



# CITY OF MORRO BAY CITY COUNCIL AGENDA

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*The City of Morro Bay provides essential public services and infrastructure to maintain a safe, clean and healthy place for residents and visitors to live, work and play.*

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## **Regular Meeting Tuesday, September 28, 2021 – 5:30 P.M. Held Via Teleconference**

ESTABLISH QUORUM AND CALL TO ORDER  
MOMENT OF SILENCE  
PLEDGE OF ALLEGIANCE  
RECOGNITION  
CLOSED SESSION REPORT  
MAYOR & COUNCILMEMBERS' REPORTS, ANNOUNCEMENTS & PRESENTATIONS  
CITY MANAGER REPORTS, ANNOUNCEMENTS AND PRESENTATIONS

### PRESENTATIONS

- Update on the Chamber presented by President/CEO Erica Crawford

### PUBLIC COMMENT

*Pursuant to Executive Order N-08-21, issued by Governor Newsom on June 11, 2021, this Meeting will be conducted telephonically through Zoom and broadcast live on Cable Channel 20 and streamed on the City website (click [here](#) to view). Please be advised that pursuant to the Executive Order, and to ensure the health and safety of the public by limiting human contact that could spread the COVID-19 virus, the Veterans' Hall will not be open for the meeting.*

### **Public Participation:**

*In order to prevent and mitigate the effects of the COVID-19 pandemic, and limit potential spread within the City of Morro Bay, in accordance with Executive Order N-08-21, the City will not make available a physical location from which members of the public may observe the meeting and offer public comment. Remote public participation is allowed in the following ways:*

- *Community members are encouraged to submit agenda correspondence in advance of the meeting via email to the City Council at [council@morrobayca.gov](mailto:council@morrobayca.gov) prior to the meeting and will be published on the City website with a final update one hour prior to the meeting start time. Agenda correspondence received less than an hour before the meeting start time may not be posted until after the meeting.*
- *Members of the public may watch the meeting either on cable Channel 20 or as streamed on the City [website](#).*
- *Alternatively, members of the public may watch the meeting and speak during general Public Comment or on a specific agenda item by logging in to the Zoom webinar using the information provided below. Please use the "raise hand" feature to indicate your desire to provide public comment. Each speaker will be allowed three minutes to provide input.*

Please click the link below to join the webinar:

- <https://us02web.zoom.us/j/82722747698?pwd=aWZpTzcwTHlRTk9xaTlmWVNWUWVUQT09>  
Password: 135692
- Or Telephone Attendee: 1 (408) 638-0968 or 1 (669) 900 6833 or 1 (346) 248 7799; Webinar ID: 827 2274 7698; Password: 135692; Press \*9 to “Raise Hand” for Public Comment

A. CONSENT AGENDA

Unless an item is pulled for separate action by the City Council, the following actions are approved without discussion. The public will also be provided an opportunity to comment on consent agenda items.

- A-1 APPROVAL OF MINUTES FOR THE AUGUST 10, 2021, CITY COUNCIL MEETING;  
(ADMINISTRATION)

**RECOMMENDATION: Approve as submitted.**

- A-2 APPROVAL OF MINUTES FOR THE AUGUST 24, 2021, CITY COUNCIL SPECIAL  
MEETING; (ADMINISTRATION)

**RECOMMENDATION: Approve as submitted.**

- A-3 APPROVAL OF MINUTES FOR THE SEPTEMBER 14, 2021, CITY COUNCIL SPECIAL  
CLOSED SESSION MEETING; (ADMINISTRATION)

**RECOMMENDATION: Approve as submitted.**

- A-4 SECOND READING AND ADOPTION OF ORDINANCE NO. 643, AN ORDINANCE OF  
THE CITY COUNCIL OF THE CITY OF MORRO BAY, CALIFORNIA RESCINDING  
MORRO BAY MUNICIPAL CODE CHAPTER 3.60 AND DISESTABLISHING THE OLD  
MORRO BAY TOURISM BUSINESS IMPROVEMENT DISTRICT FORMED IN 2009;  
(CITY ATTORNEY)

**RECOMMENDATION: Staff recommends the Council adopt, by second reading and by title only with further reading waived, Ordinance No. 643, An Ordinance of the City Council of the City of Morro Bay, California Rescinding Morro Bay Municipal Code Chapter 3.60 and Disestablishing the Old Morro Bay Tourism Business Improvement District formed in 2009.**

- A-5 ADOPTION OF ORDINANCE NO. 644, AN ORDINANCE OF THE CITY COUNCIL OF  
THE CITY OF MORRO BAY, CALIFORNIA, ADDING CHAPTER 9.36 (SAFE STORAGE  
OF FIREARMS) TO TITLE 9 (HEALTH AND SAFETY) OF THE MORRO BAY  
MUNICIPAL CODE, TO REQUIRE SAFE STORAGE OF FIREARMS LOCATED IN A  
RESIDENCE); (CITY ATTORNEY)

**RECOMMENDATION: Staff recommends Council consider adoption, by second reading and by title only with further reading waived, of Ordinance No. 644, An Ordinance of the City Council of the City of Morro Bay, California, Adding Chapter 9.36 (Safe Storage of Firearms) to Tile 9 (Health and Safety) of the Morro Bay Municipal Code, To Require Safe Storage of Firearms Located in a Residence.**

- A-6 AUTHORIZATION TO EXECUTE AND RECORD CONSERVATION COVENANT ON CITY-OWNED PROPERTY ADJACENT TO THE CITY'S WATER RECLAMATION FACILITY (WRF); (PUBLIC WORKS DEPARTMENT)

**RECOMMENDATION:** Staff recommends the City Council take the following action: 1) Authorize the Mayor to Sign the Conservation Covenant protecting 19.5 acres of critical habitat as required by the U.S. Environmental Protection Agency (USEPA) and U.S. Fish and Wildlife Service (USFWS) as a condition of the loan funding construction of the Water Reclamation project; and 2) Once signed, the City Clerk is directed to record the document with the County of San Luis Obispo Clerk Recorder and transmit a copy of the recorded document to the USEPA.

- A-7 ADOPT RESOLUTION NO. 61-21 ESTABLISHING AN ELECTRONIC SIGNATURE USE POLICY; (ADMINISTRATIVE SERVICES DEPARTMENT/CITY CLERK/HUMAN RESOURCES MANAGER)

**RECOMMENDATION:** Staff recommends the City Council adopt Resolution No. 61-21. which establishes Electronic Signature Use Policy (Policy) for the City and authorizes the City Manager to amend the Policy and adopt additional guidelines as necessary to implement the Policy's stated purpose.

- A-8 ADOPT RESOLUTION NO. 62-21 REVISING THE TERMS OF THE CITY'S REIMBURSEMENT AGREEMENT WITH THE CALIFORNIA GOVERNOR'S OFFICE OF EMERGENCY SERVICES TO ADD THE DIVISION CHIEF CLASSIFICATION AND RECEIVE PORTAL TO PORTAL REIMBURSEMENT FOR ALL FIRE DEPARTMENT CLASSIFICATIONS; (FIRE DEPARTMENT)

**RECOMMENDATION:** Council adopt Resolution No. 62-21 rescinding Resolution No. 56-20 and revising the terms of the City's reimbursement agreement to include the classification of Division Chief and provide all job classifications with portal to portal pay.

- A-9 ADOPT RESOLUTION NO. 63-21 APPROVING AN INCREASE TO THE CITY'S CONTRIBUTION TO EMPLOYEE HEALTH CARE COVERAGE; (CITY MANAGER/CITY CLERK/HUMAN RESOURCES MANAGER)

**RECOMMENDATION:** Staff recommends the City Council adopt Resolution No. 63-21 approving amended Memoranda of Understanding (MOU's) as agreed to by each represented bargaining group [Morro Bay Police Officers Association ("MBPOA"), Morro Bay Fire Fighters Association ("MBFFA") and Service Employees International Union ("SEIU") Local 620], establishing an increase to the City's contribution to employee health care coverage effective January 2022, and extending the same benefits to unrepresented Confidential, Management and Executive employees.

- B. PUBLIC HEARINGS - NONE

- C. BUSINESS ITEMS

- C-1 COVID-19 UPDATE AND REVIEW OF ASSEMBLY BILL 361, RELATED TO TELECONFERENCING PUBLIC MEETINGS; (CITY MANAGER/CITY ATTORNEY)

**RECOMMENDATION:** Receive the update and provide direction as appropriate.

- D. COUNCIL DECLARATION OF FUTURE AGENDA ITEMS

- E. ADJOURNMENT

The next Regular Meeting will be held on **Tuesday, October 12, 2021 at 5:30 p.m.** via teleconference.

**THIS AGENDA IS SUBJECT TO AMENDMENT UP TO 72 HOURS PRIOR TO THE DATE AND TIME SET FOR THE MEETING. PLEASE REFER TO THE AGENDA POSTED AT CITY HALL FOR ANY REVISIONS OR CALL THE CLERK'S OFFICE AT 805-772-6205 FOR FURTHER INFORMATION.**

**MATERIALS RELATED TO AN ITEM ON THIS AGENDA SUBMITTED TO THE CITY COUNCIL AFTER DISTRIBUTION OF THE AGENDA PACKET ARE AVAILABLE FOR PUBLIC INSPECTION UPON REQUEST BY CALLING THE CITY CLERK'S OFFICE AT 805-772-6205.**

**IN COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT, IF YOU NEED SPECIAL ASSISTANCE TO PARTICIPATE IN A CITY MEETING, PLEASE CONTACT THE CITY CLERK'S OFFICE AT LEAST 24 HOURS PRIOR TO THE MEETING TO INSURE REASONABLE ARRANGEMENTS CAN BE MADE TO PROVIDE ACCESSIBILITY TO THE MEETING.**

*City Council conducted this meeting in accordance with California Governor Newsom’s Executive Order N-08-21 issued on June 11, 2021 in response to the present State of Emergency in existence due to the threat of COVID-19. This meeting was held via teleconference for all participants.*

PRESENT:	John Headding	Mayor
	Dawn Addis	Council Member
	Laurel Barton	Council Member
	Jeff Heller	Council Member
	Vacant	Council Member
ABSENT:	None	
STAFF:	Scott Collins	City Manager
	Chris Neumeyer	City Attorney
	Dana Swanson	City Clerk
	Sarah Johnson-Rios	Assistant City Manager/Admin Services Dir.
	Greg Kwolek	Public Works Director
	Daniel McCrain	Fire Chief
	Eric Endersby	Harbor Director
	Amy Watkins	Police Commander
	Rob Livick	City Engineer
	Cindy Jacinth	Senior Planner
	Kirk Carmichael	Recreation Services Manager

#### ESTABLISH QUORUM AND CALL TO ORDER

Mayor Headding called the meeting to order at 5:30 p.m., with all but Council Member Barton present. Council Member Barton joined the meeting at 5:38 p.m.

#### MOMENT OF SILENCE

#### PLEDGE OF ALLEGIANCE

RECOGNITION – None

CLOSED SESSION REPORT – City Attorney Neumeyer stated no reportable action was taken by the City Council in accordance with the Brown Act.

#### MAYOR & COUNCILMEMBERS’ REPORTS, ANNOUNCEMENTS & PRESENTATIONS

<https://youtu.be/-kpiLKvdlSs?t=228>

#### CITY MANAGER REPORTS, ANNOUNCEMENTS AND PRESENTATIONS

<https://youtu.be/-kpiLKvdlSs?t=1120>

#### PRESENTATIONS

<https://youtu.be/-kpiLKvdlSs?t=1303>

- Proclamation honoring Council Member Robert “Red” Davis presented to wife, Gail Davis; daughter, Catherine Sullivan, and son-in-law, Pat Sullivan.

#### PUBLIC COMMENT

<https://youtu.be/-kpiLKvdlSs?t=1871>

Aaron Ochs, Morro Bay, requested the City consider an outside investigation into the City's cannabis retail permitting process and potentially cancel the license issued to Natural Healing Center.

Betty Winholtz, Morro Bay, announced she would be collecting signatures at Thursday's farmers market for those who would like to see community vote on whether tent or RV camping should be allowed on the Embarcadero or Coleman.

Mayor Headding closed public comment.

The Council and staff responded to issues raised during public comment.

A. CONSENT AGENDA  
<https://youtu.be/-kpiLKvdlSs?t=2331>

Unless an item is pulled for separate action by the City Council, the following actions are approved without discussion. The public will also be provided an opportunity to comment on consent agenda items.

A-1 APPROVAL OF MINUTES FOR THE APRIL 27, 2021, CITY COUNCIL MEETING;  
(ADMINISTRATION)

**RECOMMENDATION: Approve as submitted.**

A-2 APPROVAL OF MINUTES FOR THE MAY 25, 2021, CITY COUNCIL MEETING;  
(ADMINISTRATION)

**RECOMMENDATION: Approve as submitted.**

A-3 APPROVAL OF MINUTES FOR THE MAY 25, 2021, AND MAY 26, 2021, CITY COUNCIL  
SPECIAL MEETING; (ADMINISTRATION)

**RECOMMENDATION: Approve as submitted.**

A-4 APPROVAL OF MINUTES FOR THE JUNE 8, 2021, CITY COUNCIL MEETING;  
(ADMINISTRATION)

**RECOMMENDATION: Approve as submitted.**

A-5 APPROVAL OF MINUTES FOR THE JUNE 9, 2021, CITY COUNCIL SPECIAL  
MEETING; (ADMINISTRATION)

**RECOMMENDATION: Approve as submitted.**

A-6 APPROVAL OF MINUTES FOR THE JULY 1, 2021, CITY COUNCIL SPECIAL CLOSED  
SESSION MEETING; (ADMINISTRATION)

**RECOMMENDATION: Approve as submitted.**

A-7 APPROVAL OF MINUTES FOR THE JULY 7, 2021, CITY COUNCIL SPECIAL CLOSED  
SESSION MEETING; (ADMINISTRATION)

**RECOMMENDATION: Approve as submitted.**

A-8 ADOPT RESOLUTION NO. 55-21 ESTABLISHING THE ANNUAL PROPOSITION 4 APPROPRIATIONS LIMIT FOR THE FISCAL YEAR 2021/22; (ADMINISTRATIVE SERVICES DEPARTMENT)

**RECOMMENDATION: Staff recommends the City Council adopt Resolution No. 55-21, which sets the FY 2021/22 appropriations limit at \$30,559,247.**

A-9 PROCLAMATION EXPRESSING APPRECIATION FOR THE DEDICATION AND PUBLIC SERVICE OF ROBERT "RED" DAVIS; (ADMINISTRATION)

**RECOMMENDATION: Approve as submitted.**

Mayor Heading opened the public comment for the Consent Agenda; seeing none, the public comment period was closed.

