

April 30, 2020

Lina Velasco, Community Development Director
City of Richmond Planning Division
450 Civic Center Plaza-2nd Floor
Richmond, CA 94804
Comments submitted to: admin@pointmolateseir.com

RE: Comments on Draft SEIR for the Point Molate Mixed-Use Development Project

Dear Mrs. Velasco,

Thank you for your diligence and leadership in managing the planning aspects around the Point Molate Mixed-Use Development Project. This project has a long and convoluted processes for which we have been involved since our organization formally formed in 2007. Our organization has regularly volunteered and worked with the City on various planning aspects of the project, including, but not limited to biological assessments, bird surveys, documentation work, presentations to special committees, and conversations with interested members of the public. On behalf of Golden Hour Restoration Institute, I submit the following comments and thank you for helping guide a legal and equitable process review process.

With Covid-19 impacting everyone in the Bay Area and catalyzing a 300%+ increase in unemployment and the largest loss in local GDP since the great depression, open spaces, parks and places of non-commercial activity have created some of the most important community spaces. Point Molate's value as an open space with lots of opportunity for social distancing cannot be overstated. You, as a public servant, are a guardian of these places as they provide solace, hope, and a sense of place in a world that seems to be a little confused right now.

Point Molate is an incredibly important location both for the City and in a much larger Bay Area context. The coastal resources provided by this 413-acre site are irreplaceable. The upland resources represent a matrix (or landscape) of ecosystems that have disappeared from the East Bay: streams running from ridgeline to bay waters, old growth Toyon woodlands, expansive eelgrass beds, and native coastal prairie. Although the entire site is not pristine, it is intact and functionally significant. **We will never be able to create this assemblage of functional habitats using mitigation** (such as the Point Molate project area), these places and their connections will only continue to disappear.

Our letter points out myriad shortcomings, inadequate analyses, and short-sighted planning efforts. It's time to wipe the slate clean and restart an organized, formal, and equitable environmental review process that respects the intelligence and honor of the residents of Richmond and the greater Bay Area. We believe the City is only

exposing itself legally and impacting the citizens of Richmond with more financial risk by moving forward with this Draft SEIR. We recommend the City reject this document and initiate a new review.

Formal Comments on the Draft SEIR

1. A most important reason for a new EIR is that the documents that support this development are scattered over 2 decades of work with somewhere around 10,000 pages of supporting materials. The review of this document is, to put it kindly, burdensome for the reviewer. One can only imagine how hard the consultant was working to make ends of this project. There have been multiple analyses, of over 10 different project alternatives, amended dozens of times over the course of the project, lawsuits, general plan amendments, immoral lobbying efforts, misleading information and much more. The below tally lists only the EIR documents, not inclusive of any other supporting documents.

We recognize that everyone is trying their best, and certainly this is no fault of the current consultant, but this analysis does not meet reasonable guidelines as described in § 15006. REDUCING DELAY AND PAPERWORK, particularly subsections: (n) Reducing the length of Environmental Impact Reports by means such as setting appropriate page limits. (15141), (q) Writing Environmental Impact Reports in plain language. (15140) (r) Following a clear format for Environmental Impact Reports. (15120). Particularly relevant is 15141: PAGE LIMITS The text of draft EIRs should normally be less than 150 pages and for proposals of unusual scope or complexity should normally be less than 300 pages.

Document	Pages
DEIR + Appendices (2011)	not included
FEIR (2011)	393+ 1063 +812
DSEIR (2020)	810
DSIER Appendices (2020)	1128+2774
TOTAL	6,980 pages

We request this DSEIR be given to an average high school educated person and ask them to locate a few important regulatory considerations (e.g. a map of wetlands, or a diagram of remediated soils) and locate them in document. We believe this test will quickly exhaust even the brightest college educated individuals. What percentage of the public do you think can understand and analyze this document(s) in its current state. Does this meet CEQA guidelines?

