State Historic Preservation Officer must be initiated. There is no mention of this occurring within the body of the 2002 General Plan EIR.

4. There are several references to areas within the General Plan project area that have the potential to have a lot of cultural resources, but they give no indication, beyond archival research, that any attempt was made to investigate further, i.e. subsurface testing, intensive cultural resources pedestrian inventory. Generally, the Office of Historic Preservation does not accept a finding of no impact to historical resources when a good faith identification effort (when feasible) has not been made.
5. The potential for Native American remains, based on their archival review only, is suggested as a possible issue in the project area; however, they mention it once and do not address it again within the body of the report. As per Public Resource Code 5097.8, relied upon in the CEQA process, if there is the possibility of Native American remains within a project area, consultation with the Native American Heritage Commission is necessary. There is no indication within the body of the report that this consultation was initiated.
6. On Page 90 and 91 there is a discussion of possible cultural resources that were observed during a visit that is not discussed. They include a number of possible historic features as well as the 'wild art' features. They are deemed 'of indefinite age', yet it seems, based on descriptions of some of them, that they could easily be associated with a historic period of use. As mentioned earlier, a deferral of significance evaluation is not acceptable under CEQA standards.
7. Page 93 presents the mitigation measures set forth in the 2002 General Plan EIR. CEQA, as per CCR Title 14, Section 15126.4, has very specific standards for which they consider mitigation measures to be adequate. The mitigation measures set forth in the 2002 General Plan EIR are similar to Best Management Practices (BMPs) and less like mitigation measures. BMPs are simply the best way to manage resources, in this case cultural resources, within the project area and cannot be considered mitigation measures. There are no mitigation measures presented within the cultural resources section in this 2002 General Plan EIR that conform to CEQA standards.
8. In general, the conclusion that there are no significant impacts to cultural resources project-wide directly contradicts several statements made throughout the report suggesting the intensity of Native American use of the area as well as the extensive historic use. Without intensive fieldwork with possible presence/absence testing in areas believed to be of higher sensitivity, this impact assessment is not supported, given the historic and prehistoric use of the area. This harks back to the deferral of analysis issue so prevalent throughout this discussion. By making statements such as 'further study is needed' or that there are 'no significant impacts' based on what appears to be less than adequate fieldwork and an archival review, the authors have deferred analysis and thus brought into question the legal defensibility of the cultural resources section of the 2002 General Plan EIR.

#### **2011 Existing and Future Conditions Report, Albany Beach Restoration and Public Access Feasibility Study**

1. This report is a supporting document to the Albany Beach EIR, upon which the EIR relies for a portion of the analysis. The report states that it relies on fieldwork conducted for

the *Eastshore Park Project Resource Inventory* performed for the 2002 General Plan EIR. Although the authors state that this limited survey is sufficient, it does not meet the standard professional definition of a good-faith identification effort. The Resource Inventory fieldwork was presumably performed in 2001/2002 based on the 2002 publication date of the inventory report. In the 2011 Existing and Future report, no field results are reported for the 2002 General Plan EIR Resource Inventory report. Because the Resource Inventory appears to have inadequate coverage, this could create issues with deferral of significance evaluations because the authors made these evaluations based on inadequate fieldwork and used mostly archival review. Therefore there is a question of the cultural resource data presented in the 2011 Existing and Future report as legally defensible based on recent *Madera Oversight Coalition, Inc. et al. v. County of Madera and Tesoro Viejo, Inc., et al. (2011)* and CEQA guidelines mentioned elsewhere in this letter.

2. Page 93 reports the Park District Master Plan guidelines for the management of cultural resources, but does not clarify what the guidelines are.
3. Section 9.5.2 states that there are no archaeological or historical resources found within the study area, however, there has been little intensive survey of the area or subsurface testing (if necessary). Archival research indicates that there is a high potential for a significant amount of buried cultural resources (archaeological and historic).
4. There is no information provided about how the cultural resources were evaluated, what the evaluation concluded and under what National Register/California Register criteria; however, there are repeated statements about the necessity of further study for cultural resources within the project area. As in *Madera Oversight Coalition, Inc. et al. v. County of Madera and Tesoro Viejo, Inc., et al. (2011)*, the concept of 'further study is necessary' is unacceptable according to CEQA guidelines and thus presents a potential for deferral of identification and evaluation of historical resources.

#### **2010 Archaeological Reconnaissance and Literature Search for the Proposed Bay Trail, Albany Beach Restoration and Public Access at Eastshore State Park Project, Alameda County, California**

1. Fentress's study was conducted only for the purpose of compliance with Section 106 and was not conducted for the purpose of compliance with CEQA. While resources found eligible for inclusion in the NRHP are automatically eligible for the California Register of Historic Resources (CRHR), resources that are found ineligible for the NRHP might still meet the criteria for the CRHR. The sites must be evaluated for eligibility using the CRHR criteria (Pub. Res. Code § 5024.1, Title 14 CCR, Section 4852; ARMOR Guidelines 1990:16). Because the evaluation of resources conducted by Fentress did not include evaluation relative to the CRHR criteria, the report could be challenged if used in conjunction with an EIR. The report author could be asked to revise the report to include an evaluation of the resources relative to the CRHR.
2. A survey coverage map, showing the areas that were subjected to varying intensities of coverage, was not provided in the Fentress report, which is required by ARMOR.

Guidelines (1990:10). Because Fentress observed sites outside of the impact area, it is assumed that the survey coverage extended beyond the impact area.

3. The recommendations for unanticipated discovery should provide specific instructions for the management of unanticipated discoveries of cultural resources and human remains, and should include a protocol for communication between construction crew, the lead agency, a professional archaeologist, the Native American Heritage Commission, and the County Coroner.

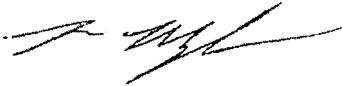
### **2012 Albany Beach Restoration and Public Access Project for the East Bay Regional Park District, Draft EIR**

