

EXHIBIT "A"

memorandum

date April 15, 2019

to San Mateo County Parks Department and the Department of Public Works

cc

from Elijah Davidian

subject **Response to Comments on the Draft Initial Study/Mitigated Negative Declaration for the Memorial Park Wastewater Treatment Facilities Improvement Project**

On March 12, 2019, the San Mateo County Parks Department and the Department of Public Works (County), serving as Lead Agency under the California Environmental Quality Act (CEQA), released for public review a Draft Initial Study/Mitigated Negative Declaration (IS/MND) for the Memorial Park Wastewater Treatment Facilities Improvement Project (the Project). The public review and comment period on the Draft IS/MND began on March 12, 2019, and closed on April 11, 2019. The CEQA Guidelines state that the decision-making body of the Lead Agency shall consider the proposed Mitigated Negative Declaration together with any comments received during the public review process. The decision-making body shall adopt the proposed Mitigated Negative Declaration only if it finds on the basis of the whole record before it (including the Initial Study and any comments received), that there is no substantial evidence that the project will have a significant effect on the environment and that the Mitigated Negative Declaration reflects the Lead Agency's independent judgment and analysis (CEQA Guidelines § 15074(b)). The Final IS/MND consists of the Draft IS/MND and this Responses to Comments Memorandum.

This memorandum summarizes and responds to the comments the County received on the Draft IS/MND for the Project. One comment letter was received and is included as Attachment A (at the end of this memo).

Furthermore, the CEQA Guidelines state when adopting a Mitigated Negative Declaration, the Lead Agency shall also adopt a program for reporting on or monitoring the changes which it has either required in the project or made a condition of approval to mitigate or avoid significant environmental effects (Section 15074(d)). Therefore, a Mitigation Monitoring and Reporting Program (MMRP) has been prepared as a separate, stand-alone document.

Responses to Comments

Native American Heritage Commission (Letter received via email on March 20, 2019)

COMMENT: The Native American Heritage Commission submitted a comment letter with the following concern:

*There are no mitigation measures specifically addressing Tribal Cultural Resources separately and distinctly from Archaeological Resources. Mitigation measures must take Tribal Cultural Resources into consideration as required under AB-52, **with or without consultation** occurring. Mitigation language for archaeological resources is not always appropriate for measures specifically for handling Tribal Cultural Resources.*

Agencies should be aware that AB 52 does not preclude them from initiating tribal consultation with tribes that are traditionally and culturally affiliated with their jurisdictions before the timeframes provided in AB 52. For that reason, we urge you to continue to request Native American Tribal Consultation Lists and Sacred Lands File searches from the NAHC.

The NAHC recommends lead agencies consult with all California Native American tribes that are traditionally and culturally affiliated with the geographic area of your proposed project as early as possible in order to avoid inadvertent discoveries of Native American human remains and best protect tribal cultural resources.

RESPONSE: The Commenter is referred to page 2-48 of the IS/MND, which explains:

The County contacted the NAHC to request a list of potentially interested tribes. On July 27, 2017, the County received the Tribal Consultation List from the NAHC. The County then contacted the listed tribal representatives, asking whether they would like to be notified pursuant to AB 52 of future projects that could affect tribal lands. The County has received no response.

On October 4, 2017, ESA contacted the NAHC by email with attachment to request a records search of their Sacred Lands File (SLF). ESA received a response from the NAHC on October 11, 2017 stating that the SLF has no record of any resources in the project area.

On October 22, 2017, an ESA archaeologist conducted an archaeological pedestrian survey of the project area. No tribal cultural resources were identified in the project area during the pedestrian survey.

The study concludes that no known tribal cultural resources are present in the project area and does not anticipate that the project would impact tribal cultural resources (ESA, 2018).

As reflected in the referenced IS/MND discussion, the County attempted to engage the Native American tribes identified by the NAHC as having potential interest in the project area. No tribes responded or otherwise expressed any interest or concern about the project's potential to affect indigenous resources. Moreover, neither the Sacred Lands File, nor the pedestrian survey revealed any such resources within the project area. For these reasons, the IS/MND appropriately concludes the project would be unlikely to adversely affect a tribal cultural

resource. Nevertheless, in response to the Commenter's suggestion, mitigation measure CUL-1 (for protocol to follow for inadvertent discovery of archaeological resources) has been revised on page 2-47 and 3-12 of the Draft IS/MND to more directly acknowledge tribal cultural resources and protocols to be followed in the event of an inadvertent discovery. Additions to the text are shown in underline and deletions are shown in ~~striketrough~~.