MOTION: Council Member Addis moved approval of all items on the Consent Agenda. The motion was seconded by Council Member Heller and carried 4-0 by roll call vote.

B. PUBLIC HEARINGS

B-1 PUBLIC HEARING, AND ADOPTION OF RESOLUTION NO. 56-21, FOR MINOR REVISIONS TO THE ADOPTED FISCAL YEAR 2021/22 (FY 2021/22) MASTER FEE SCHEDULE; (ADMINISTRATIVE SERVICES DEPARTMENT)

<https://youtu.be/-kpiLKvdlSs?t=2404>

Assistant City Manager/Administrative Services Director Johnson-Rios provided the report and responded to Council inquires.

Mayor Heading opened the Public Hearing.

Mayor Heading opened Public Comment; seeing none, public comment period was closed.

The Public Hearing was closed.

MOTION: Council Member Addis moved to adopt Resolution No. 56-21, which updates the City's Master Fee Schedule for FY 2021/22 to correct two fees that need to be consistent with State law and one revision of the explanation of the fee's applicability. The motion was seconded by Council Member Heller and carried 4-0 by roll call vote.

C. BUSINESS ITEMS

C-1 CONSIDERATION OF APPOINTMENT OF ROBERT NAVA TO THE PUBLIC WORKS ADVISORY BOARD; AND REAPPOINTMENT OF SUSAN STEWART TO THE PLANNING COMMISSION CONSISTENT WITH COUNCIL APPROVAL OF SPECIAL REQUIREMENT FOR NON-RESIDENT; (CITY CLERK)

<https://youtu.be/-kpiLKvdlSs?t=2740>

City Clerk Swanson briefly introduced the item.

MOTION: Mayor Heading moved to appoint Robert Nava to the Public Works Advisory Board (PWAB) to complete an unexpired term through January 31, 2023. The motion was seconded by Council Member Addis.

The public comment period for Item C-1 was opened; seeing none, the public comment period was closed.

The motion carried 4-0 by roll call vote.

The Council considered the reappointment of Susan Stewart to the Planning Commission. City Attorney Neumeyer responded to Council questions.

Mayor Heading reopened public comment.

Betty Winholtz, Morro Bay, opposed the appointment of a non-resident to the Planning Commission.

The public comment period was closed.

MOTION: Council Member Heller moved to appoint Susan Stewart to the Planning Commission for the remainder of the term ending January 31, 2023, with the formal approval of a special requirement that her non-residency in Morro Bay will be accepted for this appointment due to unique and qualifying circumstances as outlined by our legal counsel. The motion was seconded by Council Member Addis and carried 4-0 by roll call vote.

- C-2 ONE-YEAR REVIEW OF THE WATERFRONT RV CAMPING PILOT PROGRAM, AND CITY COUNCIL INPUT AND RECOMMENDATIONS ON THE FUTURE OF THE PROGRAM; (HARBOR DEPARTMENT)  
<https://youtu.be/-kpiLKvdISs?t=3899>

Harbor Director Endersby provided the report and responded to Council inquires.

The public comment period for Item C-2 was opened.

Betty Winholtz, Morro Bay, read the letter submitted as agenda correspondence.

The public comment period for Item C-2 was closed.

MOTION: Council Member Addis moved to pursue establishment of the Waterfront RV Camping pilot program as outlined in this report for another year with a 6-month check-in with financial information. The motion was seconded by Council Member Barton for discussion.

Council Member Heller was not in favor of a 6-month check in and suggested the program be approved until other revenue stream for the Harbor Fund is established. The Council discussed the capital needs along the waterfront and appreciated resident concerns about visual impacts and preservation of day use parking.

AMENDED MOTION: Council Member Addis moved to approve the program, as recommended, for a maximum of one year unless another revenue source is identified before then. The motion was seconded by Council Member Barton and carried 4-0 by roll call vote.

- C-3 APPROVAL OF AMENDMENT 3 TO THE CONSULTANT AGREEMENT FOR IMPLEMENTATION OF THE FIRST PHASE OF THE MORRO BAY [ONEWATER PLAN](#) (WATER AND WASTEWATER) AND AUTHORIZATION FOR THE CITY MANAGER TO SIGN THE AMENDMENT; (PUBLIC WORKS DEPARTMENT)  
<https://youtu.be/-kpiLKvdISs?t=6911>

Public Works Director Kwolek provided the report and responded to Council inquires.

The public comment period for Item C-3 was opened.

Betty Winholtz, Morro Bay, encouraged community outreach to residents near the Nutmeg tank regarding the project.

The public comment period for Item C-3 was closed.

**MOTION:** Council Member Addis moved to approve and authorize the City Manager to execute a time and materials amendment to the consultant agreement with Cannon Corporation (Cannon) for additional engineering services necessary to complete and implement the first phase of the OneWater Plan projects in an amount not to exceed \$100,000 without prior written authorization resulting in a total contract authorization of \$991,335; and return to Council during quarterly budget review with budget amendments necessary to accommodate additional design scope and to advance these projects in FY 21/22 rather than in FY 22/23. The motion was seconded by Council Member Barton for discussion.

Following discussion, the motion carried 4-0 by roll call vote.

**C-4 PROCEDURE FOR FILLING VACANCY ON THE CITY COUNCIL AND SELECTION OF METHOD FOR (OPTIONAL) TEMPORARY COUNCIL APPOINTMENT UNTIL SPECIAL ELECTION IS HELD; (ADMINISTRATION)**

<https://youtu.be/-kpiLKvdlSs?t=8764>

City Manager Collins provided the report and responded to Council inquires.

The public comment period for Item C-4 was opened; seeing none, the public comment period was closed.

**MOTION:** Council Member Addis moved to go with option A which reads “Direct staff to post a notice of vacancy, set a deadline for accepting applications for appointment, and place the consideration of applicants and making an appointment prior to September 22, 2021” and make a decision at the first September meeting. The motion was seconded by Council Member Heller for discussion.

**AMENDED MOTION:** Council Member Addis moved to go with option A which reads “Direct staff to post a notice of vacancy, set a deadline for accepting applications for appointment, and place the consideration of applicants and making an appointment prior to September 22, 2021” and to set September 3, 2021, as the application closing date. The motion was seconded by Council Member Heller for discussion.

Following discussion, the amended motion carried 4-0 by roll call vote.

**D. COUNCIL DECLARATION OF FUTURE AGENDA ITEMS**

<https://youtu.be/-kpiLKvdlSs?t=9704>

Council Member Heller requested and received full support for Council review of current City policies and available options related to procurement of professional services, construction contracts.

E. ADJOURNMENT

The meeting adjourned at 8:15 p.m.

Recorded by:

Dana Swanson  
City Clerk

*City Council conducted this meeting in accordance with California Governor Newsom’s Executive Order N-08-21 issued on June 11, 2021 in response to the present State of Emergency in existence due to the threat of COVID-19. This meeting was held via teleconference for all participants.*

PRESENT:            John Headding                            Mayor  
                         Dawn Addis                                Council Member  
                         Laurel Barton                              Council Member  
                         Jeff Heller                                 Council Member  
                         Vacant                                        Council Member

ABSENT:            None

STAFF:             Scott Collins                                City Manager  
                         Dana Swanson                              City Clerk  
                         Sarah Johnson-Rios                      Assistant City Manager/Admin Services Dir.  
                         Greg Kwolek                                Public Works Director  
                         Scot Graham                                Community Development Director  
                         Jody Cox                                     Police Chief  
                         Daniel McCrain                             Fire Chief  
                         Eric Endersby                               Harbor Director  
                         Kirk Carmichael                          Recreation Services Manager

**ESTABLISH QUORUM AND CALL TO ORDER**

Mayor Headding established a quorum and called the meeting to order at 3:30 p.m. with all except Council Member Barton present. Council Member Barton joined the meeting at 3:32 p.m.

**PUBLIC COMMENT FOR ITEMS ON THE AGENDA**

[https://youtu.be/odPn\\_CoCJcM?t=238](https://youtu.be/odPn_CoCJcM?t=238)

Erica Crawford, Morro Bay Chamber of Commerce, expressed appreciation for the City’s support of the business community.

The public comment period was closed.

**SPECIAL MEETING AGENDA ITEM:**

**I. CITY COUNCIL GOALS AND OBJECTIVES UPDATE**

City Manager Collins provided the report and responded to Council inquiries.  
[https://youtu.be/odPn\\_CoCJcM?t=369](https://youtu.be/odPn_CoCJcM?t=369)

The Council did not take any formal action on this item.

**ADJOURNMENT**

The meeting adjourned at 4:07 p.m.

Recorded by:

Dana Swanson  
City Clerk

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*City Council conducted this meeting in accordance with California Governor Newsom’s Executive Order N-08-21 issued on June 11, 2021 in response to the present State of Emergency in existence due to the threat of COVID-19. This meeting was held via teleconference for all participants.*

PRESENT:            John Headding                    Mayor  
                         Dawn Addis                        Council Member  
                         Laurel Barton                     Council Member  
                         Jeff Heller                        Council Member  
                         Vacant                             Council Member

ABSENT:            None

STAFF:             Scott Collins                     City Manager  
                         Chris Neumeyer                 City Attorney  
                         Joseph Pannone                 Special Counsel  
                         Colin Tanner                     Special Labor Counsel  
                         Sarah Johnson-Rios             Assistant City Manager/Administrative Services Director  
                         Scot Graham                     Community Development Director  
                         Eric Endersby                    Harbor Director

**ESTABLISH QUORUM AND CALL TO ORDER**

Mayor Headding called the meeting to order at 3:30 p.m. with all members present.

SUMMARY OF CLOSED SESSION ITEMS – The Mayor read a summary of Closed Session items.

CLOSED SESSION PUBLIC COMMENT – Mayor Headding opened public comment for items on the agenda.

Eric Newton, Libertine Pub, provided the Council an overview of his proposed project.

The public comment period was closed.

The City Council moved to Closed Session and heard the following items:

**CS-1 GOVERNMENT CODE SECTION 54956.8 – CONFERENCE WITH REAL PROPERTY NEGOTIATOR:**

Property:            Lease Sites 86/86W (Libertine Pub, 801 Embarcadero)  
Property Negotiators: Eric Newton  
Agency Negotiators: Eric Endersby, Harbor Director; Chris Neumeyer, City Attorney; Scott Collins, City Manager  
Negotiation:        Price and Terms of Payment

**CS-2 CONFERENCE WITH LABOR NEGOTIATORS**

A closed session will be held, pursuant to Government Code § 54957.6, with City negotiator and designated labor representative Colin Tanner, special labor counsel, regarding labor negotiations with employee organizations: 1) Morro Bay Firefighters’ Association, 2) Service Employee’s International Union - SEIU Local 620, and 3) Morro Bay Peace Officers’ Association.

RECONVENE IN OPEN SESSION – The City Council reconvened in Open Session. The Council did not take any reportable action in accordance with the Brown Act.

ADJOURNMENT - The meeting adjourned at 4:40 p.m.

Recorded by:

Dana Swanson  
City Clerk



AGENDA NO: A-4

MEETING DATE: September 28, 2021

# Staff Report

**TO:** Honorable Mayor and City Council

**DATE:** September 21, 2021

**FROM:** Scott Collins, City Manager

**SUBJECT:** Second Reading and Adoption of Ordinance No. 643, An Ordinance of the City Council of the City of Morro Bay, California Rescinding Morro Bay Municipal Code Chapter 3.60 and Disestablishing the Old Morro Bay Tourism Business Improvement District formed in 2009

## RECOMMENDATION

Staff recommends the Council adopt, by second reading and by title only with further reading waived, Ordinance No. 643, An Ordinance of the City Council of the City of Morro Bay, California Rescinding Morro Bay Municipal Code Chapter 3.60 and Disestablishing the Old Morro Bay Tourism Business Improvement District formed in 2009.

## ALTERNATIVES

No alternatives are recommended.

## FISCAL IMPACT

There is no fiscal impact associated with this action. The City Council adopted Resolution No. 28-21 approving a new MBTBID pursuant to the Parking and Business Improvement Area Law of 1994 ('94 Law) on June 8, 2021 re-establishing an assessment of 3% of gross short-term room rental revenue for all lodging businesses and vacation rental businesses for a five-year term beginning July 1, 2021 through June 30, 2026. Consistent with the prior Council direction, those revenues will be utilized by the new MBTBID, Visit Morro Bay, for tourism marketing and visitor services as outlined in their formation documents; the City will receive an administrative fee for staff time utilized to process and remit the revenues.

## BACKGROUND/DISCUSSION

On April 27, 2009, City Council approved Ordinance No. 546 (the Ordinance) amending the Morro Bay Municipal Code and establishing the MBTBID pursuant to the '89 Law with a one-year renewal cycle. On June 8, 2021, pursuant to the '94 Law, the Council adopted Resolution No. 28-21 re-establishing the MBTBID for a five-year term beginning July 1, 2021 through June 30, 2026, and allowing the MBTBID created under the '89 Law to expire (Attachment 2). This effort seeks to complete the process of modernizing the MBTBID by formally disestablishing the previous MBTBID created in 2009 pursuant to the '89 Law.

The '89 Law allows the City Council to initiate disestablishment of the '89 Law MBTBID by adoption of a resolution expressing its intention to disestablish the '89 Law MBTBID (**Attachment 1**). The resolution must state the reason for disestablishment, the time and place of the public hearing on

Prepared By: <u>   MW/DS   </u>	Dept Review: <u>          </u>
City Manager Review: <u>   SC   </u>	City Attorney Review: <u>   CFN   </u>

disestablishment, and a proposal to dispose of any assets acquired with the revenues of the assessments levied within the '89 Law MBTBID. The proposal for the disposal of any assets acquired with the revenues of the assessments levied within the '89 Law MBTBID is to transfer them to the '94 Law MBTBID, because the '94 Law MBTBID will contain the same businesses as the '89 Law MBTBID and the assets will be used for marketing and promotions efforts that benefit those businesses who paid the assessment.