2. This is a new project and an SEIR is out of compliance with 14 CCR § 15162. A new CEQA document is required when substantial changes are proposed in the project that will require major revisions to the previous environmental document.

Per § 15162(a)1 an increase in the number of housing units, the footprint of the environmental impact, a rehabilitated WineHaven facility and commercial or mixed use represents a new project.

This proposal isn't about a new drive or even a new building or two. The NOP has attempted to obfuscate the analysis by presenting a "mix-and-match" dataset in Tables 2 and 3. Once the reader cuts through the numbers, it is clear that building 860 *new (not previously reviewed)* dwelling units should constitute an entirely new project. **This increase of dwelling units, as presented in Table 3 of the NOP, represents a 253% increase in the dwelling units, almost quadrupling its impact and severity, triggering a new EIR review.** Even if the purported footprint is similar, the different land uses will have significantly and substantively different uses and requirements for nearly each section considered under CEQA (including but not limited to): air quality, biological resources, cultural resources, greenhouse gases, water quality, public services, noise, transportation, fire risk, and utilities to name a few.

Alternative D (the most expansive alternative) in 2011 FEIR is described as such:

A total of 1,100 units are proposed in five locations: near the shoreline, on the hillside, along the bay, on the shoreline knoll, and in the southern area. Residential uses would occupy approximately 70.5 acres of the project site. Roughly two-thirds of the residential units would be medium or high density, with the balance proposed for low density units.

Section 3.4.1 states the development areas would total up to 82.74 acres, leaving a balance of 12.24 acres which were not addressed in the initial FEIR (2011). This increase in acreage should not be a discretionary judgement by the Lead Agency (as per *Friends of the College of San Mateo Gardens v. San Mateo County Community College District* (2016) 1 Cal.5th 937.), instead it should be titled a new project, superseding the threshold of a "modified" project. Currently the threshold discretion may lie with the lead agency, but we believe that if this discretion is abused or misapplied, the Lead Agency will be out of compliance. A small sample of notable new impacts are listed in item #3.

3. Significant new information is available for analysis which was not considered in the previous FEIR (2011).

a) New studies on the effect of water turbidity from boats on eelgrass (*Zostera marina*) fisheries indicate that the eelgrass beds would be adversely affected and eliminated due to this project. Climate change and increasing water temperatures will eliminate this important underwater sanctuary. The proposed development further exacerbates this problem with increased water traffic. See below a portion the recent studies since 2010:

a1) Early summer heat and turbidity have been observed to eliminate eelgrass beds, with climate change impacts, we would expect this system to be more sensitive and entire beds can be lost. We believe this project will completely eliminate eelgrass beds in this area and this concern is not noted in the review, nor is there any degree of mitigation that can replace this eelgrass bed: Moore, K. A., Shields, E. C., & Parrish, D. B. (2014).

Impacts of Varying Estuarine Temperature and Light Conditions on *Zostera marina* (Eelgrass) and its Interactions with *Ruppia maritima* (Widgeongrass). Estuaries and Coasts. <https://doi.org/10.1007/s12237-013-9667-3>

a2) Even 1 degree changes can have dramatic impacts on eelgrass beds, again pointing to a likely demise of the extant bed at Point Molate. Chesapeake Bay is studied as a model here and the results indicate anthropogenic factors may eliminate all eelgrass beds in the Bay: Moore, K. A., Shields, E. C., Parrish, D. B., & Orth, R. J. (2012). Eelgrass survival in two contrasting systems: Role of turbidity and summer water temperatures. Marine Ecology Progress Series. <https://doi.org/10.3354/meps09578>

a3) In addition to impacts on the project site, the DSEIR does not mention impacts to adjacent habitat. For instance, all the eelgrass beds to the north of the pier suddenly stop at the project boundary. These beds extend far beyond this boundary and impacts these beds need to be presented. Cumulative impacts on eelgrass (direct and indirect) of this and other developments along the Bay need to be presented. Additionally, because the development will be larger and likely rely on boats for daily transportation, an additional analysis on eelgrass impacts must be completed. The consultant offers instructive insight into the value of these beds:

Eelgrass in the Bay serves as not only an important role in the food web, but additionally as a moderator of ocean pH and carbon sink. Point Molate supports one of the most stable eelgrass beds in the Bay and has served as an important source of eelgrass for restoration projects in other areas. (4.3-17)

b) Monarch butterfly overwintering sites are located within the 7.5 minute USGS quad. The US Fish and Wildlife Service determined that federally protecting the monarch may be warranted (2014), We could not locate any information on survey protocols, locations and time of surveys. We are requesting this information to be presented. As a subject expert and a report author on this subject, my professional opinion is that the trees (not just Eucalyptus) should be surveyed prior to any EIR completion.

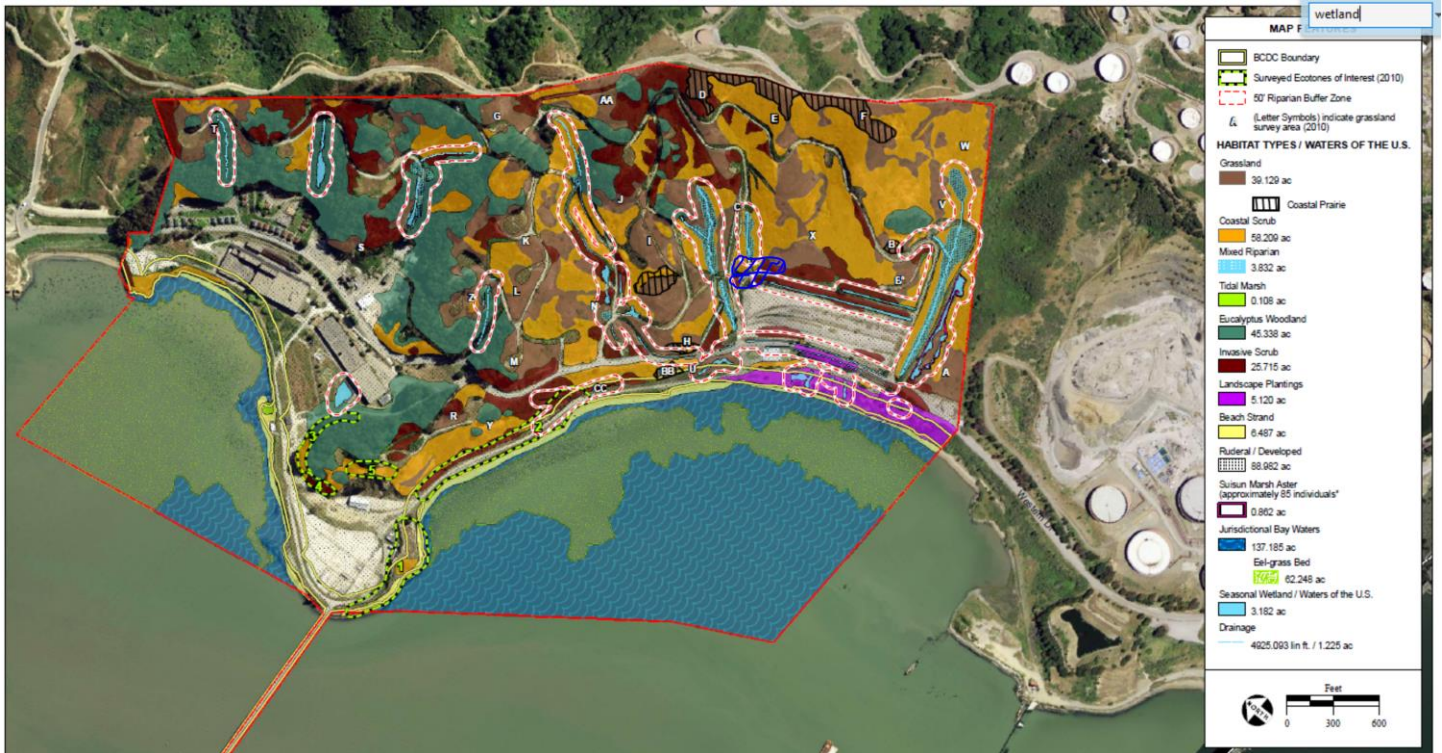
This survey should is required for this EIR to be able to provide guidance on development envelopes and mitigation measures given the butterfly has very specific habitat requirements (Weiss et al. 2012).