Mitigation Measure CUL-1: If prehistoric or historic-era archaeological resources are encountered, all construction activities within 100 feet of the find shall halt and the San Mateo County Parks Department shall be notified. Prehistoric archaeological materials might include obsidian and chert flaked-stone tools (e.g., projectile points, knives, scrapers) or toolmaking debris; culturally darkened soil ("midden") containing heat-affected rocks, artifacts, or shellfish remains; and stone milling equipment (e.g., mortars, pestles, handstones, or milling slabs); and battered stone tools, such as hammerstones and pitted stones. Historic-era materials might include stone, concrete, or adobe footings and walls; filled wells or privies; and deposits of metal, glass, and/or ceramic refuse. An archaeologist meeting the Secretary of the Interior's Professional Qualifications Standards for Archeology (qualified archaeologist) shall inspect the findings within 24 hours of discovery. ~~If it is determined that the project could damage a historical resource or a unique archaeological resource (as defined pursuant to the CEQA Guidelines), mitigation shall be implemented in accordance with Public Resources Code (PRC) § 21083.2 and CEQA Guidelines § 15126.4, with a preference for preservation in place.~~ If the County determines, based on recommendations from the qualified archaeologist, that the resource may qualify as a historical resource or unique archaeological resource (as defined in CEQA Guidelines § 15064.5) or if the resource is indigenous in origin, the resource shall be avoided and preserved in place, if feasible. Avoidance means that no activities associated with the project that may affect cultural resources shall occur within the boundaries of the resource or any defined buffer zones.

Consistent with CEQA Guidelines § 15126.4(b)(3), preservation in place may be accomplished through planning construction to avoid the resource; incorporating the resource within open space; capping and covering the resource; or deeding the site into a permanent conservation easement. If avoidance is not feasible, the County shall consult with appropriate Native American tribes (if the resource is indigenous), and other appropriate interested parties to determine treatment measures to avoid, minimize, or mitigate any potential impacts to the resource pursuant to PRC § 21083.2 and CEQA Guidelines § 15126.4, including possible preparation and implementation of a detailed treatment plan by a qualified archaeologist shall ~~prepare and implement a detailed treatment plan~~ in consultation with the County Parks Department, and appropriate Native American tribes if the resource is indigenous. Treatment of unique archaeological resources shall follow the applicable requirements of PRC § 21083.2. Treatment for most resources would consist of (but would not be not limited to) sample excavation, artifact collection, site documentation, and historical research, with the aim to target the recovery of important scientific data contained in the portion(s) of the significant resource to be impacted by the project. The treatment plan shall include provisions for analysis of data in a regional context, reporting of results within a timely manner, curation of artifacts and data at an approved facility, and dissemination of reports to local and state repositories, libraries, and interested professionals.

Attachment A
Comment letter received on the Draft IS/MND for the Project



March 20, 2019

Gilles Tourel
County of San Mateo Department of Public Works
555 County Center, 5th Floor
Redwood City, CA 94063

Also sent via e-mail: DPW_Memorialparkproject@smcgov.org

RE: SCH# 2019039065, Memorial Park Wastewater Treatment Facilities Improvement Project, Community of Loma Mar; San Mateo County, California

Dear Mr. Tourel:

The Native American Heritage Commission (NAHC) has reviewed the Mitigated Negative Declaration prepared for the above referenced project. The review included the Project Description; the Environmental Checklist, section 2.5, Cultural Resources; and the Summary of Mitigation Measures, prepared by Environmental Science Associates for the County of San Mateo Department of Public Works. We have the following concern(s):

1. There are no mitigation measures specifically addressing Tribal Cultural Resources separately and distinctly from Archaeological Resources. Mitigation measures must take Tribal Cultural Resources into consideration as required under AB-52, **with or without consultation** occurring. Mitigation language for archaeological resources is not always appropriate for measures specifically for handling Tribal Cultural Resources. If mitigation is being addressed without tribal input, sample mitigation measures for Tribal Cultural Resources can be found in the CEQA guidelines at http://opr.ca.gov/docs/Revised_AB_52_Technical_Advisory_March_2017.pdf

Agencies should be aware that AB 52 does not preclude them from initiating tribal consultation with tribes that are traditionally and culturally affiliated with their jurisdictions before the timeframes provided in AB 52. For that reason, we urge you to continue to request Native American Tribal Consultation Lists and Sacred Lands File searches from the NAHC. The request forms can be found online at: <http://nahc.ca.gov/resources/forms/>. Additional information regarding AB 52 can be found online at http://nahc.ca.gov/wp-content/uploads/2015/10/AB52TribalConsultation_CalEPAPDF.pdf, entitled "Tribal Consultation Under AB 52: Requirements and Best Practices".