The reason for disestablishment of the '89 Law MBTBID is due to the proposal to modernize and replace it with the '94 Law MBTBID. A public hearing on disestablishment of the '89 Law MBTBID was conducted at the September 14, 2021 Regular meeting, via teleconference pursuant to Executive Order N-08-21, issued by Governor Newsom on June 11, 2021.

## **MBTBID DISESTABLISHMENT PROCESS**

- August 24, 2021      **RESOLUTION OF INTENTION (COMPLETED)**  
The City Council may disestablish an area by adopting an ordinance after holding a public hearing on the disestablishment. The City Council shall adopt a resolution of intention to disestablish the area prior to the required public hearing.
- August 25, 2021      **NOTICE (COMPLETED)**  
Notice of the public hearing shall be given by both 1) publishing the resolution of intention in a newspaper of general circulation in the City of Morro Bay once, for at least seven (7) days before the hearing; and 2) mailing a complete copy of the resolution of intention by first-class mail to each business owner subject to the '89 Law MBTBID assessment within seven (7) days of the City Council's adoption of the resolution of intention.
- September 14, 2021      **PUBLIC HEARING & DISESTABLISHMENT ORDINANCE 1st READING (COMPLETED)**  
The City Council shall hold a public hearing on the disestablishment of the '89 Law MBTBID and receive public testimony on the disestablishment of the '89 Law MBTBID.  
  
At the conclusion of the public hearing to disestablish the '89 Law MBTBID, the City Council may introduce and conduct the first reading of the ordinance to disestablish the '89 Law MBTBID and rescinding MBMC Chapter 3.60.
- September 28, 2021      **DISESTABLISHMENT ORDINANCE 2nd READING & ADOPTION**  
The City Council may conduct the second reading of the ordinance to disestablish the '89 Law MBTBID and adopt the ordinance.
- September 29, 2021      **NOTICE**  
Notice of disestablishment of the MBTBID shall be published once in a newspaper of general circulation in the City of Morro Bay, not later than fifteen (15) days after the ordinance disestablishing the '89 Law MBTBID is adopted.
- June 30, 2021      **EFFECTIVE DATE OF '89 LAW MBTBID DISESTABLISHMENT**  
The '89 Law MBTBID as a matter of law shall cease to exist.

## **ATTACHMENT**

1. Resolution No. 58-21 Declaring Intent to Disestablish the MBTBID under the '89 Law
2. Proposed Ordinance No. 643

**RESOLUTION NO. 58-21**

**A RESOLUTION OF THE CITY COUNCIL  
OF THE CITY OF MORRO BAY, CALIFORNIA  
DECLARING ITS INTENTION TO DISESTABLISH THE PREVIOUS MORRO BAY TOURISM  
BUSINESS IMPROVEMENT DISTRICT PURSUANT TO THE PARKING AND BUSINESS  
IMPROVEMENT AREA LAW OF 1989; AND SET A PUBLIC HEARING**

**THE CITY COUNCIL  
City of Morro Bay, California**

**WHEREAS**, on April 27, 2009, City Council approved Ordinance No. 546 establishing the Morro Bay Tourism Business Improvement District (MTBID) pursuant to the Parking and Business Improvement Area Law of 1989, Streets and Highways Code §§36500 *et seq.* ('89 Law); and

**WHEREAS**, on June 8, 2021 with the adoption of Resolution No. 28-21, the City Council established a new Tourism Business Improvement District pursuant to the Property and Business Improvement District Law of 1994, Streets and Highways Code §§36600 *et seq.* ('94 Law); and

**WHEREAS**, the '89 Law allows the City Council to disestablish the old MTBID; and

**WHEREAS**, the City Council now intends to disestablish the old MTBID;

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL THAT:**

1. The recitals set forth herein are true and correct.
2. The City Council declares its intention to disestablish the old MTBID (established previously on June 8, 2021) pursuant to the '89 Law.
3. The reason for disestablishment of the old MTBID is because the old MTBID is being replaced by a new, similar district formed pursuant to the '94 Law.
4. The time and place for a public hearing on the disestablishment of the old MTBID is set for 5:30 PM, or as soon thereafter, as the matter may be heard on September 14, 2021, via teleconference pursuant to Executive Order N-08-21, issued by Governor Newsom on June 11, 2021.
5. The proposal for the disposal of any assets acquired with the revenues of the assessments levied within the '89 Law MTBID is to transfer them to the '94 Law MTBID, because the '94 Law MTBID will contain the same businesses as the '89 Law MTBID and the assets will be used for marketing and promotions efforts that benefits those businesses who paid the assessment.
6. The City Clerk is directed to provide notice of the public hearing in accordance with Streets and Highways Code §36523 by:
  - a. Publishing this Resolution of Intention in a newspaper of general circulation in the City of Morro Bay once, at least seven (7) days before the hearing; and

- b. Mailing a complete copy of this Resolution of Intention to each and every business owner subject to the assessment within the MBTBID within seven (7) days of the adoption of this Resolution by the City Council.

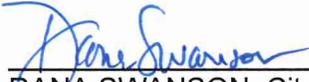
7. This resolution shall take effect immediately upon its adoption by the City Council.

**PASSED AND ADOPTED** by the City Council of the City of Morro Bay at a regular meeting of the City Council on the 24<sup>th</sup> day of August 2021 by the following vote:

AYES:           Headding, Addis, Barton, Heller  
NOES:           None  
ABSENT:       None  
ABSTAIN:      None

  
\_\_\_\_\_  
JOHN HEADDING, Mayor

ATTEST:

  
\_\_\_\_\_  
DANA SWANSON, City Clerk

**ORDINANCE NO. 643**

**AN ORDINANCE OF THE CITY COUNCIL  
OF THE CITY OF MORRO BAY, CALIFORNIA  
RESCINDING MORRO BAY MUNICIPAL CODE CHAPTER 3.60 AND  
DISESTABLISHING THE OLD MORRO BAY TOURISM BUSINESS  
IMPROVEMENT DISTRICT FORMED IN 2009**

**THE CITY COUNCIL  
City of Morro Bay, California**

THE CITY COUNCIL OF THE CITY OF MORRO BAY, CALIFORNIA DOES HEREBY FIND AND ORDAIN AS FOLLOWS:

**SECTION I. AUTHORITY.**

This ordinance is adopted pursuant to the Parking and Business Improvement Area Law of 1989 (“89 Law”), Streets and Highways Code section 36500 *et seq.* and Resolution Number 58-21 adopted by the City Council on August 24, 2021, entitled a “Resolution of the City Council of the City of Morro Bay Declaring its Intention to Disestablish the Morro Bay Tourism Business Improvement District Pursuant to the Parking and Business Improvement Area Law of 1989; and Set a Public Hearing.” Such resolution was published and mailed as provided by law and a public hearing was held by the City Council at its regular meeting on September 14, 2021, at which time all persons desiring to be heard and all objections made or filed were fully heard. The City Council duly concluded the hearing on September 14, 2021.

**SECTION II. AREA DISESTABLISHED.**

The City Council finds and determines that public convenience and necessity require disestablishment of the old “89 Law” MBTBID for reasons given in the Resolution of Intention.

Pursuant to Streets and Highways Code section 36550, of the Parking and Business Improvement Area Law of 1989, the old 89 Law Morro Bay Tourism Business Improvement District, established on April 27, 2009, is hereby disestablished, and furthermore Morro Bay Municipal Code Chapter 3.60 is hereby rescinded in its entirety.

**SECTION III. EFFECTIVE DATE.**

This Ordinance shall be in full force and take effect 30 days after the date of its adoption.

**SECTION IV. SEVERABILITY.**

If any section, subsection, sentence, clause, phrase, or portion of this ordinance is, for any reason, held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have adopted this ordinance and each section, subsection, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases, or portions thereof may be declared invalid or unconstitutional.

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**SECTION V. CERTIFICATION.**

The City Clerk shall certify to the adoption of this ordinance and shall cause the same to be posted and codified in the manner required by law.

**INTRODUCED** at a regular meeting of the City Council held on the 14<sup>th</sup> day of September 2021, by motion of Council Member Addis and seconded by Council Member Heller.

**PASSED AND ADOPTED** on the 28<sup>th</sup> day of September 2021.

\_\_\_\_\_  
JOHN HEADDING, Mayor

ATTEST:

\_\_\_\_\_  
DANA SWANSON, City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
CHRIS F. NEUMEYER, City Attorney

STATE OF CALIFORNIA )  
COUNTY OF SAN LUIS OBISPO )  
CITY OF MORRO BAY )

I, Dana Swanson, CITY CLERK OF THE CITY OF MORRO BAY, DO HEREBY CERTIFY that the foregoing Ordinance Number 643 was duly adopted by the City Council of the City of Morro Bay at a regular meeting of said Council on the 28th day of September 2021, and that it was so adopted by the following vote:

AYES:  
NOES:  
ABSENT:

\_\_\_\_\_  
City Clerk, Dana Swanson

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of the City of Morro Bay, California, this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
DANA SWANSON, City Clerk



AGENDA NO: A-5

MEETING DATE: September 28, 2021

# Staff Report

**TO:** Honorable Mayor and City Council

**DATE:** September 21, 2021

**FROM:** Chris F. Neumeyer, City Attorney

**SUBJECT:** Adoption of Ordinance No. 644, An Ordinance of the City Council of the City of Morro Bay, California, Adding Chapter 9.36 (Safe Storage of Firearms) to Title 9 (Health and Safety) of the Morro Bay Municipal Code, to Require Safe Storage of Firearms Located in a Residence

## **RECOMMENDATION**

Staff recommends Council consider adoption, by second reading and by title only with further reading waived, of Ordinance No. 644, An Ordinance of the City Council of the City of Morro Bay, California, Adding Chapter 9.36 (Safe Storage of Firearms) to Title 9 (Health and Safety) of the Morro Bay Municipal Code, To Require Safe Storage of Firearms Located in a Residence.

## **ALTERNATIVES**

Council could choose not to adopt the ordinance and/or Council could provide further direction to staff.

## **FISCAL IMPACT**

There are no fiscal impacts associated with this action.

## **BACKGROUND/DISCUSSION**

At Council's request, an extensive and detailed staff report, and presentation was provided to Council on April 13, 2021 concerning local firearm safety and regulation. That report in detail discussed recent mass shootings and other firearm-related deaths, federal Second Amendment rights as well as State firearm laws (which both act to substantially preempt many areas of local firearm regulation), and current City law and policies concerning firearms and mass shootings. Council at that meeting also considered multiple local action items for firearm safety and regulation.

On April 13, 2021, the Council directed staff to bring back (among other items) a subsequent staff report with a possible action item on a firearm safe storage local law. At the September 14, 2021 Council Meeting, the Council introduced for first reading Ordinance No. 644 Establishing a Firearm Safe Storage Local Law.

Prepared By:   CFN   Dept Review: \_\_\_\_\_  
City Manager Review:   SC   City Attorney Review:   CFN

## **Firearm Safe Storage Local Law**

The United States Court of Appeals, Ninth Circuit, held in 2014 that a San Francisco firearm safe storage ordinance was consistent with the federal Second Amendment. (*Jackson v. City & Cty. of San Francisco* (2014) 746 F.3d 953.) The proposed ordinance to add a firearm safe storage law to the Morro Bay Municipal Code is modeled on the San Francisco law determined to be constitutional by the U.S. Court of Appeals, Ninth Circuit in 2014. The proposed ordinance provides that:

*No person shall keep a firearm within a residence unless the firearm is:*

- 1. Stored in a locked container or disabled with a trigger lock; or*
- 2. Carried on the person of the owner, or other lawfully authorized user of the firearm; or*
- 3. Within close enough proximity and control that the owner, or other lawfully authorized user of the firearm, can readily retrieve and use the firearm as if carried on that person.*

The original law found constitutional by the courts only had items 1 and 2 above. Adding item 3 above will not impact the constitutionality of the proposed ordinance in regards to the federal Second Amendment, however review concludes that adding item 3 may provide for a more practical local law, and, for example, a firearm safe storage law adopted in 2019 by the City of Los Angeles included similar language and the same original law provided for a misdemeanor violation, while the proposed ordinance allows, if the situation warrants, prosecution as an infraction rather than as a misdemeanor.

### **CONCLUSION**

Staff recommends that the City Council consider adoption of Ordinance No. 644, An Ordinance of the City Council of the City of Morro Bay, California, Adding Chapter 9.36 (Safe Storage of Firearms) to Title 9 (Health and Safety) of the Morro Bay Municipal Code, To Require Safe Storage of Firearms Located in a Residence.