1. The report states that there are Native American sites presumed to be on and around the project area, but no survey has been conducted or subsurface presence/absence testing. As per Public Resource Code 5097.8, relied upon in the CEQA process, if there is the possibility of Native American remains within a project area, consultation with the Native American Heritage Commission (NAHC) is necessary. The report authors state that the NAHC was contacted along with the Albany Historical Society in an effort to ascertain whether there were Native American sacred sites or Native American sites within the project area. The authors state on page 149 that because no responses were received from either of these entities, it is assumed that no Native American cultural resources are within the project area. This again presents an issue of deferral of analysis because the authors are relying on other sources as well as archival reviews from the 10 year old 2002 General Plan EIR and Fentress's 2010 inventory report for Area 3, rather than performing full coverage survey and possible presence/absence testing to verify the existence of Native American cultural remains. Relying on the archival reviews is an issue because the 2002 General Plan EIR is outdated and Fentress's report was for a finite portion of the project area.
2. This 2012 Draft EIR states that it relies on fieldwork completed for the 2002 General Plan EIR, Fentress's 2010 fieldwork which was completed for the 2011 Existing and Future Conditions Report, as well as archival research, which are now obsolete and appear to be incomplete respectively. Additionally, Fentress's Bay Trail survey report was conducted for a very small part of the overall project area and, therefore, cannot provide a realistic picture of the historic or archaeological resources throughout the entire project area. In relying on outdated fieldwork and archival reviews, the cultural resources section of the 2012 Draft EIR may not be legally defensible. Additionally, the authors of the cultural resource section have deferred analyses of significance because they do not have recent and full coverage fieldwork to account for any cultural resources that may be located within the project area or recent archival review to reflect the same.
3. Mitigation measures have been presented as BMPs with the 'standard recommendations,' rather than as mitigation measures specific to the resources or project area and impacts. CEQA, as per CCR Title 14, Section 15126.4, has very specific standards for which they consider mitigation measures to be adequate. The 'standard recommendations' and BMPs presented in the 2012 Draft EIR are inadequate according to CEQA guidelines.

The fieldwork and literature review for the 2012 Draft EIR are both pulled from the reports listed within this review letter. This could present issues of how up-to-date the research may be in regard to the current project.

Please contact me at 916-782-3100 or [bmayerle@ecorpconsulting.com](mailto:bmayerle@ecorpconsulting.com) if you have any questions or need additional information.

**Sincerely,**

A handwritten signature in black ink, appearing to read 'B. Mayerle', with a long horizontal flourish extending to the right.

Brian C. Mayerle  
Senior Project Manager  
ECORP Consulting, Inc.



## REFERENCES

- Boyer, K.E. and S. Wyllie-Echeverria. 2010. Appendix 8-1: Eelgrass Conservation and Restoration in San Francisco Bay: Opportunities and Constraints, In: San Francisco Bay Subtidal Habitat Goals Project,
- California Department of Fish Game. 2011. California Natural Diversity Database
- California Office of Historic Preservation  
1990 *Archaeological Resource Management Reports (ARMR): Recommended Contents and Format* (February 1990).  
1995 *Instructions for Recording Historical Resources* (March 1995).
- Eastshore State Park – Albany Reach. 2011. Habitat Restoration and Public Access Feasibility study
- Fentress, J. 2010 Archaeological Reconnaissance and Literature Search for the Proposed Bay Trail, Albany Beach Restoration and Public Access at Eastshore State Park Project, Alameda County, California. Prepared for Questa Engineering Corporation, Point Richmond, California.
- LSA Associates, Inc.  
2011 *Existing and Future Conditions Report: Albany Beach Restoration and Public Access Feasibility Study.*
- LSA Associates, Inc.  
2002 *Eastshore Park Project General Plan: EIR (Public Review).*
- San Francisco Bay Conservation and Development Commission. 2008. The San Francisco Bay Plan
- Questa Engineering Corporation  
2012 *Albany Beach Restoration and Public Access Project for the East Bay Regional Park District, Draft Environmental Impact Report.*

BRISCOE IVESTER & BAZEL LLP  
155 SANSOME STREET  
SEVENTH FLOOR  
SAN FRANCISCO, CALIFORNIA 94104  
(415) 402-2700  
FAX (415) 398-5630

David Ivester  
(415) 402-2702  
divester@briscoelaw.net

November 13, 2012

*Via FedEx*  
Board of Directors  
East Bay Regional Park District  
2950 Peralta Oaks Court  
Oakland, CA 94605

**Re: McLaughlin Eastshore State Park  
San Francisco Bay Trail/Albany Beach Restoration**

Dear Directors:

In reviewing the Comments and Responses for the Draft Environmental Impact Report Albany Beach Restoration and Public Access Project two more issues have come to our attention that have not been sufficiently analyzed. They are (1) the magnitude of the project's bay fill and the environmental effects of that fill and (2) the impact of the project on marine mammals beyond the construction phase of the project. In order for the EIR to be in compliance with CEQA, these two issues must be addressed and the EIR recirculated for public comment.

**1. Magnitude and Impact of Project Bay Fill**

The DEIR leaves uncertain how much filling of San Francisco Bay the project proposes. At different times the District has presented varying estimates of the magnitude of proposed bay fill. The District staff said at an April 5, 2011, board meeting that "we will not be filling in any of the bay." Two months later, the June 2011 Feasibility Study estimated that 8,000 to 10,000 cubic yards of fill would be required, filling 47,500 square feet of the bay. (Appendix H at 8.) The July 2012 DEIR and the Comments and Responses document, however, say that bay fill will be "minimized" (DEIR at 2, 220) and estimate that the project could involve up to 6,800 cubic yards of bay fill over 27,200 square feet (DEIR at 57 – 58). The EIR should provide an explanation of the difference.

A BCDC permit is required for any filling of the San Francisco Bay, as "any filling is harmful to the Bay, and thus to present and future generations of Bay Area residents." (BCDC Bay Plan at 2; see Government Code § 66601.) The EIR does not include such a bay fill permit on its list of Required Permits and Approvals (page 8) despite acknowledging that the project will involve substantial fill.

In any event, regardless of the magnitude of fill, the EIR should thoroughly evaluate the environmental effects of the proposed filling in the Bay's tidal marshes and tidal flats. It does not do so. Even though the DEIR identifies such an evaluation as necessary (DEIR at 216), it does not provide it. This evaluation should also include analyses of the environmental impacts of likely bay fill permit conditions, where fill material will be obtained, and the environmental impact of obtaining fill material. Analysis of likely bay fill permit conditions is especially necessary considering that mitigation ratios under BCDC permits are greater than 1:1 for a large majority of fill projects, and are greater than 5:1 in a significant minority of cases. (BCDC Background Report on Mitigation, adopted October 17, 2002, at 7. Available online at [www.bcdc.ca.gov/pdf/planning/reports/mitigation.pdf](http://www.bcdc.ca.gov/pdf/planning/reports/mitigation.pdf); excerpted here as Attachment A.)

Because the District's estimates of bay fill have ranged from zero to ten thousand cubic yards and because there has yet to be any significant evaluation of the source or impact of bay fill and the resulting mitigation requirements, recirculation of the FEIR will be necessary after the FEIR is amended to address the issue of bay fill.

## **2. Impact of Project on Marine Mammals**

Marine mammals, including harbor seals and sea lions, occur and have been observed in the park project area. (DEIR at 36, 128, Appendix I at II-26, Appendix J at 75, Eastshore State Park Project Resource Summary at RS-17.) While the EIR claims that no haul-out sites for marine mammals are present in the project area, the fact is that sea lions have hauled out on Albany Beach at least as recently as September 2011 (*see* Albany Patch article included as Attachment B and an iwindsurf.com message board posting included as Attachment C) and the Eastshore State Park General Plan contemplates that marine mammals may beach themselves in the project area (General Plan at III-36). The Marine Mammal Center alone has logged eight incidents of sea lion and harbor seal strandings in the project area over eight years between 2002 and 2010. (Spreadsheet provided by the Center, included as Attachment D.) The EIR, however, appears not to recognize or acknowledge these facts and includes only a cursory discussion of impacts of the project on marine mammals, and even that is limited to impacts of construction and does not include operation of the project. (DEIR at 10.)