The NAHC recommends lead agencies consult with all California Native American tribes that are traditionally and culturally affiliated with the geographic area of your proposed project as early as possible in order to avoid inadvertent discoveries of Native American human remains and best protect tribal cultural resources.

A brief summary of portions of AB 52 and SB 18 as well as the NAHC's recommendations for conducting cultural resources assessments is also attached.

If you have any questions, please contact me at my email address: gayle.totton@nahc.ca.gov.

Sincerely,


Gayle Totton, B.S., M.A., Ph. D
Associate Governmental Program Analyst

Attachment
cc: State Clearinghouse

The California Environmental Quality Act (CEQA)¹, specifically Public Resources Code §21084.1, states that a project that may cause a substantial adverse change in the significance of a historical resource is a project that may have a significant effect on the environment.² If there is substantial evidence, in light of the whole record before a lead agency, that a project may have a significant effect on the environment, an environmental impact report (EIR) shall be prepared.³ In order to determine whether a project will cause a substantial adverse change in the significance of a historical resource, a lead agency will need to determine whether there are historical resources with the area of project effect (APE).

CEQA was amended in 2014 by Assembly Bill 52. (AB 52).⁴ **AB 52 applies to any project for which a notice of preparation or a notice of negative declaration or mitigated negative declaration is filed on or after July 1, 2015.** AB 52 created a separate category for “tribal cultural resources”⁵, that now includes “a project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment.”⁶ Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource.⁷ Your project may also be subject to **Senate Bill 18 (SB 18)** (Burton, Chapter 905, Statutes of 2004), Government Code §65352.3, if it also involves the adoption of or amendment to a general plan or a specific plan, or the designation or proposed designation of open space. **Both SB 18 and AB 52 have tribal consultation requirements.** Additionally, if your project is also subject to the federal National Environmental Policy Act (42 U.S.C. § 4321 et seq.) (NEPA), the tribal consultation requirements of Section 106 of the National Historic Preservation Act of 1966⁸ may also apply.

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

Pertinent Statutory Information:

Under AB 52:

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

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

A **lead agency** shall begin the consultation process within 30 days of receiving a request for consultation from a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project.⁹ and **prior to the release of a negative declaration, mitigated negative declaration or environmental impact report.** For purposes of AB 52, “consultation shall have the same meaning as provided in Gov. Code §65352.4 (SB 18).¹⁰

The following topics of consultation, if a tribe requests to discuss them, are mandatory topics of consultation:

- a. Alternatives to the project.
- b. Recommended mitigation measures.
- c. Significant effects.¹¹

1. The following topics are discretionary topics of consultation:

- a. Type of environmental review necessary.
- b. Significance of the tribal cultural resources.
- c. Significance of the project’s impacts on tribal cultural resources.

If necessary, project alternatives or appropriate measures for preservation or mitigation that the tribe may recommend to the lead agency.¹²

With some exceptions, any information, including but not limited to, the location, description, and use of tribal cultural resources submitted by a California Native American tribe during the environmental review process **shall not be included in the environmental document or otherwise disclosed by the lead agency or any other public agency to the public, consistent with Government Code §6254 (r) and §6254.10.** Any information submitted by a California Native American tribe during the consultation or environmental review process shall be published in a confidential appendix to the environmental document unless the tribe that provided the information consents, in writing, to the disclosure of some or all of the information to the public.¹³

If a project may have a significant impact on a tribal cultural resource, **the lead agency’s environmental document shall discuss** both of the following:

- a. Whether the proposed project has a significant impact on an identified tribal cultural resource.

¹ Pub. Resources Code § 21000 et seq.

² Pub. Resources Code § 21084.1; Cal. Code Regs., tit.14, § 15064.5 (b); CEQA Guidelines Section 15064.5 (b)

³ Pub. Resources Code § 21080 (d); Cal. Code Regs., tit. 14, § 15064 subd.(a)(1); CEQA Guidelines § 15064 (a)(1)

⁴ Government Code 65352.3

⁵ Pub. Resources Code § 21074

⁶ Pub. Resources Code § 21084.2

⁷ Pub. Resources Code § 21084.3 (a)

⁸ 154 U.S.C. 300101, 36 C.F.R. § 800 et seq.