### **ATTACHMENT**

1. Ordinance No. 644

**ORDINANCE NO. 644**

**AN ORDINANCE OF THE CITY COUNCIL  
OF THE CITY OF MORRO BAY, CALIFORNIA,  
ADDING CHAPTER 9.36 (SAFE STORAGE OF FIREARMS) TO  
TITLE 9 (HEALTH AND SAFETY) OF THE MORRO BAY  
MUNICIPAL CODE, TO REQUIRE SAFE STORAGE OF  
FIREARMS LOCATED IN A RESIDENCE**

**THE CITY OF MORRO BAY  
City of Morro Bay, California**

**WHEREAS**, the City of Morro Bay (“City”) is empowered to enact legislation to protect the health, safety, and welfare of the public; and

**WHEREAS**, firearm injuries, deaths and suicides have a significant public health impact both nationally and locally; and

**WHEREAS**, firearm deaths from preventable, intentional and undetermined causes totaled 39,773 in 2017, a 2.9% increase from 38,658 deaths in 2016, according to the National Safety Council, and suicide deaths are the most common firearm related fatalities, accounting for 60% of deaths related to firearms, according to Centers for Disease Control and Prevention, National Center for Injury Prevention and Control; and

**WHEREAS**, data indicates that access to a firearm increases the risk of death by suicide by three times (Anglemyer A, Horvath T, Rutherford G. “The accessibility of firearms and risk for suicide and homicide victimization among household members: A systematic review and meta-analysis.” *Annals of Internal Medicine*. 2014; 160(2): 101-110); and

**WHEREAS**, compared with people who stored their firearms unlocked and/or loaded, those who stored their firearms safely were less likely to die by firearm suicide (Edmond D. Shenassa, Michelle L. Rogers, Kirsten L. Spalding, and Mary B. Roberts, “Safer Storage of Firearms at Home and Risk of Suicide: a Study of Protective Factors in a Nationally Representative Sample,” *Journal of Epidemiology & Community Health* 58, no. 10 (2004): 841–848); and

**WHEREAS**, nationally representative survey data suggests that approximately 380,000 guns are stolen from individual gun owners each year, and firearm owners who do not safely store their firearms are significantly more likely to have their guns stolen (David Hemenway, Deborah Azrael, and Matthew Miller, “Whose Guns are Stolen? The Epidemiology of Gun Theft Victims,” *Injury Epidemiology* 4, no. 1 (2017)); and

**WHEREAS**, more than half of all gun owners store at least one gun without any locks or other safe storage measures, and nearly a quarter of all gun owners report storing all of their guns in an unlocked location in the home (Cassandra K. Crifasi, et al., “Storage Practices of US Gun Owners in 2016,” *American Journal of Public Health* 108, no. 4 (2018): 532–537); and

**WHEREAS**, Safe storage behavior can help to mitigate the risks of unsecured guns, with studies showing that these practices can prevent both firearm injuries and gun thefts (Michael C.

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Ordinance No. 644

Page 1

Monuteaux, Deborah Azrael, and Matthew Miller, "Association of Increased Safe Household Firearm Storage With Firearm Suicide and Unintentional Death Among US Youths," *JAMA Pediatrics* (2019)); and

**WHEREAS**, safe storage laws can help increase compliance with safe storage behaviors, and states with a law in place that required handguns to be locked at least in certain circumstances experienced reduced rates of firearm suicide (Michael D. Anestis and Joye C. Anestis, "Suicide Rates and State Laws Regulating Access and Exposure to Handguns," *American Journal of Public Health* 105, no. 10 (2015): 2049–2058); and

**WHEREAS**, keeping a firearm locked or disabled with a trigger lock, when the firearm is not being carried by or under the control of an authorized user, prevents unauthorized users from accessing and using firearms, which can reduce tragedies due to suicide, unintentional discharges, and firearm theft; and

**WHEREAS**, requiring firearms in a residence, when not being carried by, or in the immediate control of, an authorized user, to be either disabled with trigger locks or stored in a locked container ("safe storage requirements"), is consistent with Second Amendment rights and is constitutional (*Jackson v. City & Cty. of San Francisco* (9<sup>th</sup> Cir. 2014) 746 F.3d 953); and

**WHEREAS**, safe storage requirements apply only to firearms that are not being lawfully carried or within the immediate control of a lawful user, and allow lawful firearm owners to carry loaded and unlocked firearms in their home at any time.

**THE CITY COUNCIL OF THE CITY OF MORRO BAY, CALIFORNIA DOES HEREBY FIND AND ORDAIN AS FOLLOWS:**

**SECTION 1. CHAPTER 9.36 (SAFE STORAGE OF FIREARMS) IS HEREBY ADDED TO TITLE 9 OF THE MORRO BAY MUNICIPAL CODE, TO READ AS FOLLOWS:**

**"Chapter 9.36 - SAFE STORAGE OF FIREARMS**

*9.36.010 - Purpose and Intent.*

*9.36.020 - Definitions.*

*9.36.030 - Prohibition.*

*9.36.040 - Violation and Penalty.*

**9.36.010 - Purpose and Intent.**

This law is intended to reduce firearm violence and firearm injuries and make the City safer. Having an unsecured firearm in the home is associated with an increased risk of firearm-related injury, death and suicide. Applying trigger locks or using locked containers when storing firearms in the home reduces the risk of firearm injury and death. Keeping a firearm locked or stored safely when it is not being carried or within immediate control ensures that it cannot be accessed and used by others without the owners' knowledge or permission. This simple measure significantly

decreases the risk that the firearm will be used to commit suicide, homicide or inflict injury, whether intentionally or unintentionally.

### **9.36.020 - Definitions.**

The following words and phrases, as used in this chapter, shall have the following meanings:

- A. "Firearm" means a device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of an explosion or other form of combustion, as defined in California Penal Code section 16520, as amended from time to time.
- B. "Locked container" means a secure container that is fully enclosed and locked by a padlock, key lock, combination lock or similar locking device, as defined in California Penal Code section 16850, as amended from time to time, and is listed on the California Department of Justice Bureau of Firearms roster of approved firearm safety devices.
- C. "Residence" means any structure intended or used for human habitation, including, but not limited to, houses, condominiums, rooms, accessory dwelling units, motels, hotels, vacation rentals, single room occupancies, time-shares, and recreational and other vehicles where human habitation occurs.
- D. "Trigger lock" means a trigger lock that is listed on the California Department of Justice's roster of approved firearm safety devices and that is identified as appropriate for that firearm by reference to either the manufacturer and model of the firearm or to the physical characteristics of the firearm that match those listed on the roster for use with the device under Penal Code section 23655(d), as amended from time to time.

### **9.36.030 - Prohibition.**

No person shall keep a firearm within a residence unless the firearm is:

- 1. Stored in a locked container or disabled with a trigger lock; or
- 2. Carried on the person of the owner, or other lawfully authorized user of the firearm; or
- 3. Within close enough proximity and control that the owner, or other lawfully authorized user of the firearm, can readily retrieve and use the firearm as if carried on that person.

### **9.36.040 - Violation and Penalty.**

Failure to comply with any of the requirements of this chapter is a misdemeanor punishable by imprisonment in the city or county jail for a period not exceeding six months or by fine not exceeding one thousand dollars, or by both. Where the city attorney has determined that such action would be in the best interests of justice, the city attorney may specify in the accusatory pleading that the violation shall be an infraction and the violation shall be prosecuted as an infraction.

**SECTION 2. SEVERABILITY.** If any section, subsection, sentence, clause, phrase, or portion of this ordinance is, for any reason, held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining

portions of this ordinance. The City Council hereby declares that it would have adopted this ordinance and each section, subsection, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases, or portions thereof may be declared invalid or unconstitutional.

**SECTION 3. EFFECTIVE DATE.** This ordinance shall be in full force and effect thirty (30) days after its passage.

**SECTION 4. CERTIFICATION.** The City Clerk shall certify to the adoption of this ordinance, and shall cause the same to be posted and codified in the manner required by law.

**INTRODUCED** at a regular meeting of the City Council held on the 14<sup>th</sup> day of September 2021, by motion of Council Member Addis and seconded by Mayor Headding.

**PASSED AND ADOPTED** on the \_\_\_\_ day of \_\_\_\_\_ 2021, by the following vote:

AYES:  
NOES:  
ABSENT:

\_\_\_\_\_  
JOHN HEADDING, Mayor

ATTEST:

\_\_\_\_\_  
DANA SWANSON, City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
CHRIS F. NEUMEYER, City Attorney

STATE OF CALIFORNIA            )  
COUNTY OF SAN LUIS OBISPO    )  
CITY OF MORRO BAY             )

I, Dana Swanson, CITY CLERK OF THE CITY OF MORRO BAY, DO HEREBY CERTIFY that the foregoing Ordinance Number 644 was duly adopted by the City Council of the City of Morro Bay at a regular meeting of said Council on the \_\_\_\_ day of \_\_\_\_\_, 2021, and that it was so adopted by the following vote:

AYES:  
NOES:  
ABSENT:

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of the City of Morro Bay, California, this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

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DANA SWANSON, City Clerk

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AGENDA NO: A-6

MEETING DATE: September 28, 2021

# Staff Report

**TO:** Honorable Mayor and City Council      **DATE:** September 1, 2021  
**FROM:** Rob Livick, PE/PLS/QSD – City Engineer  
**SUBJECT:** Authorization to execute and record Conservation Covenant on City-owned property adjacent to the City’s Water Reclamation Facility (WRF)

## **RECOMMENDATION**

Staff recommends the City Council take the following action:

1. Authorize the Mayor to Sign the Conservation Covenant protecting 19.5 acres of critical habitat as required by the U.S. Environmental Protection Agency (USEPA) and U.S. Fish and Wildlife Service (USFWS) as a condition of the loan funding construction of the Water Reclamation project.
2. Once signed, the City Clerk is directed to record the document with the County of San Luis Obispo Clerk Recorder and transmit a copy of the recorded document to the USEPA.

## **FISCAL IMPACT**

Not executing the conservation covenant could risk the low interest Water Infrastructure Finance and Innovation Act (WIFIA) loan from the EPA.

## **BACKGROUND/DISCUSSION**

The City is required to comply with various federal statutes to qualify for the low interest WIFIA loan. These federal statutes include the Clean Water Act and the Endangered Species Act. The latter requires the preparation of a biological opinion to assess impacts to threatened or endangered species. As such, the City received a Biological Opinion from the USFWS dated February 20, 2020, that includes requirements mandating the City mitigate the loss of 17 acres of California red-legged frog critical habitat. This mitigation is accomplished through the recordation of a conservation covenant for 19.5 acres of the City’s property on the Water Reclamation Facility (WRF) site.

If City Council authorizes the Mayor to sign this conservation covenant, staff will record the document with the County of San Luis Obispo Clerk Recorder and transmit a copy of the recorded document to the EPA.

## **CONCLUSION**

The City is required to record the subject conservation covenant protecting 19.5 acres of the WRF site to protect endangered species in order to comply with the terms of the City’s

Prepared By: RL

Dept Review: GK

City Manager Review: SC

City Attorney Review: JWP

agreement for the low interest EPA WIFIA loan, the Biological Opinion, and federal statutes.

**ATTACHMENT**

1. Draft Covenant

**RECORDING REQUESTED BY AND  
WHEN RECORDED RETURN TO:**

City of Morro Bay  
Attn: City Clerk  
595 Harbor Street  
Morro Bay, CA 93442

APN 073-101-019

SPACE ABOVE FOR RECORDER'S USE ONLY

**DECLARATION OF CONSERVATION COVENANT**

**THIS DECLARATION OF CONSERVATION COVENANT (HEREINAFTER THE "CONSERVATION COVENANT"), dated this \_\_\_\_ day of \_\_\_\_\_, 2021, by the City of Morro Bay ("Covenantor" or "CITY") for the benefit of the United States of America acting by and through the U.S. Environmental Protection Agency ("USEPA") is made with reference to the following facts.**

**1. RECITALS**

- 1.1. Covenantor is the sole owner in fee simple of certain real property in an unincorporated portion of the County of San Luis Obispo, State of California, described in a Grant Deed recorded on January 24, 2020, as Document Number 2020003622 of Official Records in the Office of the County Recorder at said County; and described and depicted in Exhibits A-1 and A-2 (the "Real Property").
- 1.2. An area of 19.5 acres, described and depicted in Exhibit B-1 and B-2, of the Real Property has been set aside pursuant to the Endangered Species Act Section 7 consultation between USEPA and U.S. Fish and Wildlife Service ("USFWS") defined below and referred to herein as the "Mitigation Property."
- 1.3. The Property possesses wildlife and habitat values (collectively, "conservation values") of great importance to the United States.
- 1.4. This Conservation Covenant provides compensatory mitigation for impacts to approximately 17 acres of California red-legged frog critical habitat and is to satisfy the requirements of the Section 7 consultation and Biological Opinion #2020-F-0010 issued by USFWS, the USEPA pursuant to its authority under the federal Clean Water Act (33 U.S.C. Section 1344) and is attached as Exhibit C.
- 1.5. The Biological Opinion was issued to USEPA on February 20, 2020, and authorized impacts of approximately 17 acres of California red-legged frog critical habitat composed

of annual grassland for grading activities associated with construction of the Water Reclamation Facility being funded through the Water Infrastructure Finance and Innovation Act (WIFIA). Said activity is located as shown on the Approved Construction Plans on file in the office of the City Engineer.

**2. COVENANTS, TERMS, CONDITIONS AND RESTRICTIONS**

- 2.1. In consideration of the above recitals and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and pursuant to California law. Covenantor hereby voluntarily records a conservation covenant in perpetuity over the Mitigation Property. This conservation covenant shall run with the land and be binding on Covenantor and Covenantor's heirs, successors in interest, administrators, assigns, lessees, and other occupiers or users of the Mitigation Property or any portion of it.

2.2. Purpose. The purpose of this Conservation Covenant is to ensure the Mitigation Property will be retained forever in a natural condition, defined below, and to prevent any use of the Mitigation Property that will impair or interfere with the conservation values of the Mitigation Property. Covenantor intends this Conservation Covenant will confine the use of the Mitigation Property to such activities, including without limitation, those involving the preservation and enhancement of native species and their habitat in a manner consistent with the habitat conservation purposes of this Conservation Covenant.

2.2.1. The term “natural condition” shall initially mean the condition of the Mitigation Property at the time of this grant. However, the intent of Covenantor and USEPA is that certain mitigation activities, as required in the Biological Opinion, and described in the Riparian Enhancement Plan and other associated documents, should occur on the Mitigation Property. Covenantor certifies there are no buildings and easements existing on the Mitigation Property at the time of this Covenant. The natural condition is evidenced in part by a plat of the Mitigation Property showing all relevant property lines, easements, rights of way and dedications, and all existing man-made improvements, and major, distinct natural features. Covenantor has delivered further evidence of the “natural condition” to USEPA consisting of: (1) an aerial photograph of the Mitigation Property at an appropriate scale taken as close in time as possible to the date the grant is made; (2) on-site photographs showing all man-made improvements. A copy of the survey plat, construction plans, and copies of the aerial and on-site photos are on file in the office of the Morro Bay City Engineer. If a controversy arises with respect to the natural condition of the Mitigation Property, then the parties shall not be foreclosed from utilizing any and all other relevant documents, surveys, photographs or other evidence or information to assist in the resolution of the controversy.