The EIR completely neglects to discuss long term effects of the project on the local harbor seal and sea lion populations, even though its appendices suggest that use of the beach is already causing alteration of marine mammal behavior. Appendix G at page 76 states that marine mammals are not expected to haul out at Albany Beach "due to ongoing disturbance

BRISCOE IVESTER & BAZEL LLP

November 13, 2012

Page 3

associated with trail users and pets." Increased use of the beach by humans and dogs and use for non-motorized boat launching will cause an increased impact on harbor seal behavior. (See Drake's Bay Oyster Company DEIS at 240. Available online at [parkplanning.nps.gov/document.cfm?parkID=333&projectID=33043&documentID=43390](http://parkplanning.nps.gov/document.cfm?parkID=333&projectID=33043&documentID=43390) and excerpted here as Attachment E.)

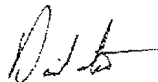
Increased behavioral disturbance due to increased visitor use of Albany Beach (see DEIR at 277) is not only a CEQA concern but also a Marine Mammal Protection Act (MMPA) concern. The MMPA bars activities with the "potential to disturb a marine mammal in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering." (16 USCS § 1362 (18)(a)(ii).) Under the MMPA, if an activity is determined to be harassment under the above criteria, a specific permit called an Incidental Harassment Authorization may be required. The DEIR does not include such a permit on its list of required permits. (DEIR at 8.)

Because the EIR's analysis of impact on harbor seals fails to discuss post-construction impacts and MMPA concerns and will require significant new information on these subjects, the EIR must be recirculated.

Thank you for your attention to these issues.

Sincerely yours,

BRISCOE IVESTER & BAZEL LLP



David Ivester

DJ/wm  
Attachment

cc: Nancy Wenninger, East Bay Regional Park District  
Peter Tunney, Pacific Racing Association  
Joe Morris, Pacific Racing Association  
R. Doyle, East Bay Regional Park District  
Ted Radosevich, East Bay Regional Park District  
Todd Amspoker, Counsel for East Bay Regional Park District

Attachment A

and other participants of the San Francisco Bay Area Wetlands Ecosystem Goals Project. The Goals Report offers the first San Francisco Bay regional vision of its depth and magnitude and provides a vital vision and guide for the long-term restoration and improvement of the baylands and related habitats of the Bay.

In conclusion, it is clear from the permit review that despite the Commission's policies that generally favor on-site and in-kind mitigation in an attempt to require mitigation that is appropriate and reasonable, the Commission has evaluated proposed mitigation projects on a permit by permit basis and has allowed, in some cases, both off-site and out-of-kind mitigation. However, there is no overall policy basis for determining the appropriate type, amount and location of compensatory mitigation on a regional scale, nor do the mitigation policies reflect the potential contribution offered by the Goals Report to long-term, long range mitigation planning.

**Recommendation.** The Commission's mitigation policies should be revised to promote the selection of mitigation type and location on a case-by-case basis in a broader geographic context, favoring mitigation as close to the impact site as feasible based on the likelihood of long-term ecological success of the mitigation project. The policies should support compensation for the impacted functions, address potential social and economic considerations, and ensure a high likelihood of ecological success. A regional approach to mitigation should be informed by the Goals Project.

**Habitat Classification Methods.** Lack of or inconsistent definitions of habitat type at both the impact site and the mitigation site makes informed decisions regarding the appropriate type, size, and location of mitigation difficult. As described above, for a significant percentage of permits during the permit review it was unclear whether the required mitigation was in-kind or out-of-kind, often because the habitat type of the impact site, the mitigation site, or both, was not clearly described in the permit.

In 1988 the Commission adopted a staff recommendation concerning mitigation evaluation which included proposed changes to the permit application form to include specific environmental information from applicants for proposed projects "such as the types and amounts of tidelands that would be impacted (i.e., pickleweed marsh, cordgrass marsh, intertidal mudflats)...." The current permit application form now includes a question on the square footage of "tidal marsh or wetland area to be filled" and also requires the applicant to "describe in detail the anticipated impacts of the fill on the tidal environment...." However, information on the specific types of wetlands and related habitats that would be impacted is still not specifically required in the permit application.

The use of standardized and consistent definitions of habitat type would assist the Commission in comparing the impacted site with the proposed mitigation site. To establish regional habitat goals for the San Francisco Bay Area, the Goals Project participants developed a hierarchical classification system of habitats specific to the Bay area. The classification system contains three major habitats—Bay, baylands, and adjacent habitats—which are then further broken down into several, more detailed habitat types.

In conclusion, the classification system as laid out in the Goals Project is specific to the San Francisco Bay Area and is also simple and general enough for use in the Commission's permit applications as well as in staff summaries, staff recommendations, staff reports, and planning reports. In addition, the recent Bay Plan policy revisions on tidal marshes and tidal flats and subtidal habitats are based on the habitats as classified in the Goals Project. Though more detailed information on the structure (i.e., vegetation cover, species diversity) and function (i.e., nutrient retention, hydrologic functions) of various habitat types may be needed on a case by case basis to determine appropriate mitigation, general use of the Goals Project's classification would support staff findings and increase agency accountability for compensatory mitigation decisions by employing consistent, standardized descriptions of habitat type and functions as the basis of a logical, analytical approach to determining if public benefits of a project clearly exceed public detriments.

**Recommendation.** The Commission's permit application form should be amended to require information on the impacts of projects on specific bayland habitats, based on the classification developed in the Goals Project. The classification system should also be used in staff summaries, staff recommendations, staff reports, and planning documents where appropriate.

**Mitigation Ratios.** Mitigation ratios (the ratio of the acreage of an area replaced per acreage of area lost) are a widely used tool for regulators to ensure compensatory mitigation successfully offsets impacted resources, and may be higher or lower than one to one (1:1) depending on various factors. However in general, due to the potential lack of success of mitigation projects as well as the common time delay

between the impact and the functioning of the mitigation site, ratios greater than 1:1 may be needed in order to ensure full replacement of habitats. In any case, ratios should be based on an identifiable rationale that is clearly described in the mitigation program or plan and approved by the appropriate regulatory agencies.

The Commission has always analyzed and required mitigation ratios on a permit by permit basis, though a 1988 BCDC staff report recommended higher than a 1:1 ratio in general to compensate for time lags between impacts and mitigation, and to compensate for lack of assurances regarding the success of mitigation.