c) The Cosco Busan spill and other subsequent releases of petrochemical product have adversely impacted the Pacific herring population which NOAA has noted is the most important in California. New evidence summed up by the PEW Ocean Science (2013) *The State of the Science: Forage Fish in the California Current* states "The largest remaining California population, in urban San Francisco Bay, recently suffered effects of an oil spill (Incardona et al. 2012) presumably reducing already depressed numbers (CDFG 2012). Other historically large herring spawning populations in California, such as Tomales Bay, are also significantly reduced (Bartling 2006)." Herring fisheries impacts and impacts to Bay require reanalysis. The EIR does not report impacts to the most important Pacific herring population as noted by NOAA, the impact of this project on local water quality, and address future oil spill impact probabilities.

4. CN1.1 is not accurate when it states that "Development plans are concentrated around those habitats identified as invasive, non-sensitive, or previously developed. Impacts to sensitive habitats are minimized through avoidance and intentional design. Quality or sensitive habitat has been included in the protected open space area, where natural habitat will be left in its current state, or other public-access and park space." This statement needs further clarification because eelgrass beds are sensitive and they will be impacted by all run-off from the development as well as increased water pollution and turbidity from water craft movement. The Appendix D of the SEIR mentions wastewater and treatment but does not offer insight into rates and timing needs to be presented in order for analysis of this impact. This data needs to be presented so then new turbidity calculations can be created for impacts to eelgrass beds. Modeling effluent and water quality from a similar system should provide reasonable insight into changes in the Point Molate area.

In addition to flow, we ask the consultant consider the type of waste which will now enter the Bay. Household waste will be very different than current effluent entering the Bay. How will this project analyze and mitigate for chemicals, pesticides, medications, garbage, plastics and other dumped materials that will enter the system and impact eelgrass?

a) The document states that "The only wetlands impacted by development are manmade and channelized drainages. Wetlands are avoided through the design to the extent feasible. Mitigation Measures 4.3-16 and 4.3-19 are included in this SEIR related to wetland impacts that would reduce impacts to less-than-significant levels." We have mapped and observed wetlands on site at the following location with hydric vegetation and an inundation period consist with a seasonal wetland: This is not included in the analysis nor identified on the most germane map I could locate (see below). This *Water of the US* will be impacted and we request a wetland survey to be conducted during a year with average or above average precipitation. I have photographs and information on this location from surveys. I have added a medium blue hatched polygon to the map where additional wetlands have been located and observed on multiple dates, included July 20, 2019,



b) In order to determine if the development will impact the eelgrass resources, which are protected as a sensitive plant community, the on-site water treatment facilities, storm sewers, effluent sites, and runoff management plans need to be fully vetted. Without this level of information, the only reasonable conclusion is that the development will significantly impact 50 acres of this resource and likely lead to a significant impact that cannot be mitigated. Therefore, we find that impacts to eelgrass vegetation needs to be presented in the *Statement of Overriding Considerations*.

5. The previous project FEIR (2011) that was certified **due to coercion and for the reason of terminating the previous project, and should not be used as the basis for this analysis**. Notes from the City Council archives as well as local publications indicate the developer was threatening a lawsuit (Butt 2011) and many City Council officials felt they needed to certify the FEIR to then subsequently reject the project. The FEIR that underpins this entire project was certified for procedural reasons to then reject the project. This FEIR cannot be legally used to underpin the subsequent EIR that is currently being presented.