2.3. Covenantor. To accomplish the purposes of this Conservation Covenant, Covenantor hereby covenants as follows:

2.3.1. To preserve and protect the conservation values of the Mitigation Property;

2.3.2. To prevent any activity on or use of the Mitigation Property that is inconsistent with the purposes of this Conservation Covenant and to require the restoration of such areas or features of the Mitigation Property that may be damaged by any act, failure to act, or any use that is inconsistent with the purposes of this Conservation Covenant.

2.3.3. Prohibited Uses. Any activity that does not presently exist on, or use of, the Mitigation Property inconsistent with the purposes of this Conservation Covenant is prohibited. Without limiting the generality of the foregoing, the following uses are expressly prohibited:

2.3.3.1. Unseasonal watering following plant establishment in the Riparian Enhancement Area, use of herbicides except in areas identified as containing noxious weeds, rodenticides, or incompatible fire protection activities and any and all other uses which may adversely affect the purposes of this Conservation

Covenant.

- 2.3.3.2. Use of off-road vehicles and use of any other motorized vehicles except on designated roadway, if any;
  - 2.3.3.3. Soil disturbance for cultivation or other agricultural activity of any kind;
  - 2.3.3.4. Erecting of any building or other improvement, billboard, or sign (except for signage permitted under Section 7, below);
  - 2.3.3.5. Depositing of soil, trash, ashes, garbage, waste, bio-solids or any other material;
  - 2.3.3.6. Excavating, dredging, drilling or removing of loam, gravel, soil, rock, sand or other material;
  - 2.3.3.7. Otherwise altering the general topography of the Mitigation Property, including but not limited to building of roads and associated work;
  - 2.3.3.8. Removing, destroying, or cutting of vegetation, except as required by law for (1) fire breaks, (2) maintenance of existing trails or roads, (3) prevention or treatment of disease, or (4) required mitigation programs;
  - 2.3.3.9. Establishing any easement, for any purpose (without the written consent of USEPA), within the boundaries of the Mitigation Property not in existence, disclosed to and approved by USEPA, as of the date of this Covenant; and
  - 2.3.3.10. Surface entry for exploration or extraction of minerals.
- 2.4. Covenantor's Duties. Covenantor shall undertake all reasonable actions to prevent the unlawful entry and trespass by persons whose activities may degrade or harm the conservation values of the Mitigation Property and shall comply with all conditions of the Biological Opinion, a copy of which is attached hereto as Exhibit "C" and incorporated herein by this reference.
- 2.5. Reserved Rights. Covenantor reserves to itself, and to its personal representatives, heirs, successors, and assigns, all rights accruing from its ownership of the Mitigation Property, including the right to engage in or to permit or invite others to engage in all uses of the Mitigation Property that are consistent with the purposes of this Conservation Covenant.
- 2.6. USEPA Remedies. If USEPA determines Covenantor or its agents, contractors, or invitees are in violation of the terms of this Conservation Covenant or a violation is threatened, then the USEPA making such determination shall give written notice to Covenantor of such violation and demand in writing the cure of such violation. If Covenantor fails to cure the violation within fifteen (15) days after receipt of said written notice and demand, or said cure reasonably requires more than fifteen (15) days to complete and Covenantor fails to begin the cure within the fifteen (15) day period or fails

to continue diligently to complete the cure, then either USEPA may bring an action at law or in equity in a court of competent jurisdiction to enforce compliance by Covenantor with the terms of this Conservation Covenant, to recover any damages to which USEPA may be entitled for violation by Covenantor of the terms of this Conservation Covenant or for any injury to the conservation values of the Mitigation Property, to enjoin the violation, *ex parte* as necessary, by temporary or permanent injunction without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies, or for other equitable relief, including, but not limited to, the restoration of the Mitigation Property to the condition in which it existed prior to any such violation or injury. Without limiting Covenantor's liability therefore, either USEPA may apply any damages recovered to the cost of undertaking any corrective action on the Mitigation Property.

- 2.7. If USEPA, in its sole discretion, determines circumstances require immediate action to prevent or mitigate significant damage to the conservation values of the Mitigation Property, then USEPA may pursue its remedies under Section 2.6 without prior notice to Covenantor or without waiting for the period provided for cure to expire. The rights of USEPA under this section apply equally to actual or threatened violations of the terms of this Conservation Covenant. Covenantor agrees USEPA remedies at law for any violation of the terms of this Conservation Covenant are inadequate and that USEPA shall be entitled to the injunctive relief described in this section, both prohibitive and mandatory, in addition to such other relief to which USEPA may be entitled, including specific performance of the terms of this Conservation Covenant, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. The remedies of USEPA described in this section shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity, including, but not limited to, the remedies set forth in California Civil Code Section 815, *et seq.*, inclusive. The failure of USEPA to discover a violation or to take immediate legal action shall not bar the USEPA from taking such action at a later time.
- 2.8. If at any time in the future, Covenantor or any subsequent transferee uses or threatens to use the Mitigation Property for purposes inconsistent with this Conservation Covenant, then appropriate enforcement agencies of the United States have standing to enforce this Conservation Covenant. These rights are in addition to, and do not limit, the rights of enforcement under any one or more of the Biological Opinion, or any of the various documents create thereunder or referred to therein.
- 2.9. Costs of Enforcement. Any costs incurred by USEPA where it is the prevailing party, in enforcing the terms of this Conservation Covenant against Covenantor, including, but not limited to, reasonable costs of suit and attorneys' fees, and any reasonable costs of restoration necessitated by Covenantor's violation or negligence under the terms of this Conservation Covenant shall be borne by Covenantor.
- 2.10. USEPA Discretion. Enforcement of the terms of this Conservation Covenant by USEPA shall be at the discretion of the USEPA, and any forbearance by USEPA to exercise its rights under this Conservation Covenant in the event of any breach of any term of the Conservation Covenant shall not be construed to be a waiver by USEPA of such terms or of any subsequent breach of the same or any other term of this Conservation Covenant

or of any of USEPA rights under this Conservation Covenant. No delay or omission by USEPA in the exercise of any right or remedy upon any breach by Covenantor shall impair such right or remedy or be construed as a waiver. Further, nothing in this Conservation Covenant creates a non-discretionary duty upon the USEPA to enforce its provisions, nor shall deviation from these terms and procedures, or failure to enforce its provisions give rise to a private right of action against USEPA by any third parties.

- 2.11. Acts Beyond Covenantor’s Control. Nothing contained in this Conservation Covenant shall be construed to entitle USEPA to bring any action against Covenantor for any significant injury to or change in the Mitigation Property resulting from natural causes beyond Covenantor ’s control, including, but not limited to, fire not caused by Covenantor, flood, storm, and earth movement, or from any prudent action taken by Covenantor under emergency conditions to prevent, abate, or mitigate significant injury to the Mitigation Property resulting from such causes. Such excuse from performance by Covenantor shall only be allowed if such event beyond Covenantor’s control has caused a substantial failure of or degradation of the conservation and environmental values on the Mitigation Property. Notwithstanding the foregoing, even actions undertaken during emergency conditions must receive prior authorization from the USEPA (through expedited procedures, if appropriate) if the action involves discharge of dredged or fill material into jurisdictional “waters of the United States.” The lack of such authorization may result in an enforcement action by the USEPA.
- 2.12. Installation and Maintenance of Signage. Covenantor shall post and maintain appropriate signage identifying the Conservation Covenant. Such signage shall be subject to the prior written approval of USEPA, which shall not be unreasonably withheld.
- 2.13. Access. This Conservation Covenant does not convey a general right of access to the public.
- 2.14. Costs and Liabilities. Covenantor retains all responsibilities and shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep, and maintenance of the Mitigation Property. Covenantor agrees that USEPA shall have no duty or responsibility for the operation or maintenance of the Property, the monitoring of hazardous conditions thereon, or the protection of Covenantor, the public or any third parties from risks relating to conditions on the Mitigation Property. Covenantor remains solely responsible for obtaining any applicable governmental permits and approvals for any activity or use permitted by this Conservation Covenant, and any activity or use shall be undertaken in accordance with all applicable federal, state, local and administrative agency statutes, ordinances, rules, regulations, orders or requirements.
- 2.15. Taxes. Covenantor shall pay before delinquency all taxes, assessments, fees, and charges of whatever description levied on or assessed against the Mitigation Property by competent authority (collectively “taxes”), including any taxes imposed upon, or incurred as a result of, this Conservation Covenant, and shall furnish USEPA with satisfactory evidence of payment upon request.
- 2.16. Indemnity. (a) Covenantor shall hold harmless, indemnify, protect and defend

USEPA and its respective directors, officers, employees, agents, contractors, and representative (collectively “Indemnified Parties”) from and against any and all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands, or judgments, including without limitation, reasonable attorneys’ fees (collectively “Claims”), arising from or in any way connected with: (1) injury to or the death of any person, or physical damage to any property occurring on or about the Mitigation Property, regardless of cause, except that Covenantor shall not be obligated to indemnify a particular USEPA if the injury or damage is due to the negligent or willful act or omission of that USEPA (2) the obligations specified in Sections 4, 9, and 9.1; or (3) the existence or administration of this Conservation Covenant.

2.17. Condemnation. The purposes of the Conservation Covenant are presumed to be the best and most necessary public use as defined at California Code of Civil Procedure Section 1240.680 notwithstanding Code of Civil Procedure Sections 1240.690 and 1240.700.

2.18. [RESERVED]

2.19. Subsequent Transfers. Covenantor agrees to incorporate the terms of this Conservation Covenant in any deed or other legal instrument by which Covenantor conveys or divests itself of any interest in all or any portion of the Property, including without limitation, a leasehold interest. Covenantor further agrees to give written notice to USEPA of the intent to transfer any interest at least fifteen (15) days prior to the date of such transfer. The failure of Covenantor to perform any act provided in this section shall not impair the validity of this Conservation Covenant or limit its enforceability in any way.

2.20. Notices. Any notice, demand, request, consent, approval, or communication that any party desires or is required to give to any other party or parties shall be in writing and be served personally or sent by recognized overnight courier that guarantees next-business-day delivery or by first class mail, postage prepaid, addressed as follows:

To Covenantor: City Clerk  
City of Morro Bay  
595 Harbor Street  
Morro Bay, CA 93442

To USEPA: U.S. Environmental Protection Agency  
Water Infrastructure Division  
Office of Wastewater Management  
1301 Constitution Ave., N.W.  
Room #6210G  
Washington, DC 20004

or to such other address as a party shall designate by written notice to the other parties. Notice shall be deemed effective upon delivery in the case of personal delivery or delivery by overnight

courier or, in the case of delivery by first class mail, five (5) days after deposit into the United States mail.

2.21. Amendment. This Conservation Covenant may be amended by Covenantor only with written approval of the USEPA. Any such amendment shall be consistent with the purposes of this Conservation Covenant and shall not affect its perpetual duration. Any such amendment shall be recorded in the official records of San Luis Obispo County, State of California.

2.22. General Provisions.

2.22.1. Controlling Law. The interpretation and performance of this Conservation Covenant shall be governed by the laws of the United States and the State of California.

2.22.2. Liberal Construction. Any general rule of construction to the contrary notwithstanding, this Conservation Covenant shall be liberally construed to affect the purposes of this Conservation Covenant. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the purposes of this Conservation Covenant that would render the provision valid shall be favored over any interpretation that would render it invalid.

2.22.3. Severability. If a court of competent jurisdiction voids or invalidates on its face any provision of this Conservation Covenant, such action shall not affect the remainder of this Conservation Covenant. If a court of competent jurisdiction voids or invalidates the application of any provision of this Conservation Covenant to a person or circumstance, such action shall not affect the application of the provision to other persons or circumstances.

2.22.4. Entire Agreement. This instrument together with the attached exhibits and any documents referred to herein sets forth the entire agreement of the parties with respect to the Conservation Covenant and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Conservation Covenant. No alteration or variation of this instrument shall be valid or binding unless contained in an amendment in accordance with Section 2.21.

2.22.5. No Forfeiture. Nothing contained herein will result in a forfeiture or reversion of Covenantor's title in any respect.

2.22.6. Successors. The covenants, terms, conditions, and restrictions of this Conservation Covenant shall be binding upon and inure to the benefit of Covenantor and its respective personal representatives, heirs, successors, and assigns and shall constitute a servitude running in perpetuity with the Mitigation Property.

2.22.7. Termination of Rights and Obligations. A party's rights and obligations under this Conservation Covenant terminates upon transfer of the party's interest in the Conservation Covenant or Property, except that liability for acts or omissions

occurring prior to transfer shall survive transfer.

2.22.8. Captions. The captions in this instrument have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon its construction or interpretation

2.23. No Hazardous Materials Liability. Covenantor represents and warrants that it has no knowledge of any release or threatened release of Hazardous Materials (defined below) in, on, under, about or affecting the Property. Without limiting the obligations of Covenantor under Section 2.16, Covenantor agrees to indemnify, protect, defend and hold harmless the Indemnified Parties (defined in Section 2.16) against all Claims (defined in Section 2.16) arising from or connected with any Hazardous Materials present, alleged to be present, or otherwise associated with the Mitigation Property at any time, except that Covenantor shall not be obligated to indemnify USEPA if the Hazardous Materials were placed, disposed or released by USEPA.

2.24. Despite any contrary provision of this Conservation Covenant, the parties do not intend this Conservation Covenant to be, and this Conservation Covenant shall not be, construed such that it creates in or gives to USEPA any of the following:

2.24.1. The obligations or liabilities of an “owner” or “operator”, as those terms are defined and used in Environmental Laws (defined below), including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. Section 9601, et seq.; hereinafter “CERCLA”); or

2.24.2. The obligations or liabilities of a person described in 42 U.S.C. Section 9607(a)(3) or (4); or

2.24.3. The obligations of a responsible person under any applicable Environmental Laws; or

2.24.4. The right to investigate and remediate any Hazardous Materials associated with the Mitigation Property; or

2.24.5. Any control over Covenantor’s ability to investigate, remove, remediate or otherwise clean up any Hazardous Materials associated with the Mitigation Property.