⁹ Pub. Resources Code § 21080.3.1, subds. (d) and (e)

¹⁰ Pub. Resources Code § 21080.3.1 (b)

¹¹ Pub. Resources Code § 21080.3.2 (a)

¹² Pub. Resources Code § 21080.3.2 (a)

¹³ Pub. Resources Code § 21082.3 (c)(1)

- b. Whether feasible alternatives or mitigation measures, including those measures that may be agreed to pursuant to Public Resources Code §21082.3, subdivision (a), avoid or substantially lessen the impact on the identified tribal cultural resource.¹⁴

Consultation with a tribe shall be considered concluded when either of the following occurs:

- a. The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource; or
- b. A party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached.¹⁵

Any mitigation measures agreed upon in the consultation conducted pursuant to Public Resources Code §21080.3.2 **shall be recommended for inclusion in the environmental document and in an adopted mitigation monitoring and reporting program**, if determined to avoid or lessen the impact pursuant to Public Resources Code §21082.3, subdivision (b), paragraph 2, and shall be fully enforceable.¹⁶

If mitigation measures recommended by the staff of the lead agency as a result of the consultation process are not included in the environmental document or if there are no agreed upon mitigation measures at the conclusion of consultation, or if consultation does not occur, and if substantial evidence demonstrates that a project will cause a significant effect to a tribal cultural resource, **the lead agency shall consider feasible mitigation** pursuant to Public Resources Code §21084.3 (b).¹⁷

An environmental impact report **may not be certified**, nor may a mitigated negative declaration or a negative declaration be adopted unless one of the following occurs:

- a. The consultation process between the tribes and the lead agency has occurred as provided in Public Resources Code §21080.3.1 and §21080.3.2 and concluded pursuant to Public Resources Code §21080.3.2.
- b. The tribe that requested consultation failed to provide comments to the lead agency or otherwise failed to engage in the consultation process.
- c. The lead agency provided notice of the project to the tribe in compliance with Public Resources Code §21080.3.1 (d) and the tribe failed to request consultation within 30 days.¹⁸

This process should be documented in the Tribal Cultural Resources section of your environmental document.

Under SB 18:

Government Code §65352.3 (a) (1) requires consultation with Native Americans on general plan proposals for the purposes of “preserving or mitigating impacts to places, features, and objects described §5097.9 and §5091.993 of the Public Resources Code that are located within the city or county’s jurisdiction. Government Code §65560 (a), (b), and (c) provides for consultation with Native American tribes on the open-space element of a county or city general plan for the purposes of protecting places, features, and objects described in Public Resources Code §5097.9 and §5097.993.

- SB 18 applies to **local governments** and requires them to contact, provide notice to, refer plans to, and consult with tribes prior to the adoption or amendment of a general plan or a specific plan, or the designation of open space. Local governments should consult the Governor’s Office of Planning and Research’s “Tribal Consultation Guidelines,” which can be found online at: https://www.opr.ca.gov/docs/09_14_05_Updated_Guidelines_922.pdf
- **Tribal Consultation:** If a local government considers a proposal to adopt or amend a general plan or a specific plan, or to designate open space it is required to contact the appropriate tribes identified by the NAHC by requesting a “Tribal Consultation List.” If a tribe, once contacted, requests consultation the local government must consult with the tribe on the plan proposal. **A tribe has 90 days from the date of receipt of notification to request consultation unless a shorter timeframe has been agreed to by the tribe.**¹⁹
- **There is no Statutory Time Limit on Tribal Consultation under the law.**
- **Confidentiality:** Consistent with the guidelines developed and adopted by the Office of Planning and Research,²⁰ the city or county shall protect the confidentiality of the information concerning the specific identity, location, character, and use of places, features and objects described in Public Resources Code §5097.9 and §5097.993 that are within the city’s or county’s jurisdiction.²¹
- **Conclusion Tribal Consultation:** Consultation should be concluded at the point in which:
 - The parties to the consultation come to a mutual agreement concerning the appropriate measures for preservation or mitigation; or
 - Either the local government or the tribe, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached concerning the appropriate measures of preservation or mitigation.²²

NAHC Recommendations for Cultural Resources Assessments:

- Contact the NAHC for:

¹⁴ Pub. Resources Code § 21082.3 (b)

¹⁵ Pub. Resources Code § 21080.3.2 (b)

¹⁶ Pub. Resources Code § 21082.3 (a)

¹⁷ Pub. Resources Code § 21082.3 (e)

¹⁸ Pub. Resources Code § 21082.3 (d)

¹⁹ (Gov. Code § 65352.3 (a)(2)).