The letter from the now Mayor of Richmond, Tom Butt, is reproduced in Appendix A of this document.

6. The City is overstepping their bounds by producing an additional impact on traffic resources by creating a Significant and Unavoidable impact and refusing to address these concerns besides their flippant statement from the final page of the NOA (2019): "iii) Implementation of the Modified Project would increase the volume

of traffic and would adversely impact various intersections during peak commute hours and exceed the level of service standards under existing and cumulative conditions, the identified mitigation would help to reduce impacts at these affected intersections, **however as these intersections are not under the jurisdiction of the City, improvements to these intersections might not be achieved by the time the Modified Project begins full operations**; iv) Implementation of the Modified Project would increase traffic on westbound I-580 during peak hours and increase the delay index which currently exceeds the Multi-Modal Transportation Service Objectives under existing and cumulative conditions, the identified mitigation would help to reduce impacts, however, since the City does not control the funding, improvements may not be achieved by the time the Modified Project begins full operations."".

In *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 360-361, 46 Cal.Rptr.3d 355, 138 P.3d 692, the court held that CEQA imposes on public agencies a duty to " 'mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.' " When public agencies fail to meet their obligations, they are out of compliance. The proposed project requires a full cost estimate and engineering estimate for the changes in traffic circulation that will be required. The cost estimate should fully consider engineering costs, land acquisition costs, construction costs, permitting, public hearing and all associated standard projects which expand interstate highways and bridge traffic. In addition to these costs, the City needs to clearly communicate how these costs will be paid, and by whom.

7. In a time when climate change impacts have caused incredible impacts to the globe, creating a new development in an ecologically sensitive area that serves as an important carbon sink is irresponsible. Although the City has adopted a Climate Action Plan, a General Plan with climate protection provisions and much more, it has completely disregarded those community planning efforts when they should serve as guidance to reject the said project.

In addition to local and regional regulations, climate change impacts to both the Bay and to terrestrial environments are more dramatic than expected and managing these impacts will be costlier than previously expected and present new challenges. A research article specifically analyzes the SF Bay area (Cloern et al. 2011). Shile et al. (2014) indicate how important it is to have coastal upland connections for future climate change: Point Molate is one of those such areas.

The following **Significant and Unavoidable impact** is unconscionable: ii) Emissions associated with operation of the Modified Project would produce Greenhouse gas (GHG) emissions in excess of the zero GHG threshold, even with the implementation of all feasible mitigation measures.

If City leaders cannot uphold the laws and policies they've written and approved, then who are they expecting will abide by these laws. Because of the gravity of this impact we request to review the City's statement of overriding considerations while the DSEIR is being reviewed and before it is approved.

8. Construction of this project will require tremendous amounts of soil movement. Given the remediation history and known pollutants on site, we believe this EIR should clearly outline where, how often and when excavated soils and material will be tested, stock-piled, and disposed of. We would like to see thresholds for when a soil is considered contaminated. For the purpose of environmental health, the public should have full access to these tests, reporting their frequency and positive as well as negative results. Who will be paying for this service and how will its results be delivered to the public, water quality, and wildlife agencies? This needs to be fully vetted as a mitigation measure and described in the EIR.

9. Although this project was initially sold project beneficial to the Guidiville Tribe, it is unclear how this SDEIR and the proposed projects have any connection with the initial project intent. Section 1.4.3.6 is reproduced from the 2020 DSEIR and it causes great confusion.

Section 1.4.3.6: Cultural Resources and Tribal Cultural Resources

The Project Site has a relationship with indigenous tribes and groups of people, therefore commenters requested Assembly Bill (AB) 52 consultation and Senate Bill (SB) 18 consultation. A discussion of consultation in accordance with AB 52 and SB 18 and the potential impacts of the Modified Project on cultural resources and tribal cultural resources is included in **Section 4.4, Cultural Resources and Tribal Cultural Resources**.