2.25. The term “Hazardous Materials” includes, without limitation, (a) material that is flammable, explosive or radioactive; (b) petroleum products, including by-products and fractions thereof; and (c) hazardous materials, hazardous wastes, hazardous or toxic substances, or related materials defined in CERCLA, the Hazardous Materials Transportation Act (49 U.S.C. Section 6901, et seq.); the Hazardous Waste Control Law (California Health & Safety Code Section 25100, et seq.); the Hazardous Substance Account Act (California Health & Safety Code Section 25300, et seq.), and in the regulations adopted and publications promulgated pursuant to them, or any other applicable federal, state or local laws, ordinances, rules, regulations or orders now in effect or enacted after the date of this Conservation Covenant.

2.26. The term “Environmental Laws” includes, without limitation, any federal, state, local or administrative agency statute, ordinance, rule, regulation, order or requirement relating to pollution, protection of human health or safety, the environment or Hazardous Materials. Covenantor represents, warrants and covenants to USEPA Covenantor’s activities upon and use of the Mitigation Property will comply with all Environmental Laws.

IN WITNESS WHEREOF Covenantor has executed this Conservation Covenant the day and year first above written.

COVENANTOR:

CITY OF MORRO BAY

By: \_\_\_\_\_  
John Headding, Mayor

Attest:

\_\_\_\_\_  
Dana Swanson, City Clerk

Approved as to Form:

\_\_\_\_\_  
Chris Neumeyer, City Attorney

## EXHIBIT "A-1" - WRF PARCEL DESCRIPTION

A portion of Parcel 2 of Parcel Map No. CO/MB 89-363 in the County of San Luis Obispo, State of California, as shown on map recorded in Book 48, at Page 13 of Parcel Maps in the Office of the San Luis Obispo County Recorder, described as follows:

Beginning at a point on the south line of said Parcel 2, distant thereon N 56°43'00" W, 93.00 feet from a 1-1/2" iron pipe at the southeast corner of said Parcel as shown on said map;

thence, leaving said south line, N 21°25'57" E, 408.00 feet;

thence N 15°10'57" E, 291.24 feet;

thence N 34°55'57" E, 195.04 feet;

thence N 0°00'57" E, 256.79 feet;

thence N 19°34'03" W, 702.95 feet;

thence S 70°25'57" W, 229.10 feet;

thence S 49°47'18" W, 698.48 feet;

thence S 6°51'42" W, 734.75 feet to the south line of said Parcel 2;

thence, along said south line, S 56°43'00" E, 879.66 feet to the Point of Beginning.

End of Description.

  
JoAnn B. Head

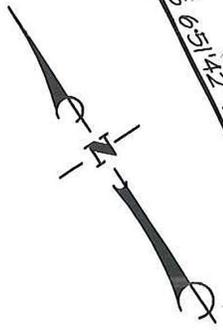
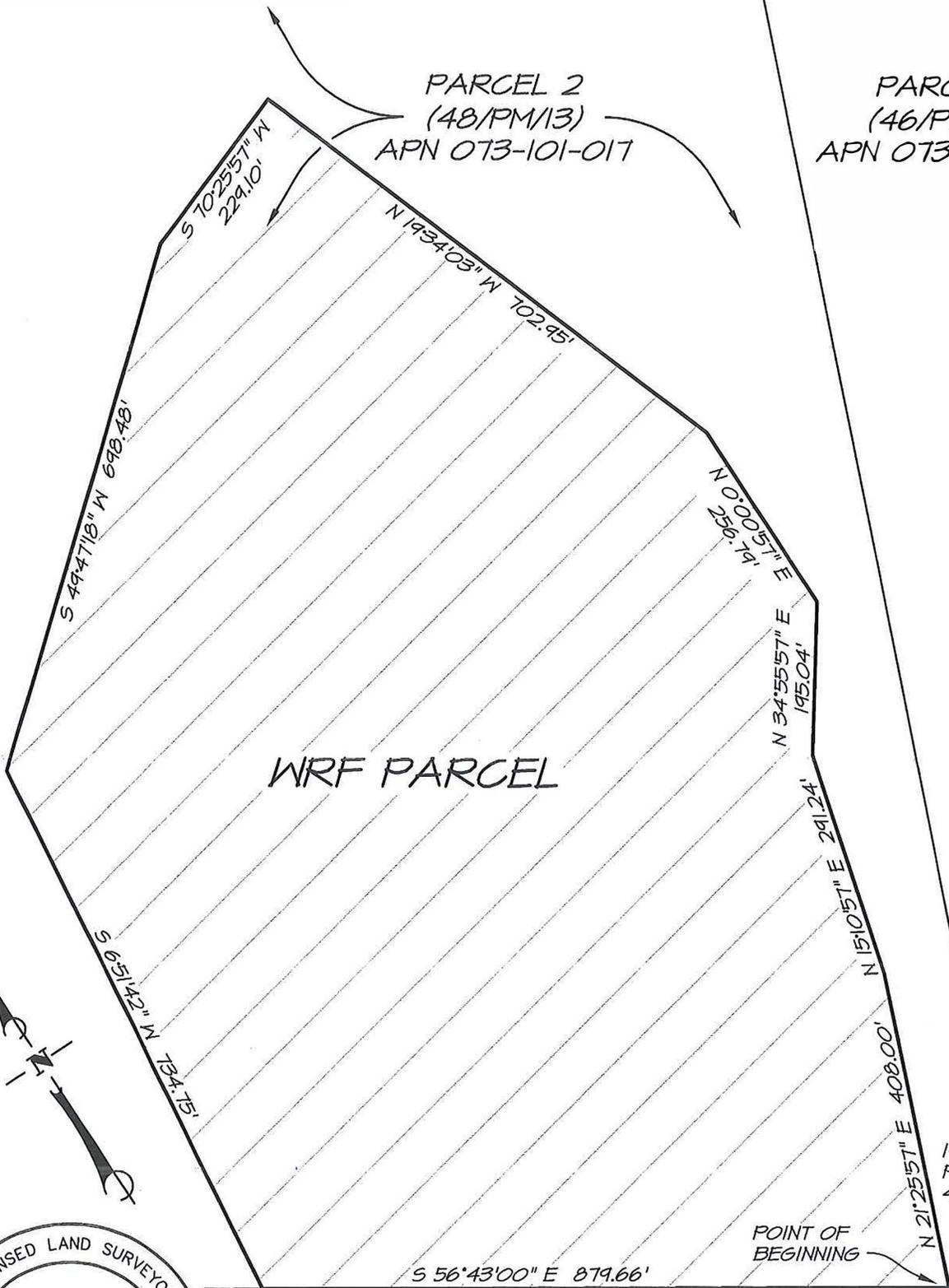


EXHIBIT "A-2"

PARCEL 2  
(48/PM/13)  
APN 073-101-017

PARCEL 1  
(46/PM/75)  
APN 073-121-022

WRF PARCEL



APN 068-411-007

JOANN HEAD LAND SURVEYING

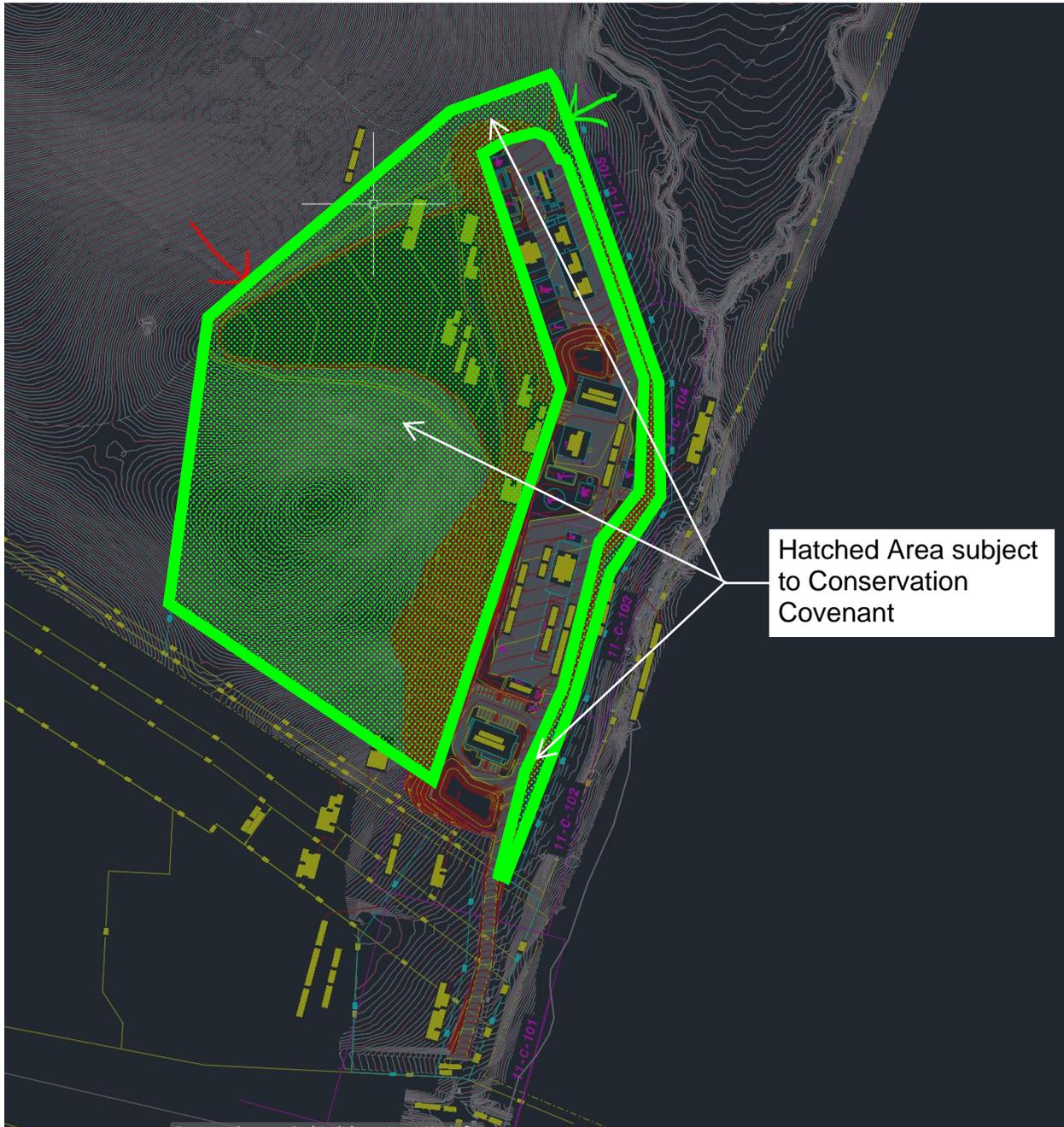
Post Office Box 887  
Santa Margarita, CA 93453  
(805) 674-1530



June, 2019

020-05 EX WRF.dwg

EXHIBIT B-1 and B-2  
(Placeholder for Legal Description Prepared By City Engineer)





## United States Department of the Interior

### U.S. FISH AND WILDLIFE SERVICE

Ecological Services  
Ventura Fish and Wildlife Office  
2493 Portola Road, Suite B  
Ventura, California 93003



IN REPLY REFER TO:  
08EVEN00-2020-F-0010

February 20, 2020

Alaina McCurdy  
U.S. Environmental Protection Agency  
William Jefferson Clinton West Building  
1301 Constitution Ave., N.W.  
Room # 6210G  
Washington, DC 20004

Subject: Biological Opinion of the City of Morro Bay's Water Reclamation Facility Project

This document transmits the U.S. Fish and Wildlife Service's (Service) biological opinion based on our review of the U.S. Environmental Protection Agency's (EPA) proposed funding of a new Water Reclamation Facility (project) for the City of Morro Bay and its effects on the federally threatened California red-legged frog (*Rana draytonii*) and its critical habitat in accordance with section 7 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 et seq.). We received your October 22, 2019 request for formal consultation on October 22, 2019.

We have based this biological opinion on information that accompanied your request for consultation, including the Biological Resources Assessment, South Bay Boulevard Site (Merk 2017), the Biological Resources Supplemental Information for the Morro Bay Wastewater Reclamation Facility Project (Merk 2019), the Morro Bay Water Reclamation Facility Final Environmental Impact Report (ESA Consultants 2018) and additional information provided throughout the consultation process on September 10, 2019, October 22, 2019, November 14, 2019, December 4, 2019, and December 13, 2019. These documents, and others relating to the consultation, are located at the Ventura Fish and Wildlife Office.

The Service published a final rule on August 27, 2019 (84 Federal Register 44976) that changed the definitions of some of the terms that we use in section 7(a)(2) consultations. The changes became effective on October 28, 2019. We developed this biological opinion in accordance with the changes in the final rule.

You have also requested our concurrence that the project may affect, but is not likely to adversely affect the federally endangered tidewater goby (*Eucyclogobius newberryi*) and the federally endangered Morro shoulderband snail (*Helminthoglypta walkeriana*). We provide our response to your informal consultation request below.

Additionally, you have requested our concurrence with your determination that the proposed action would have “no effect” on the federally endangered giant kangaroo rat (*Dipodomys ingens*), Morro Bay kangaroo rat (*Dipodomys heermanni morroensis*), San Joaquin kit fox (*Vulpes macrotis mutica*), California clapper rail (*Rallus longirostris obsoletus*), California condor (*Gymnogyps californianus*), California least tern (*Sterna antillarum browni*), least Bell’s vireo (*Vireo bellii pusillus*), southwestern willow flycatcher (*Empidonax trallii extimus*), blunt-nosed leopard lizard (*Gambelia silus*), and the federally threatened southern sea otter (*Enhydra lutris nereis*), marbled murrelet (*Brachyramphus marmoratus marmoratus*), western snowy plover (*Charadrius nivosus nivosus*), California tiger salamander (*Ambystoma californiense*), Kern primrose sphinx moth (*Euproserpinus euterpe*), and vernal pool fairy shrimp (*Branchinecta lynchi*). The regulations implementing section 7(a)(2) of the Act (50 CFR 402) do not require our concurrence with a “no effect” determination made by a Federal agency.

### **Informal Consultation**

#### Tidewater goby

Tidewater gobies may be present within the project area. Suitable habitat is present for tidewater gobies in the Morro Creek lagoon, downstream of the proposed pipeline bridge crossing of Morro Creek. Suitable habitat is also present in the Morro Bay estuary and Chorro Creek, where there are historic occurrences of tidewater goby from 1984 and 1999 (CNDDDB 2019). Tidewater gobies can migrate upstream from estuaries up to one kilometer (Service 2005, pp. 12-13). Depending on water volume and season, gobies may be present in the unnamed drainages near the proposed pipeline route.