The Commission has historically taken a broader view of what constitutes appropriate and reasonable requirements for the amount and type of mitigation, and does not generally specifically describe mitigation ratios in its permits. Conclusions regarding mitigation ratios in the permit review process were calculated from data on acreages provided in the permit. The mitigation ratios required in the reviewed permits varied, though the majority of the permits required ratios of between 1:1 and 5:1. About 65 percent of the projects required ratios of greater than 1:1, with about 35 percent requiring 1:1 or less. About 15 percent of the projects required ratios of less than 1:1 and about 15 percent required ratios of 5:1 or above.

Most projects requiring less than 1:1 mitigation ratios were requiring compensation for adverse environmental impacts that were temporary in nature, or those resulting from pile-supported fill. Of the projects requiring ratios of 5:1 or greater, the majority included enhancement of degraded habitats as part of the mitigation package.

The reasoning behind the required replacement ratio was assumedly different from permit to permit, depending on a variety of factors on a case-by-case basis including the type of mitigation (creation, restoration, or enhancement), the degree of adverse impact, the expected time lag between loss and replacement, and the relative qualities of the impact and mitigation site. It is clear that mitigation ratios are among the tools the Commission relies upon to achieve reasonable and adequate compensation for unavoidable adverse impacts. A clearly identified rationale for how the required amount of mitigation was determined would help inform decisions regarding the appropriateness of mitigation on a case by case basis, and would support staff findings and increase agency accountability.

*Recommendation.* The Commission should retain its practice of determining the size or amount of a compensatory mitigation area and type on a case by case basis (based on an analysis of the risk of failure of the mitigation project, the expected time delay and the quality of the impact site as compared to the mitigation site) as a tool for securing appropriate mitigation for impacts and the Bay Plan mitigation policies should be revised to support this practice.

*Mitigation Timing.* To avoid any time delay between permitted loss of resources and replacement of those resources, compensatory mitigation would have to be implemented prior to when the permitted impacts occur. However, in a regulatory context, it is often infeasible to delay permittee's development projects until mitigation sites are constructed and function to meet performance standards, and requiring mitigation no later than concurrent with the permitted impact is in many cases the most practical compromise. However, unless a mitigation site is functioning prior to the permitted impact, there will be some temporal loss of habitat function until a replacement area is functioning, so higher mitigation ratios may be appropriate. Where feasible, and with particularly risky mitigation projects involving impacts to high quality habitats, advance mitigation may be appropriate.

The Commission's mitigation policies state in part that the mitigation should, "to the extent possible, be provided concurrently with those parts of the project causing adverse impacts."

The majority of the reviewed permits required the mitigation to be implemented concurrent with the timing of the approved project, though about a dozen or so permits allowed the mitigation to commence after completion of the permitted project (most of those required higher than one to one mitigation ratios or involved the use of in-lieu-fees where the ratio was not quantified). Only one of the permits reviewed required implementation of the mitigation prior to the project.

In conclusion, the Commission's policies and practices reflect an emphasis on concurrent mitigation. In 1988 the Commission adopted a staff recommendation concerning mitigation evaluation which stated that "mitigation should be carried out concurrently with or prior to the Bay fill project, unless unreasonable. If unreasonable, the permittee should provide a larger mitigation area and greater Bay



Attachment B





By [Emilie Raguso](#) [emilie@patch.com](mailto:emilie@patch.com)



Like

[Patch Newsletter](#)

[Nearby](#)

[Join](#)

[Sign In](#)

# AlbanyPatch

54°

[Home](#)

[News](#)

[Events](#)

[Directory](#)

[Pics & Clips](#)

[Holidays](#)

[Real Estate](#)

[a](#)



## ALBANY WATERFRONT

### The Neighborhood Files

# Beached Sea Lion Rescued at Albany Waterfront Dies

The sea lion was found to be suffering from kidney failure after his rescue.

By [Emilie Raguso](#) [Email the author](#) September 23, 2011

Facebook 6

Tweet 0

Email

Print

1 Comment



About this column: Here you'll find all stories dealing with the Albany Waterfront, and some of its most challenging issues: dog management, vegetation, art, homeless encampments and more.

Related Topics: [Albany Beach](#), [Albany Waterfront](#), [California Sea Lion](#), [Waterfront](#), and [leptospirosis](#)

An adult male sea lion [rescued last week on Albany Beach](#) died two days later at the [Marine Mammal Center](#) in Sausalito.

The sea lion beached itself sometime before 7 p.m. at a popular dog area at the waterfront on Sept. 15, according to the [Albany Police Department](#).

Several rescue workers were able to get the animal to the Mammal Center after having a disagreement with dog owners at the scene, which resulted in the animal biting a dog, according to the Police Department.

The sea lion, which was named Ailani, said Marine Mammal Center spokesman Jim Oswald, was found to be suffering from [leptospirosis](#), a bacterial infection that causes kidney failure.

"Every four to five years, The Marine Mammal Center sees a surge in the number of California sea lions that are admitted with symptoms of leptospirosis, a bacterial infection that affects the kidneys and can be lethal for patients. If not treated, the bacteria can cause irreversible kidney damage," according to the center.

The infection's symptoms include drinking water and folding the flippers over the abdomen.

"[Marine mammals](#) generally do not need to drink water because they receive all the moisture they need from food sources; but when they are infected with the *Leptospira* bacteria, their kidneys, which filter toxins, stop functioning properly."

Ailani died two days after the rescue as a result of the disease.

"In California sea lions, epidemics of the bacterial infection were first documented in the early 1970s," according to the Marine Mammal Center.

[California sea lions](#) have brown fur, act playful, like to stay together in large groups, and sound like barking dogs. You can see them often on offshore rocks or floating together in large groups called "rafts." Males can weigh up to 800 pounds, while females may weigh up to 220 pounds.

The current population is approximately 238,000.

Everybody makes mistakes ... [even us!](#) If there's something in this article you think should be corrected, or if something else is amiss, call editor Emilie Raguso at 510-459-8125 or email her at [emilie@patch.com](mailto:emilie@patch.com)

Enter your email address to receive this story

Enter your email address


Keep me posted

Attachment C

wendel

Joined: 02 May 1999  
Posts: 81

Posted: Thu Sep 22, 2011 4:57 pm Post subject:

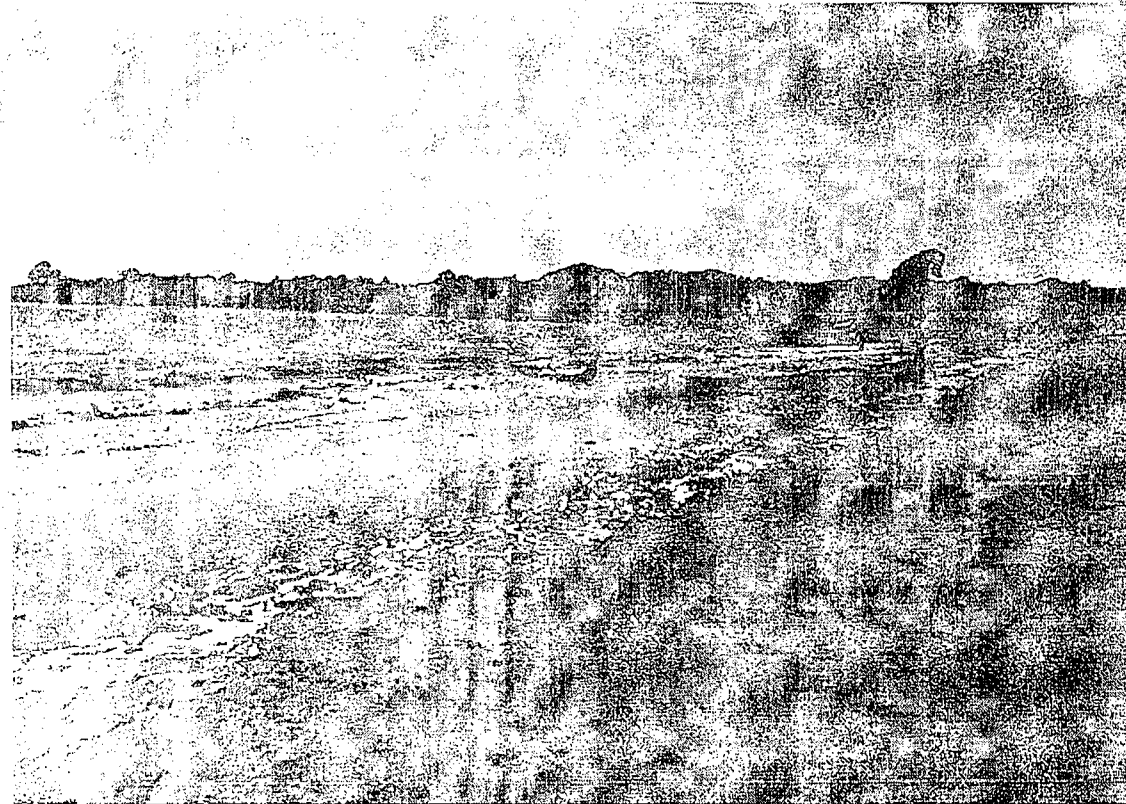
 quote

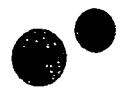
I wonder if that's the same sea lion that came ashore at Golden Gate Fields beach.

It came in when I started kite sesh, then was still there couple hrs later when I was derigging. The Marine Mammal Center rescue squad was there and corralled her into a cage, which I then got conscripted to help push cage across sand and lift into truck.

Watch out for those marine mammals (they have very fishy breath!)

| sea lion.jpg |             |
|--------------|-------------|
| Description: |             |
| File size:   | 118.82 KB   |
| Viewed:      | 804 Time(s) |





Attachment D

(Spreadsheet provided by Marine Mammal Center, November 13, 2012.)

| Admit Date | Common Name         | MMC ID   | Stranding City | Stranding County | Stranding Locality    | Stranding Details  |
|------------|---------------------|----------|----------------|------------------|-----------------------|--|
| 07/14/2002 | California sea lion | CSL-5315 | Albany         | Alameda Co.      |                       | on beach in front of Golden Gate Fields race track                 |
| 05/02/2004 | harbor seal         | HS-1548  | Albany         | Alameda Co.      |                       | Golden Gate Fields   |
| 01/15/1980 | California sea lion | CSL-88   | Albany         | Alameda Co.      |                       | behind Golden Gate Fields  |
| 07/14/1984 | California sea lion | CSL-435  | Albany         | Alameda Co.      |                       | near Golden Gate Fields  |
| 12/08/1985 | California sea lion | CSL-693  | Albany         | Alameda Co.      |                       | near Golden Gate Fields Race Track                                 |
| 09/11/1994 | California sea lion | CSL-2418 | Albany         | Alameda Co.      |                       | Golden Gate Fields   |
| 03/28/2005 | California sea lion | CSL-6503 | Albany         | Alameda Co.      |                       | Golden Gate Fields   |
| 08/13/2010 | California sea lion | CSL-9527 | Albany         | Alameda Co.      |                       | in parking lot next to Golden Gate Fields, at end of Gilman Street |
| 05/27/2007 | California sea lion | CSL-7253 | Albany         | Alameda Co.      | Albany Bulb           | northwest end of Golden Gate Fields Racetrack                      |
| 09/01/2007 | California sea lion | CSL-7449 | Albany         | Alameda Co.      | Albany Bulb           | north end of race track  |
| 11/21/2007 | California sea lion | CSL-7552 | Albany         | Alameda Co.      | Albany Bulb           | in the parking lot   |
| 06/04/2008 | harbor seal         | HS-1852  | Albany         | Alameda Co.      | Albany Bulb           | just south of the north jetty, near the sculpture                  |
| 04/24/2000 | gray whale          | C-112    | Albany         | Alameda Co.      | Albany Shoreline Park |  |



Attachment E

THE LIVINGSTON LAW GROUP  
400 CAPITOL MALL, SUITE 2555  
SACRAMENTO, CA 95814  
(916) 947-6972

BRISCOE IVESTER & BAZEL LLP  
155 SANSOME STREET  
SAN FRANCISCO, CA 94104  
(415) 402-2700

November 19, 2012

Board of Directors  
East Bay Regional Park District  
PO Box 5381  
Oakland, CA 94605  
[cbarton@ebparks.org](mailto:cbarton@ebparks.org)

Delivered by U.S. Mail and e-mail to the addresses listed above.

Re: Comments on the Albany Beach Restoration & Public Access Project Final  
Environmental Impact Report (SCH#2012032072)

Dear Members of the Board:

In our Comment Letter on the Albany Beach Restoration and Public Access Project Draft Environmental Impact Report dated August 27, 2012 (the "DEIR"), we called to the attention of the East Bay Regional Park District ("EBRPD" or the "District") a host of critical deficiencies which need to be addressed in a revised and recirculated DEIR if the District is to bring its environmental review into compliance with the California Environmental Quality Act (Pub. Resources Code, §21000 *et seq.*) ("CEQA").

These deficiencies include:

- a failure to prepare a Specific Project Plan (the "SPP") for the purpose of defining the proposed project's full scope and design, as required by the Eastshore Park General Plan adopted by EBRPD in 2002 (the "General Plan");
- a failure to undertake the more detailed studies and plans required to prepare the Specific Project Plan, as contemplated by the General Plan;
- a failure to conduct the additional studies and analysis required to adequately assess the proposed project's impacts on the environment and the feasibility of mitigating those impacts that are identified as significant; and
- a failure to adequately evaluate the feasibility of project alternatives.

We have appended to this correspondence as Attachment I a summary list of the steps the District will need to take in order to produce a legally sufficient DEIR. We also noted in our August 27th Comment Letter that the deficiencies of the District's DEIR are such that recirculation of a revised DEIR is both warranted and required.