Per § 15162(a)2 substantial project changes as to the circumstances of the FEIR (2011) are clear and evident. This project was heavily marketed as a project to benefit native peoples and "tribes". In the FEIR (2011) the word "tribe" or "tribes" is mentioned 33 times in 16 pages. It is clear this element of "tribe" is both central and integral to this project. Even "ALTERNATIVE D – NON-TRUST ACQUISITION WITH NONGAMING MIXED-USE DEVELOPMENT" notes that the first step in this process is "Sale of the Point Molate property to the Tribe/Upstream;" (FEIR, page 2-60).

We are repeating and highlighting the following text from the FEIR:

The approval of the Proposed Project would provide a Tribal land base for its members and establish a Tribal Headquarters from which its Tribal Government can operate to provide housing, health care and other governmental services, and from which it can conduct the economic development necessary to fund these Tribal Government services and provide employment opportunities for its members. The Proposed Action serves the needs of the BIA by advancing the agency's "Self Determination" policy of promoting the Tribe's self-governance capability. It serves the needs of the Tribe by promoting meaningful opportunities for economic development and self-sufficiency of the Tribe and its members, as well as satisfying some of the provisions of the *Scotts Valley et al. v. United States* decision.

Approval and construction of the Proposed Project would assist the Tribe in meeting the following specific objectives:

- Replace wrongfully terminated reservation lands, pursuant to a court approved stipulation in the

Scotts Valley et. al. v. United States decision of September 6, 1991 (NO. C-86-3660-VRW);

- Improve the socioeconomic status of the Tribe by providing a revenue source that would be used to: a) strengthen the Tribal Government, b) fund a variety of social, cultural, environmental, housing, governmental, administrative, educational, health and welfare services to improve the quality of life of Tribal members consistent with federal policy, and c) provide capital for future economic development and investment opportunities;
- Allow the Tribe to establish a foundation for economic self-sufficiency;
- Provide employment and business opportunities to the Tribal and non-Tribal community;
- Provide funding for local governmental agencies, programs, and services; and
- Make contributions to charitable organizations and governmental operations, including local educational institutions.

Materially the project lead is different due to this change because the removal of "Tribe" from this land transfer negates the cultural, restitution, and ethical dimension presented in the 2011 FEIR.

The word "tribe" is mentioned zero (0) times in the 2019 NOP, but mentioned dozens of times in the SDEIR. Unfortunately the only section that pertains to the "relationship with indigenous people" is reprinted above (Section 1.4.3.6). The characterization of this project as beneficial and healing to native tribes clearly played a role in the EIR's certification. This has no such association/remediation with "tribes" therefore making this a different project. The precedent this type of SEIR could set is harrowing. We hope the City will consider being sensitive and equitable to our First Nations people.

The above-mentioned relationship needs full clarification in writing – in this SEIR (including but not limited to agreements, fiscal, cultural, and otherwise involving the Guidiville Tribe), otherwise this project can only be seen as a cultural appropriation of our most important native citizens – the native Americans who occupied North America well prior to European colonization.

We thank you for your consideration of these comments and hope you will take proper legal steps to rectify the current project and documentation around it.

Sincerely,

Lech Naumovich
Executive Director

REFERENCES

Bartling, R. 2006. Pacific herring. Status of the Fisheries Report. California Department of Fish and Game.

Butt, T. 2011. "City Council Rolls over of Point Molate EIR." Public comment. The Berkeley Daily Planet. Wed. March 9, 2011.

California Department of Fish and Game. 2012. Final supplemental environmental document Pacific herring commercial fishing regulations. (Sections 163, 163.1, 163.5, and 164, Title 14, California Code of Regulations). SCH No. 98052052, State of California, Natural Resources Agency, Department of Fish and Game. Sacramento

Cloern, James E., et al. 2011. "Projected evolution of California's San Francisco Bay-Delta-River system in a century of climate change." PloS one 6.9

FEIR. 2011. Final Environmental Impact Report. Certified by the Richmond City Council.