The project will not require any work directly in waterways. The pipeline will cross Morro Creek via a pipeline bridge, and will pass under Willow Camp Creek drainage along Quintana Road. If present, tidewater gobies may be exposed to effects of the project if construction debris, liquids, or disturbed substrate washes into waterways. This could negatively affect water quality in tidewater goby habitat, either in the immediate area, or downstream. The applicant has proposed the following measures to avoid effects of the project to tidewater gobies:

1. The applicant will implement erosion and sedimentation control measures (e.g., silt fences, straw bales or wattles) in all areas where disturbed substrate may potentially wash into waters via rainfall or runoff, particularly around stockpiled material and at the downstream end of each project reach. Such measures will remain in place and be inspected periodically until the project is complete and exposed soils are stabilized. Diversion structures, sediment traps/basins and associated equipment (e.g., pumps, lines) will be maintained in optimal working condition for the entire duration of the preparation and construction periods.
2. Prior to the start of work, the applicant will prepare a spill prevention plan to ensure prompt and effective response to any accidental spills. The applicant will inform all workers of the importance of preventing spills and of the appropriate measures to take should a spill occur. All project-related hazardous materials spills within the project site will be cleaned up

immediately. Spill prevention and cleanup materials will be on-site at all times during the course of the project.

3. All refueling, maintenance, and washing of equipment and vehicles will occur on paved areas in a location where a spill would not travel into a drainage feature or storm drain inlet. This fueling and staging area will conform to Best Management Practices applicable to attaining zero discharge of stormwater runoff into waters of the U.S. and State of California. At a minimum, all equipment and vehicles must be checked and maintained on a daily basis to ensure proper operation and avoid potential leaks or spills. Workers will washing equipment only in a location where polluted water and materials can be contained for subsequent removal from the site.
4. The applicant will designate a concrete washout location onsite, in an area at least 50 feet from any drainage feature or storm drain inlet. The applicant will maintain and inspect the washout weekly, and cover it prior to and during any rain event. If a container is used, the applicant will remove concrete debris whenever the washout container reaches the half-full mark.
5. Best Management Practices for dust abatement will be a component of the project's construction documents. The applicant will carefully implement dust control requirements to prevent water used for dust abatement from transporting pollutants to storm drains leading to the creek channel.
6. The applicant will prepare a frac-out contingency plan prior to initiation of construction activities that involve horizontal direction drilling activities. The applicant will implement the frac-out contingency plan during horizontal directional drilling construction activities. At a minimum, the plan will include the following:
  - a. Measures to minimize the potential for a frac-out associated with horizontal directional drilling activities;
  - b. Provide for the timely detection of frac-outs;
  - c. Protect areas that are considered environmentally sensitive (streams, wetlands, other biological resources, cultural resources);
  - d. Ensure an organized, timely, and "minimum-impact" response in the event a frac-out and the release of drilling mud occurs; and
  - e. Ensure that all appropriate notifications are made to the appropriate environmental specialists immediately (e.g., qualified biological monitor), and to appropriate regulatory agencies within 24 hours and that documentation is completed.

We concur with you determination that the project may affect, but is not likely to adversely affect the tidewater goby. We based our determination on the following:

1. The project does not involve any work directly in waterways where tidewater gobies may be present, either in the immediate area or downstream of the project area.
2. The applicant proposes numerous measures to avoid runoff of chemicals, sediment, or materials into waterways within the project area.

As a reminder, in the unlikely event of a frac-out during horizontal directional drilling, the EPA and applicant must contact our office immediately to assess whether formal consultation for tidewater goby may be necessary.

### Morro shoulderband snail

Morro shoulderband snail may be present within the project area. Morro shoulderband snails inhabit coastal dune scrub and maritime chaparral plant communities in stabilized dune systems. They typically occur on dune lands, as well as Baywood fine sand soils (Service 1998, p. 3). They have also been found in iceplant (*Carpobrotus sp.*) and other non-native vegetation that occurs on Baywood fine sand or dune lands.

Approximately one third of the pipeline route of the project would occur on Baywood fine sand soils and dune lands. However, the project would largely occur in disturbed areas that are currently developed and devoid of suitable habitat. Morro shoulderband snails have been previously identified in an undeveloped lot adjacent to the project, between Atascadero Road and Morro Bay High School (Merk 2017, p. 30). If present within the project area, Morro shoulderband snails may be harmed by ground disturbance, vegetation clearing, and staging of materials and equipment. Ground disturbance and vegetation clearing activities could result in snails becoming trapped in work materials or equipment or crushed by equipment or human activity. The applicant has proposed the following measures to avoid adverse effects of the project to Morro shoulderband snails:

1. A Service-approved biologist will survey for Morro Bay shoulderband snails no more than 48 hours before initial ground-disturbing and vegetation-clearing activities that occur on dune land or Baywood fine sand. The Service-approved biologist will monitor all construction activities occurring on dune land or Baywood fine sand. If the species is located during any of these pre-activity surveys or during subsequent project activities, the Service will be contacted immediately and activities will halt in that particular area until it is determined what actions may be necessary to avoid take of the snail.
2. Any equipment use, materials stockpiling, lift station construction, or any other uses proposed on the north side of Atascadero Road opposite the existing treatment plant will be setback from any potentially suitable habitat. If construction adjacent to potentially suitable Morro shoulderband snail habitat occurs during the winter rain season, a Service-approved biologist will survey the work area immediately following rain events or dense fog conditions to ensure that no Morro shoulderband snails have entered the site.
3. Silt fence will not be used to exclude Morro shoulderband snails from work areas where suitable sandy soils and habitat may be present. Work areas in sandy soils near potential Morro shoulderband snail habitat will be clearly delineated with flagging and/or stakes to limit the boundaries of work areas and confine them to developed and paved areas. If silt fencing must be used for other reasons in areas near potential Morro shoulderband snail habitat, additional measures developed by a Service-approved biologist will be implemented to avoid harm to the Morro shoulderband snail.

We concur with your determination that the project may affect, but is not likely to adversely affect the Morro shoulderband snail. We have based our concurrence on the following:

1. The parts of the project that occur on dune lands and Baywood fine sand soils would affect very little potential Morro shoulderband snail habitat, as the project occurs largely on disturbed surfaces.
2. The applicant proposes measures to avoid injury, entrapment, or death to the Morro shoulderband snail through setbacks of equipment from potentially suitable habitat; pre-activity surveys and biological monitoring on dune land and Baywood fine sand soils; and if snails are present and in harm's way, all work activity that may result in take of snails will cease.

### **Consultation History**

The EPA submitted a request for concurrence that the project may affect, but is not likely to adversely affect the California red-legged frog on July 29, 2019. The Service requested that EPA provide additional information on project effects to the California red-legged frog, which the EPA provided responses to on September 10, 2019. On October 4, 2019, the Service provided their non-concurrence with EPA's determination of project effects to the California red-legged frog, and recommended that EPA initiate formal consultation.

On October 22, 2019, the EPA requested to initiate formal consultation on project effects to the California red-legged frog. The Service, EPA, and representatives from the City of Morro Bay participated in conference calls on November 1, 2019 and November 15, 2019 to address concerns about the risk of California red-legged frogs entering the project area, wildlife exclusion fencing, construction during the wet season, and compensatory mitigation.

The EPA determined that the project was not likely to adversely affect critical habitat of the California red-legged frog on September 18, 2019. We did not concur with this determination, therefore we include the effects of the project to California red-legged frog critical habitat in formal consultation of this biological opinion.

On December 4, 2019, the EPA requested an expedited timeline and requested that the Service complete the biological opinion by January 20, 2020. We did not have sufficient information to initiate formal consultation until December 13, 2019, and thus were not able to meet the EPA's request.

On January 31, 2020, the EPA requested a draft of the biological opinion by February 13, 2020, which the Service provided on February 13, 2020.

## BIOLOGICAL OPINION

## DESCRIPTION OF THE PROPOSED ACTION

The EPA proposes to fund a new Water Reclamation Facility (WRF) for the City of Morro Bay to improve reuse of advanced treated recycled water and replenish groundwater for indirect potable reuse. The City of Morro Bay (applicant) would construct the WRF, pump stations, injection wells, a water pipeline between the WRF and injection wells, and a pipeline between the WRF and lift stations. The applicant would also decommission the existing Wastewater Treatment Plant.

The WRF and operations and maintenance buildings would be located adjacent to the City of Morro Bay, north of the northern terminus of South Bay Boulevard. A paved road would connect the WRF to South Bay Boulevard, lying parallel to an unnamed drainage referred to as Drainage 3 (Merk 2017, Figure 3). A pipeline would run primarily from the WRF along Quintana Road to the lift stations at the existing Wastewater Treatment Plant. The applicant proposes injection well sites to the east and west of Quintana Road. The Biological Resources Supplemental Information provides more detail on project layout (Merk 2019, p. 8), and is hereby incorporated by reference.

To construct the WRF, the applicant would excavate and grade at the site, construct buildings and water retention ponds, install night lighting around the facility, install fence around the WRF perimeter, pave parking areas and the road to the facility, and revegetate and landscape areas of temporary disturbance. The permanent fencing will include a concrete exclusion barrier along the eastern boundary of the site that extends 24 inches above grade. The top of the concrete exclusion barrier will include a six-inch lip that will serve as a climbing barrier for the California red-legged frog. Affixed to the top of the concrete exclusion barrier will be a six-foot chain link fence with privacy slats. The remaining perimeter of the site will include a six-foot chain link fence with privacy slats. Permanent night lighting will be minimal with low intensity to prevent spillover into open space areas. The applicant expects construction of the WRF to take approximately 24 months.

The applicant would install the pipeline underground mostly along the disturbed right-of-way along Quintana Road. The pipeline would cross Morro Creek via a pipe bridge. The pipeline bridge would require the applicant to remove riparian vegetation for the bases of the pipeline bridge. No work will occur in the creek. The applicant would install the pipeline underneath Willow Camp Creek via horizontal directional drilling, thus no work in the waterway would occur. The applicant would construct two lift stations, which involves installing piping and electrical equipment, and constructing the pump house. The applicant estimates constructing the lift stations would take six to eight months.

Four injection well sites would be installed, either in the east injection well field or west injection well field (Merk 2019, p. 9). The applicant would drill and construct the well, and

conduct water testing. The applicant would convey water discharged during well drilling to onsite temporary settling basins and then to the storm drain under a permit from the Regional Water Quality Control Board.

The applicant would decommission the existing Wastewater Treatment Plant by demolishing and removing structures and equipment, above and below grade. The applicant would backfill trenches with clean structural fill and grade the site to fit the basic drainage pattern of the surrounding facility. The applicant expects demolition will take approximately three months to complete.

After construction is completed and the facility is operating, there would be traffic associated with worker commute and facility operations. Lift stations and pipelines would require general mechanical maintenance on an approximately quarterly basis. Refer to the Morro Bay Water Reclamation Facility Final Environmental Impact Report for more project details (Environmental Science Associates 2018, pp. 2-1—2-33).

The project would occur on approximately 17 acres of critical habitat for the California red-legged frog. The applicant proposes to mitigate for the loss of California red-legged frog critical habitat through the conservation of 19.5 acres of critical habitat. These acres would be located on the same parcel as the Water Reclamation Facility. The applicant will achieve protection through a conservation easement or another appropriate and feasible mechanism. The applicant will develop the protection in coordination with the Service and complete protection within 12 months of initiating project activities. The construction process will disturb nine acres of the proposed mitigation area by grading and installing fourteen drainage swales. The drainage swales would be concrete-lined with sides at a 1:1 slope. The applicant will revegetate the disturbed areas and return them to grassland.

The applicant's Coastal Development Permit, issued by the Coastal Commission of California, obligates the applicant to restore and enhance 1.5 acres of riparian zone. These acres are located between the Water Reclamation Facility's eastern fence line and the property boundary parallel to Drainage 3. The applicant will plant native trees, shrubs, and grasses to enhance the riparian area. A restoration ecologist will monitor the riparian restoration zone for five years or until restored areas have met success criteria. The proposed riparian restoration zone connects with the proposed compensatory mitigation acres at the north end of the facility.

The applicant proposes to implement the following avoidance and minimization measures:

1. Only Service-approved biologists will participate in activities associated with the capture, handling, and relocation of California red-legged frogs.
2. The applicant will submit the names and resumes of a qualified biologist and qualified biological monitor for approval by the Service at least 14 days prior to the start of work. Ground disturbance will not begin until written approval is received from the Service that project biologist(s) are qualified to conduct the work.

3. A Service-approved biologist will survey the project site no more than 48 hours before the onset of work activities. The Service-approved biologist will survey a 500-foot buffer zone upstream and downstream of the construction area for California red-legged frogs, as feasible, in consideration of the private property in the area. The Pre-Construction Survey will include a description of any standing or flowing water present in the drainage feature in proximity to the WRF construction area. If any life stage of the California red-legged frog is found and these individuals are likely to be killed or injured by work activities, the approved biologist will be allowed sufficient time to move them from the site before work begins. The Service-approved biologist will relocate the California red-legged frogs the shortest distance possible to a location that contains suitable habitat and that will not be affected by activities associated with the project. The relocation site will be in the same drainage to the extent practicable. The Service-approved biologist will coordinate with the Service on the relocation site prior to the capture of any California red-legged frogs.
4. A Service-approved biologist will be present at the work site until all California red-legged frogs have been relocated out of harm's way, workers have been instructed, and disturbance of habitat has been completed. After this time, the Service-approved biological monitor will ensure and document on-site compliance with all minimization measures. Biological monitoring will occur for all initial disturbance activities, and then will be scaled back to an as-needed basis once all habitat was removed for any activity occurring near a drainage feature or other environmentally sensitive habitat area. Biological monitoring will occur on a daily basis during the rainy season, defined as between October 15 and April 15, for any construction related activities at the WRF site. The Service-approved biologist will ensure that this monitor receives training on the minimization measures. If the Service-approved biological monitor or the Service-approved biologist recommends that work be stopped because California red-legged frogs would be affected in a manner not anticipated by the EPA and the Service during review of the proposed action, they will notify the project manager (the manager that is directly overseeing and in command of construction activities) immediately. The project manager will either resolve the situation by eliminating the adverse effect immediately or require that all actions causing these effects be halted. At this time, the Service-approved biologist will be called to relocate the California red-legged frog(s) out of harm's way.
5. Before the start of any construction activities at the Water Reclamation Facility, the applicant will erect a combination silt, safety, and wildlife exclusion fence around the entire site. The entire site will include all disturbed areas and areas utilized by the applicant and its contractors for temporary construction laydown and stockpiling. The fence will have a minimum height of 36 inches above ground, a trench depth of at least six inches, and a minimum five-inch overhang that will serve as a climbing barrier for California red-legged frogs. To allow for site access, a temporary chain link fence gate will be erected at the head of the access road at Teresa Road. The exclusion fencing material will be affixed to the chain link fence gate and will be equipped with ground sweeps. The temporary construction fence will be monitored on a daily basis during the winter rain season (October 15 through April 15) and will remain in place until after substantial completion of the Water Reclamation Facility following the completion of the permanent exclusion fencing system.