Instead of curing the DEIR's fundamental inadequacies and recirculating a revised draft document to allow for meaningful public review, however, the District has issued a Final EIR that is infected with the same fatal flaws as the draft. The FEIR includes a "response" to our August 27th comments consisting in large part of a restatement of the provisions of the DEIR that we found deficient followed by a conclusory assertion of the adequacy of the information and analysis already provided. In so doing, the District has taken a cavalier and dismissive approach to CEQA that is profoundly disturbing and that has marked the District's ill-advised rush to condemn the Golden Gate Fields shoreline from its inception.

While we do not believe any purpose will be served by a detailed point-by-point rebuttal to the District's rejection of our August 27th comments, we feel compelled by the District's response (or lack thereof) to offer further comments on the fatally flawed approach the District has taken and is taking to its role as lead agency under CEQA.

**The District's Decision to Adopt the April 5, 2011  
Resolution of Necessity without Conducting CEQA Review  
Belies Its Self-Proclaimed Role as a Steward of the Environment**

CEQA is only as effective as the lead agency's review of both project impacts and mitigation strategies is thorough. The District's apparent lack of interest in or commitment to a thorough review of the proposed Albany Beach/Bay Trail improvements is particularly disconcerting given EBRPD's self-proclaimed role as a public steward of the environment and the "environmental ethic" the District claims it is guided by "in all of its activities." EBRPD's 2012 Master Plan Update at p. 5. There is no more compelling embodiment of this environmental ethic than the CEQA mandate the District has chosen in significant part to ignore. While the EBRPD 2012 Master Plan Update asserts an intent to "fully comply with the requirements of the California Environmental Quality Act," the District's claim of allegiance to CEQA is belied by its decision to adopt the April 5, 2011 Resolution of Necessity (the "RON") without conducting the requisite environmental review under CEQA and by its spurious claim of exemption from CEQA. When this effort by the District to circumvent CEQA was determined by the court to be without legal merit, the District found itself in a very awkward situation.

The Assistant District Manager, Nancy Wenninger, had already acknowledged at the April 5<sup>th</sup> Board hearing on the original RON that, although the condemnation was purportedly *necessary* to accommodate enhancements to Albany Beach and improvements to the Bay Trail, "no decision has been made . . . as to what [the beach improvements] will be" and the planning for and design of the trail improvements was also "still preliminary". District's Appellate Brief at p. 8. The District itself notes the logistical dilemma created by its decision to proceed with its condemnation action before "commit[ing] to a definite course of action." District's Appellate Brief at footnote 4, p.25. Because "[p]lans for the Bay Trail and Albany Beach were still preliminary and the project's full scope and design were not known" when the RON was considered by the District Board, "meaningful CEQA review could not have occurred."



District's Appellate Brief at p. 25. If, as the court found, however, CEQA review *is required* in order to condemn the Golden Gate Fields ("GGF") property, the District has little choice but to take one of two paths to a new Resolution of Necessity:

1. The District can expend the additional time and resources required to define the proposed project's "full scope and design" and to prepare the detailed plans required to enable meaningful CEQA review prior to undertaking preparation of the Environmental Impact Report.

or

2. The District can (a) undertake CEQA review of the project ("whatever [the project] may be," as the District's Assistant Manager noted) based on the preliminary plans in place at the time the RON was adopted and (b) engage in a smoke-and-mirrors attempt to disguise the "preliminary" work that has been done on the project as a commitment to "a definite course of action" sufficient to sustain a meaningful environmental review.

The first path leads to a proposed project of substance that is what it purports to be and to an environmental review process that holds promise of being both "meaningful" and CEQA compliant. The second path leads to a proposed project of indeterminate character that purports to be what it is not and to an environmental review process that holds promise only of further litigation. The FEIR Notice of Completion filed by the District on November 8, 2012, leaves little question the District has chosen to follow the second path.

**The District's Failure to Prepare a Specific Project Plan  
Constitutes a Fundamental Flaw in CEQA Compliance Making  
Meaningful Environmental Review Impossible**

Had the District chosen the first path, it would have travelled a route to CEQA compliance that has been clearly marked. As we pointed out in our August 27th Comment Letter and as the District has acknowledged in its legal briefs<sup>1</sup>, the 2002 General Plan provides that the District's commitment "to a definite course of action" is to be made in and take the form of a Specific Project Plan. As we also noted in our August 27th comments on the DEIR, the 2002 General Plan incorporates detailed policies that explicitly prescribe the content of the Specific Project Plans, including the project-specific studies and detailed design work that will need to be performed to generate the information that is required to transform the General Plan "program" into a Specific Plan "project." Although the District has completed the bulk of the background studies and preliminary design work as part of its project feasibility analysis, it has not completed the more detailed design work required to prepare a Specific Project Plan, nor has it undertaken the additional more detailed analysis required to support that work.

---

<sup>1</sup> The District has acknowledged the fact that "the Eastshore General Plan requires a 'specific project plan'", but contends the Albany Beach/Bay Trail Specific Project Plan need not be prepared prior to review of the proposed project under CEQA or adoption of the Resolution of Necessity, so long as it is completed "prior to any development of the area." See District's Appellate Brief at p. 35. The District's position in this regard provides yet one more example of its persistent effort to defer its commitment "to a definite course of action" (District's Appellate Brief at footnote 4, p. 25) to a point in time where the course of action itself will be beyond the reach of CEQA and of no relevance in informing the District's decision to condemn the Golden Gate Fields property.

In the absence of a Specific Project Plan that can provide a project-level point of reference for purposes of CEQA review, the District has little choice but to place heavy reliance on the District-wide Eastshore State Parks program for which provision is made in the 2002 General Plan and on the program-level environmental analysis provided in the General Plan EIR. In its decision to tier its environmental review off of the General Plan EIR, however, the District chooses to conveniently ignore the following challenges raised by such a tiered approach:

- the studies upon which the EIR relies were prepared over a decade ago, and an analysis will need to be performed to determine which of the studies will need to be updated;
- many of the General Plan studies reflect a “program-level” review and will need to be redone to provide a “project-level” analysis;
- still other studies requiring project-specific analysis have been deferred and will need to be prepared from scratch; and
- the General Plan EIR, itself, is also over ten years old, and an analysis will need to be performed to determine if revisions are required to reflect new information and/or changed circumstances.

**The District Attempts to Evade Its Lead Agency Responsibilities  
By Creating the Illusion That a Commitment to a  
Definite Course of Action Has Been Made and a  
Project-Level Environmental Review Has Been Undertaken**

With the publication of the FEIR, the District put the public on notice that it has no intention of undertaking the additional project-level design work, studies, and analysis required to prepare a Project Specific Plan and a project-level EIR. To do so would take time and require a commitment of resources the District apparently determined it either did not have or was unwilling to commit. On this much we can agree -- if the District was to salvage a condemnation schedule that was originally based on the flawed assumption it would be exempt from CEQA (an assumed exemption the court found wholly lacking in merit), the District would have no choice but to attempt an end run around CEQA. And attempt such an end run it did – by seeking to create an illusion that the Project Specific Plan has been prepared and that the project-level environmental analysis has been completed. The District attempts this illusion by:

- preparing a “project description” for the DEIR that describes a proposed project that does not yet exist;
- embedding this project description in a lengthy expository narrative, all based on the presumption it is what it is not;
- hiding the absence of both a Specific Project Plan and the project-level environmental analysis of such a plan behind page after page of references to (a) the General Plan parks program adopted in 2002, (b) the background feasibility studies and preliminary design work that have been undertaken

in more recent years, and (c) the decade-old program-level environmental analysis contained in the General Plan EIR; and

- pulling back the curtain to reveal a document that purports to be a stand-in for both the missing Specific Project Plan and project-level DEIR.