Incardona, J.P., C.A. Vines, B.F. Anulacion, D.H. Baldwin, H.L. Day, B.L. French, J.S. Labenia, T.L. Linbo, M.S. Meyers, O.P. Olson, C.A. Sloan, S. Sol, F.J. Griffin, K. Menard, S.G. Morgan, J.E. West, T.K. Collier, G.M. Ylitalo, G.N. Cherr, and N.L. Scholz. 2012. Unexpectedly high mortality in Pacific herring embryos exposed to the 2007 Cosco Busan oil spill in San Francisco Bay. Proceedings of the National Academy of Sciences 109:51-58

Pew Ocean Science. 2013. Scientific Report. THE STATE OF THE SCIENCE: FORAGE FISH IN THE CALIFORNIA CURRENT

Schile, Lisa M., et al. 2014. "Modeling tidal marsh distribution with sea-level rise: Evaluating the role of vegetation, sediment, and upland habitat in marsh resiliency." PloS one 9.2

Weiss, S. B., Naumovich, L., & Niederer, C. 2012. *Rob Hill Monarch Habitat: Site Assessment and Initial Recommendations*. Report for the Presidio Trust of San Francisco. Menlo Park, CA.

Appendix A: Letter to Berkeley Daily Planet from Tom Butt. March 9, 2011

Wednesday
March 09, 2011

THE BERKELEY  DAILY PLANET

[FRONT PAGE](#) [COLUMNISTS](#) [ARTS & EVENTS](#) [THE WEEK](#) [FULL TEXT](#)

Public Comment

City Council Rolls Over on Point Molate EIR

By Tom Butt, Richmond City Councilmember
Wednesday March 09, 2011 - 10:56:00 AM

Intimidated by both Upstream, which has threatened to sue, and its own City Attorney's Office, the Richmond City Council's wimped out majority exposed their jellied backbones last night and certified a final EIR (FEIR) for the Point Molate casino project that almost everyone agreed was substantially flawed, including other credible public agencies like the Association of Bay Area Governments (ABAG) Bay Trail Project, the East Bay Regional Parks District and the West Contra Costa Transportation Advisory Committee.

SHARE   

This was stunningly similar to the events that led to the certification of the Chevron EIR in 2008 that was eventually challenged and thrown out in court.

Richmond's award-winning Trails for Richmond Action Committee (TRAC) made a valiant effort to include the Bay Trail connection across I-580 as a mitigation and provided expert testimony supporting a fair and rational funding formula. The City Council majority blew them off.

Despite the fact that several U.S. Government agencies, including the Center for Disease Control, the Surgeon General and the National Institute for Occupational Safety and Health (NIOSH) have all published reports that find that secondhand smoke in casinos is harmful to health, the City Council backed off a proposed mitigation that would have either banned smoking or required that employees not be exposed to smokers. This was particularly shocking given Richmond's recognized leadership in the movement to protect people from unwanted secondhand tobacco smoke. I guess if someone is desperate enough to take a casino job, they deserve to die of lung cancer.

The California Native Plant Society was the lone environmental organization to point out serious errors in both the FEIR and the process by which it was fast tracked to approval at the 11th hour. Most other environmental organizations, including the Sierra Club, had long since been bought off by Upstream for a reported \$45 million.

Only Mayor McLaughlin and I did not vote for the certification. Nat Bates was out of town. I was so disgusted when I saw the way things were going south, I just went home.

The FEIR was prepared by Analytical Environmental Services (AES) of Sacramento, a consulting firm that is substantially supported by Indian tribes seeking casino approvals, and they were paid directly by the Guidiville Band for their work. Although the City had signed a secret agreement with the Bureau of Indian Affairs in 2005 making the City an equal partner in the EIR process, City staff did little more than rubber stamp the document that had all the appearances of being ghost written by Upstream.

All in all, it was one of the most disappointing performances by both staff and the City Council that I have ever endured. At the end of the day, it was all about money. I thought we were on a roll towards a new era for Richmond, but it was déjà vu all over again in Richmond last night.