²⁰ pursuant to Gov. Code section 65040.2,

²¹ (Gov. Code § 65352.3 (b)).

²² (Tribal Consultation Guidelines, Governor’s Office of Planning and Research (2005) at p. 18).

- A Sacred Lands File search. Remember that tribes do not always record their sacred sites in the Sacred Lands File, nor are they required to do so. A Sacred Lands File search is not a substitute for consultation with tribes that are traditionally and culturally affiliated with the geographic area of the project's APE.
- A Native American Tribal Contact List of appropriate tribes for consultation concerning the project site and to assist in planning for avoidance, preservation in place, or, failing both, mitigation measures.
 - The request form can be found at <http://nahc.ca.gov/resources/forms/>.
- Contact the appropriate regional California Historical Research Information System (CHRIS) Center (http://ohp.parks.ca.gov/?page_id=1068) for an archaeological records search. The records search will determine:
 - If part or the entire APE has been previously surveyed for cultural resources.
 - If any known cultural resources have been already been recorded on or adjacent to the APE.
 - If the probability is low, moderate, or high that cultural resources are located in the APE.
 - If a survey is required to determine whether previously unrecorded cultural resources are present.
- If an archaeological inventory survey is required, the final stage is the preparation of a professional report detailing the findings and recommendations of the records search and field survey.
 - The final report containing site forms, site significance, and mitigation measures should be submitted immediately to the planning department. All information regarding site locations, Native American human remains, and associated funerary objects should be in a separate confidential addendum and not be made available for public disclosure.
 - The final written report should be submitted within 3 months after work has been completed to the appropriate regional CHRIS center.

Examples of Mitigation Measures That May Be Considered to Avoid or Minimize Significant Adverse Impacts to Tribal Cultural Resources:

- Avoidance and preservation of the resources in place, including, but not limited to:
 - Planning and construction to avoid the resources and protect the cultural and natural context.
 - Planning greenspace, parks, or other open space, to incorporate the resources with culturally appropriate protection and management criteria.
- Treating the resource with culturally appropriate dignity, taking into account the tribal cultural values and meaning of the resource, including, but not limited to, the following:
 - Protecting the cultural character and integrity of the resource.
 - Protecting the traditional use of the resource.
 - Protecting the confidentiality of the resource.
- Permanent conservation easements or other interests in real property, with culturally appropriate management criteria for the purposes of preserving or utilizing the resources or places.
- Please note that a federally recognized California Native American tribe or a non-federally recognized California Native American tribe that is on the contact list maintained by the NAHC to protect a California prehistoric, archaeological, cultural, spiritual, or ceremonial place may acquire and hold conservation easements if the conservation easement is voluntarily conveyed.²³
- Please note that it is the policy of the state that Native American remains and associated grave artifacts shall be repatriated.²⁴

The lack of surface evidence of archaeological resources (including tribal cultural resources) does not preclude their subsurface existence.

- Lead agencies should include in their mitigation and monitoring reporting program plan provisions for the identification and evaluation of inadvertently discovered archaeological resources.²⁵ In areas of identified archaeological sensitivity, a certified archaeologist and a culturally affiliated Native American with knowledge of cultural resources should monitor all ground-disturbing activities.
- Lead agencies should include in their mitigation and monitoring reporting program plans provisions for the disposition of recovered cultural items that are not burial associated in consultation with culturally affiliated Native Americans.
- Lead agencies should include in their mitigation and monitoring reporting program plans provisions for the treatment and disposition of inadvertently discovered Native American human remains. Health and Safety Code section 7050.5, Public Resources Code §5097.98, and Cal. Code Regs., tit. 14, §15064.5, subdivisions (d) and (e) (CEQA Guidelines §15064.5, subs. (d) and (e)) address the processes to be followed in the event of an inadvertent discovery of any Native American human remains and associated grave goods in a location other than a dedicated cemetery.

²³ (Civ. Code § 815.3 (c)).

²⁴ (Pub. Resources Code § 5097.991).

²⁵ per Cal. Code Regs., tit. 14, section 15064.5(f) (CEQA Guidelines section 15064.5(f)).