It is precisely this sort of evasion and subterfuge that lead agencies are expected to guard against, not embrace. As a lead agency, the District has a responsibility to the public, to the environment, and to the owner of the property being condemned to make certain that the impacts of a proposed project (a) have been subjected to a thorough, objective, and independent analysis; (b) are fully understood before a decision is made to approve the proposed project; and (c) have been mitigated to the maximum extent feasible. Of course, project proponents typically bring a different set of interests to the CEQA table. Project proponents want their projects approved; they want to secure the project approvals as quickly as possible and at the least possible cost; they want the approvals to be granted with as few conditions as possible; and they want the conditions that are imposed to have as little impact on the project schedule and budget as possible. Where public agencies are assuming the role of both the project proponent and the lead agency, it is absolutely critical that they take steps to assure this apparent conflict of interest does not compromise the integrity of the CEQA review and mitigation process. It is both an unfortunate lapse of judgment and an unacceptable derogation of statutory duty that the District has allowed its role as the proponent of the Albany Beach/Bay Trail project to overwhelm its lead agency role as the CEQA gatekeeper and a critically important guardian of the environment.

**EIR Reflects District's Unwillingness to Remove Its  
Project Proponent's Hat for Purposes of  
Carrying Out Its Legal Duties as Lead Agency**

When a single public entity proposes to wear the hats of both the project proponent and the lead agency, it is essential that the entity keep these roles separate. In its role as the project proponent, the agency is expected to determine "what" the project "will be." Once "the project's full scope and design" have been determined, CEQA assumes the public entity will remove its project proponent hat and don its lead agency hat for the purpose of: (a) reviewing the environmental impacts of the project as proposed, (b) assuring feasible mitigation is made a part of the project's scope and design, and (c) preparing the EIR to report the results of its review.

In the matter at hand, not only has the District failed in its role as the project proponent to determine the project's full scope and design through the preparation of a Specific Project Plan, but it has also failed in its role as a lead agency by proposing to use the EIR to fill the Specific Project Plan void with a description of a project which does not otherwise exist. The District's unwillingness to take off its project proponent's hat in order to conduct its review as lead agency under CEQA results in a process that is fundamentally compromised before it is started and that is marred by repeated omissions which find their source in the District's desire, as project proponent, to maintain a condemnation schedule and budget that was not designed to accommodate CEQA review in the first place.

**District's Abdication of Its Lead Agency Duties  
Particularly Troubling Given Critical Importance of  
CEQA Review to the Findings of Necessity  
Required to Adopt a Resolution of Necessity**

The District's abdication of its lead agency duties under CEQA is particularly troubling where the decision that is to be informed by the CEQA review – e.g., the adoption of a Resolution of Necessity under the State's Eminent Domain Law – involves the exercise of authority which itself must meet certain statutory criteria. Although the District seeks to have the appellate court rule otherwise, the exercise of the power of eminent domain involves an acquisition process that is very different from a market-based purchase and sale transaction where a landowner voluntarily agrees to convey ownership of private property to a public entity for such use as the public entity may subsequently determine to be appropriate. The exercise of condemnation authority does not involve the free associations of the market or a willing seller; rather, eminent domain involves an involuntary "taking" of privately owned property from an unwilling landowner in order to effect a specific public purpose. To assure that this extraordinary authority is not abused, it is carefully limited by statute.

The Code of Civil Procedure section 1240.030 provides:

"The power of eminent domain may be exercised to acquire property for a proposed project only if all of the following are established:

- (a) The public interest and necessity require the project.
- (b) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.
- (c) The property sought to be acquired is necessary for the project."

These three statutory preconditions to the use of governmental authority to take private property for public purpose form the rational basis without which a decision to condemn cannot be made. And because the Resolution of Necessity is the means by which the power of eminent domain is exercised, the Resolution itself must establish compliance with these three requirements of necessity.

It should be self-evident that compliance with these three requirements of necessity cannot be established until:

- it is known "what" the "full scope" and "design" of the proposed project "will be";
- the proposed project's adverse impacts on the environment have been identified;
- the feasibility of mitigating the proposed project's identified impacts is known; and

- a determination has been made regarding the changes to the proposed project that will be required to accommodate the mitigation measures and alternatives that are found to be feasible.

Without this information (and the substantial evidence it provides), an adequate understanding of the “public interest” being served by the taking; the “public good” and the “private injury” that will result from the taking; and the public “necessity” of both the “project” itself and the taking is not possible. Indeed, if CEQA review results in the identification of significant project impacts and feasible mitigation strategies, the originally proposed project itself may have to be substantially revised in form and/or substance and may, as a result, require a very different taking or no taking at all. Accordingly, where the full scope and design of the proposed project is not known and the CEQA review of the proposed project is less than adequate, not only does the District as lead agency lack the rational basis for certifying the EIR but it also lacks the substantial evidence required to support the three Section 1240.030 findings required to adopt the Resolution of Necessity.

### **Conclusion**

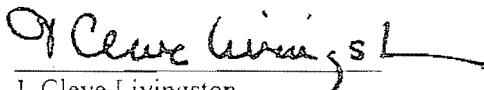
#### **A Roadmap to CEQA Compliance**

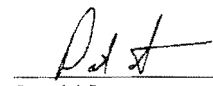
In its haste to make use of its eminent domain authority, the District has, as the proponent of the condemnation project, engaged in a pattern of calculated avoidance, the purpose of which is to circumvent the substantive requirements of CEQA while maintaining the appearance of a lead agency intent on a thorough review. Given the length of the DEIR and FEIR, it is apparent the District has committed a significant amount of time and resources to this effort. But while the document produced by the District takes the form of an environmental impact report, it lacks the essential substance CEQA requires. For the reasons originally discussed in our August 27th Comment Letter and revisited in this correspondence, we respectfully propose the following roadmap to assist the District in bringing its condemnation proceedings into compliance with CEQA and the State’s Eminent Domain Law:

1. cancel the hearing on the new Resolution of Necessity scheduled for November 20, 2012;
2. dismiss the currently pending eminent domain proceedings;
3. undertake the additional project-level studies and detailed design work required to prepare an adequate Specific Project Plan;
4. prepare a Specific Project Plan for the Albany Beach enhancements and Bay Trail improvements;
5. provide the public with an opportunity to review and comment on the Specific Project Plan;
6. provide the Board with an opportunity to put the Specific Project Plan forward as the “proposed project” for purposes of CEQA review;

7. undertake a review of the proposed project under CEQA to identify the project's significant environmental impacts and assess the feasibility of mitigating such impacts;
8. prepare a new draft EIR based on this CEQA review;
9. circulate the DEIR for public review and comment;
10. prepare a new FEIR, based on the comments received on the DEIR and circulate for further public review and comment;
11. make changes to the proposed project to incorporate feasible measures or alternatives that avoid significant impacts or reduce such impacts to a less-than-significant level, as contemplated by the EIR;
12. based in large part on the information provided by the Specific Project Plan, the DEIR, and the FEIR, determine whether the Section 1240.030 findings are supported by substantial evidence;
13. determine the property which is necessary to be acquired in order to accommodate the proposed project;
14. have a current appraisal prepared on the property to be acquired;
15. submit a new offer to landowner based on the current appraisal;
16. prepare an Acquisition Evaluation for Board consideration at the hearing on the Resolution of Necessity;
17. schedule the EIR and Resolution of Necessity for Board hearing;
18. prepare CEQA findings and a project-specific Mitigation Monitoring Plan ("MMP") for adoption by the Board at the RON hearing;
19. prepare a staff report describing the substantial evidence supporting the Section 1240.030 findings of necessity;
20. certify the EIR with the requisite CEQA findings and MMP; and
21. adopt the Resolution of Necessity with the requisite Section 1240.030 findings.

Respectfully submitted,

  
J. Cleve Livingston  
The Livingston Law Group

  
David Ivester  
Briscoe Ivester & Bazel LLP

## ATTACHMENT I

### To November 19, 2012 Comment Letter on FEIR

We have submitted an initial comment letter dated August 27, 2012 regarding the legal deficiencies of the DEIR for the Albany Beach Restoration and Public Access Project (“Comment Letter I”); a second comment letter dated November 13, 2012 regarding the District’s failure to adequately address project-related impacts to harbor seals and other marine mammals as well as impacts to tidelands associated with bay fill (“Comment Letter II”); and a third comment letter dated November 19, 2012 (to which this Attachment I is appended) regarding the legal inadequacies of the FEIR for the proposed project and of the district’s failure to comply with its legal duty as a lead agency to assure compliance with CEQA (“Comment Letter III”). In these letters we point out numerous ways in which the District’s environmental review is fatally flawed. We have listed below some of the most serious legal shortcomings of the District’s CEQA review. This list is not intended to be comprehensive or inclusive but rather to provide the District with a summary perspective of just how far EBRPD has missed the mark.

#### Points To Be Addressed in New EIR

1. The District must prepare a Specific Project Plan which consists of “the detailed implementation plans needed to accomplish specific projects” (see 2002 Eastshore State Park General Plan at pp. I-17 through I-19). See Comment Letter I at pp. 1-2 and 7-10; see also Comment Letter III at pp. 1-8.
2. The District must prepare the more refined project design as required to provide the detail and documentation necessary for meaningful CEQA analysis and for processing project-related discretionary permits and approvals (see Implementation Approach, Albany Beach Restoration and Public Access Feasibility Study dated June 16, 2011 at p. 7). See Comment Letter I at pp. 10-11; see also Comment Letter III at pp. 3-4.
3. The District must undertake a more thorough examination of construction-related impacts once the project design detail has been prepared in accordance with numbered paragraph 2 above. See Comment Letter I at pp. 12-13, 15-16, and 36.
4. The District must incorporate as part of the proposed project for purposes of CEQA review any changes that will be required with respect to the Golden Gate Fields site plan and related land uses. See Comment Letter I at pp. 3 and 12. These changes will include:
  - changes in the physical configuration and operational characteristics of the existing on-site circulation system (see Comment Letter I at pp. 34-35) and
  - changes in the options available to Golden Gate Fields to address the impacts of sea level rise where strategies involving shoreline mitigation are no longer available as a result of the District’s condemnation of the Golden Gate Fields bay frontage (see Comment letter I at p. 30).

5. If the District intends to use the 2010 BAAQMD cumulative air quality impact thresholds as standards of significance, the validity of their use and any reliance placed upon them by the DEIR must be supported by substantial evidence contained within the DEIR itself. See Comment Letter I at pp. 14-15.

6. The DEIR must be revised to include a detailed traffic analysis that looks at both project-related operational impacts and construction-related impacts to affected intersections and roadway segments. See Comment Letter I at pp. 2 and 32-36.

7. The DEIR air quality analysis and discussion of greenhouse gas impacts will need to be revised to reflect the detailed traffic analysis referenced in numbered paragraph 6 above. See Comment Letter I at pp. 14-17.

8. The DEIR discussion of impacts to biological resources will need to be revised to better evaluate the presence of special status species and their respective habitats, the potential project-related impacts on such species and habitat, and feasible mitigation strategies for addressing identified impacts, particularly with respect to:

- burrowing owl (see Comment Letter I at pp. 2 and 18);
- eelgrass (see Comment Letter I at pp. 18-19); and
- harbor seals and other marine mammals (see Comment Letter II at pp. 2-3).

9. The District must include the site-specific geotechnical evaluation and design called for by the 2002 General Plan Guidelines OPER – 11, 12 and 13 as well as feasible mitigation strategies to address identified impacts related to seismic ground shaking; seismic-related ground failure including liquefaction, soil erosion and topsoil loss; and geologic instability including lateral spreading and subsidence. See Comment Letter I at pp. 22-24.

10. The District's analysis of impacts and mitigation strategies associated with flooding and sea level rise must be revised to take into consideration wave runup and storm surge. See Comment Letter I at pp. 25-30.

11. The DEIR will need to be revised to include a thorough analysis of the impacts associated with bay fill. See Comment Letter II at pp. 1-2.

12. The District's CEQA analysis should also include those investigations, studies, and reports referenced in the 2002 General plan "guidelines" (see 2002 General Plan at pp. III-16 through III-61 and III-78 through III-87) which will assist the District in better informing the RON decision by defining the scope, character, and reach of potential project impacts and in identifying feasible mitigation strategies. See Comment Letter I at pp. 22-24 for examples of such guidelines.

13. The DEIR alternatives analysis will need to be revised to provide a more detailed assessment of the "East of I-80 Bay Trail" alternative, consideration of the "On-Site" alternatives rejected by staff prior to the preparation of the DEIR, and of an "Interim" alternative reflecting a negotiated agreement between the District and the GGF landowners to formalize continued and new project-related uses of the GGF site for an interim period while deferring condemnation to a future date. See Comment Letter at pp. 37-40.



Until these points have been addressed and the other legal deficiencies in the District's DEIR and FEIR, as identified in our Comment Letters, have been cured, the District is in no position to certify the EIR for the Albany Beach Restoration and Public Access Project.