6. Prior to the commencement of construction-related activities, and for the duration of proposed construction activities, all construction workers will attend an Environmental Awareness Training and Education Program, developed and presented by the Service-approved biologist. The program will include information such as identification, habitat description, and protection under the Federal Endangered Species Act. The training will include detailed information about California red-legged frog and its habitat, the specific measures that are being implemented to conserve the California red-legged frog for the project, and the boundaries within which the project may be accomplished. Brochures, books, and briefings may be used in the training session as determined by the Service-approved biologist. Workers will be required to sign an acknowledgement form and will receive a hard hat sticker documenting their completion of the environmental awareness training.
7. Before ground disturbing work activities begin each day, the Service-approved biological monitor will conduct a pre-construction survey and inspect under construction equipment and materials to look for California red-legged frogs. If a California red-legged frog is found during these checks or during construction, the Service-approved biological monitor will halt work that may affect the animal until the Service-approved biologist can move it out of harm's way.
8. The Service-approved biologist will be present at the work site during initial site disturbance activities, including installation of exclusion fencing, erosion and sediment controls, and until the applicant has completed all surface disturbance. For work during the rainy season, defined as between October 15 and April 15, when California red-legged frogs may be moving through the project area, the biological monitor will conduct daily clearance surveys each morning prior to the start of work to ensure California red-legged frogs have not moved into the area and the wildlife exclusion fence is in good condition. If a California red-legged frog is observed within the biological monitoring area, the biological monitor will immediately contact the construction superintendent and evaluate the location of the frog in relation to ongoing work. If the frog is located within the work area, all work within 200 feet of the individual will be halted, and the individual will be allowed to leave the area under its own volition, or the Service-approved biologist may be called to capture and relocate the individual. The biological monitor will also provide additional training to the project's key construction management personnel on all environmental requirements associated with the project, so they can ensure all avoidance and minimization measures for biological resources are followed when the biological monitor is not present.
9. Prior to the start of work, the contractor will prepare a Spill Prevention Plan to ensure prompt and effective response to any accidental spills. All workers will be informed of the importance of preventing spills and of the appropriate measures to take should a spill occur. All project-related hazardous materials spills within the project site will be cleaned up immediately. Spill prevention and cleanup materials will be on-site at all times during the course of the project. During construction/ground disturbing activities, all refueling, maintenance, and staging of equipment and vehicles will be located at least 100 feet from a drainage feature in a protected location where any potential spill would be contained and not

drain directly toward aquatic habitat. The construction superintendent with support from the biological monitor will ensure contamination of habitat does not occur during such operations.

- a. All refueling, maintenance, and washing of equipment and vehicles will be located on paved areas in a location where a spill will not travel into a drainage feature or storm drain inlet. This fueling/staging area will conform to Best Management Practices (BMPs) applicable to attaining zero discharge of stormwater runoff into waters of the U.S. and State of California. At a minimum, all equipment and vehicles must be checked and maintained on a daily basis to ensure proper operation and avoid potential leaks or spills. Washing of equipment will occur only in a location where polluted water and materials can be contained for subsequent removal from the site.
  - b. A designated concrete washout location will be established onsite, in an area at least 50 feet from any drainage feature or storm drain inlet. The washout will be maintained and inspected weekly, and will be covered prior to and during any rain event. If a container is used, concrete debris will be removed whenever the washout container reaches the 1/2 full mark.
  - c. BMPs for dust abatement will be a component of the project's construction documents. Dust control requirements will be carefully implemented to prevent water used for dust abatement from transporting pollutants to storm drains leading to the creek channel.
10. To prevent inadvertent entrapment during construction, all excavated, steep-walled holes or trenches will be covered with plywood or similar materials at the close of each work day, or provided with one or more escape ramps constructed of earth fill or wooden planks. If trapped California red-legged frogs are observed, the Service-approved biologist will relocate the California red-legged frog.
  11. During project activities, all trash that may attract predators will be properly contained, removed from the work site, and disposed of regularly. Following construction, all trash and construction debris will be removed from work areas.
  12. Spoils will be stockpiled in disturbed areas that lack native vegetation. BMPs will be employed to prevent erosion in accordance with the project's approved Stormwater Pollution Prevention Plan.
  13. Vehicular traffic to and from the WRF construction site will use existing routes of travel. Cross-country vehicle and equipment use outside designated work areas will be prohibited.
  14. Areas of disturbance will be minimized to the maximum extent practicable. Parking areas, new roads, staging, storage, excavation access routes, and disposal or temporary placement of spoils will be confined to the smallest areas possible. These areas will be flagged and disturbance activities, vehicles, and equipment will be confined to these flagged areas. Construction-related activities outside of the impact zone will be avoided.
  15. Nighttime lighting during construction of the WRF will be minimized to the maximum extent practicable. While regular nighttime work is not anticipated, nighttime lighting may be

- required during construction, but mitigation measures are required to ensure the lighting is shielded and pointed away from sensitive receptors such as the surrounding open space areas.
16. Workers will be prohibited from bringing pets and firearms to the project site and from feeding wildlife.
  17. To ensure that diseases are not conveyed between work sites by the Service-approved biologist, the fieldwork code of practice developed by the Declining Amphibian Populations Task Force will be followed at all times (Appendix A).
  18. The project proponent will conduct regular inspections and maintenance of the slatted chain link fence in order to ensure slats are in good condition to prevent entry of California red-legged frogs. This will occur at least twice yearly, with one inspection occurring within one month of the onset of the rainy season. The rainy season is defined as between October 15 and April 15.
  19. The applicant will develop and implement a revegetation plan that includes: location of the restoration, plant species to be used, restoration techniques, time of year the work will be done, identifiable success criteria for completion, and remedial actions if the success criteria are not achieved. All areas of temporary disturbance will be revegetated with an assemblage of native species, and locally collected plant materials will be used to the extent practical. All areas revegetated due to temporary disturbance will be monitored by a qualified biologist/restoration ecologist for five years following seeding and planting activities or until the final success criteria have been met.
  20. Any use of herbicides during the routine maintenance landscaping and revegetated areas which occurs outside Water Reclamation Facility fence will be minimized. The applicant will implement the following additional protective measures for the California red-legged frog:
    - a. The applicant will not use herbicides during the breeding season for the California red-legged frog.
    - b. All precautions will be taken to ensure that no herbicide is applied to native vegetation.
    - c. Herbicides will not be applied on or near open water surfaces (no closer than 60 feet from open water).
    - d. Foliar applications of herbicide will not occur when wind speeds are in excess of 3 miles per hour.
    - e. No herbicides will be applied within 24 hours of forecasted rain.
    - f. Application of all herbicides will be done by qualified personnel or contractors to ensure that overspray is minimized, that all application is made in accordance with label recommendations, and with implementation of all required and reasonable safety measures. A safe dye will be added to the mixture to visually denote treated sites. Application of herbicides will be consistent with the EPA's Office of Pesticide Programs, Endangered Species Protection Program county bulletins [<https://www.epa.gov/endangered-species>].

## ANALYTICAL FRAMEWORK FOR THE JEOPARDY AND ADVERSE MODIFICATION DETERMINATIONS

### **Jeopardy Determination**

Section 7(a)(2) of the Endangered Species Act requires that Federal agencies ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of listed species. “Jeopardize the continued existence of” means “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species” (50 CFR 402.02).

The jeopardy analysis in this biological opinion relies on four components: (1) the Status of the Species, which describes the rangewide condition of the California red-legged frog, the factors responsible for that condition, and its survival and recovery needs; (2) the Environmental Baseline, which analyzes the condition of the California red-legged frog in the action area, the factors responsible for that condition, and the relationship of the action area to the survival and recovery of the California red-legged frog; (3) the Effects of the Action, which determines the direct and indirect impacts of the proposed Federal action on the California red-legged frog; and (4) the Cumulative Effects, which evaluates the effects of future, non-Federal activities, that are reasonably certain to occur in the action area, on the California red-legged frog.

In accordance with policy and regulation, the jeopardy determination is made by evaluating the effects of the proposed Federal action in the context of the current status of the California red-legged frog, taking into account any cumulative effects, to determine if implementation of the proposed action is likely to reduce appreciably the likelihood of both the survival and recovery of the California red-legged frog in the wild by reducing the reproduction, numbers, and distribution of that species.

### **Adverse Modification Determination**

Section 7(a)(2) of the Act requires that Federal agencies insure that any action they authorize, fund, or carry out is not likely to destroy or to adversely modify designated critical habitat. A final rule revising the regulatory definition of “destruction or adverse modification” was published on February 11, 2016 (81 FR 7214). The final rule became effective on March 14, 2016. The revised definition states:

“Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.”

The destruction or adverse modification analysis in this biological opinion relies on four components: (1) the Status of Critical Habitat, which describes the rangewide condition of the critical habitat for the California red-legged frog, the factors responsible for that condition, and the intended function of critical habitat overall; (2) the Environmental Baseline, which evaluates the condition of the critical habitat in the action area, the factors responsible for that condition, and the recovery role of the critical habitat in the action area; (3) the Effects of the Action, which are all consequences to critical habitat caused by the proposed action that are reasonably certain to occur; and (4) Cumulative Effects, which evaluate the effects of future non-Federal activities in the action area on critical habitat that are reasonably certain to occur.

For the section 7(a)(2) determination regarding destruction or adverse modification, the Service begins by evaluating the effects of the proposed Federal action and the cumulative effects. The Service then examines those effects against the condition of all critical habitat described in the listing designation to determine if the proposed action's effects are likely to appreciably diminish the value of critical habitat as a whole for the conservation of the species.

## STATUS OF THE SPECIES AND ITS CRITICAL HABITAT

### **Legal Status**

The California red-legged frog was federally listed as threatened on May 23, 1996 (61 Federal Register (FR) 25813). Revised critical habitat for the California red-legged frog was designated on March 17, 2010 (75 FR 12816, Service 2010). The Service issued a recovery plan for the species on May 28, 2002 (Service 2002).

### **Natural History**

The California red-legged frog uses a variety of habitat types, including various aquatic systems, riparian, and upland habitats. They have been found at elevations ranging from sea level to approximately 5,000 feet. California red-legged frogs use the environment in a variety of ways, and in many cases, they may complete their entire life cycle in a particular area without using other components (i.e., a pond is suitable for each life stage and use of upland habitat or a riparian corridor is not necessary). Populations appear to persist where a mosaic of habitat elements exists, embedded within a matrix of dispersal habitat. Adults are often associated with dense, shrubby riparian or emergent vegetation and areas with deep (greater than 1.6 feet) still or slow-moving water; the largest summer densities of California red-legged frogs are associated with deep-water pools with dense stands of overhanging willows (*Salix* spp.) and an intermixed fringe of cattails (*Typha latifolia*) (Hayes and Jennings 1988, p. 147). Hayes and Tennant (1985, p. 604) found juveniles to seek prey diurnally and nocturnally, whereas adults were largely nocturnal.

California red-legged frogs breed in aquatic habitats; larvae, juveniles, and adult frogs have been collected from streams, creeks, ponds, marshes, deep pools and backwaters within streams and creeks, dune ponds, lagoons, and estuaries. They frequently breed in artificial impoundments such as stock ponds, given the proper management of hydro-period, pond structure, vegetative cover, and control of exotic predators. While frogs successfully breed in streams and riparian systems, high spring flows and cold temperatures in streams often make these sites risky egg and tadpole environments. An important factor influencing the suitability of aquatic breeding sites is the general lack of introduced aquatic predators. Accessibility to sheltering habitat is essential for the survival of California red-legged frogs within a watershed and can be a factor limiting population numbers and distribution.

During periods of wet weather, starting with the first rains of fall, some individual California red-legged frogs may make long-distance overland excursions through upland habitats to reach breeding sites. In Santa Cruz County, Bulger et al. (2003, p. 90) found marked California red-legged frogs moving up to 1.7 miles through upland habitats, via point-to-point, straight-line migrations without regard to topography, rather than following riparian corridors. Most of these overland movements occurred at night and took up to 2 months. Similarly, in San Luis Obispo County, Rathbun and Schneider (2001, p. 1302) documented the movement of a male California red-legged frog between two ponds that were 1.78 miles apart in less than 32 days; however, most California red-legged frogs in the Bulger et al. (2003, p. 93) study were non-migrating frogs and always remained within 426 feet of their aquatic site of residence (half of the frogs always stayed within 82 feet of water). Rathbun et al. (1993, p. 15) radio-tracked three California red-legged frogs near the coast in San Luis Obispo County at various times between July and January; these frogs also stayed close to water and never strayed more than 85 feet into upland vegetation. Scott (2002, p. 2) radio-tracked nine California red-legged frogs in East Las Virgenes Creek in Ventura County from January to June 2001, which remained relatively sedentary as well; the longest within-channel movement was 280 feet and the farthest movement away from the stream was 30 feet.

After breeding, California red-legged frogs often disperse from their breeding habitat to forage and seek suitable dry-season habitat. Cover within dry-season aquatic habitat could include boulders, downed trees, and logs; agricultural features such as drains, watering troughs, spring boxes, abandoned sheds, or hay-ricks, and industrial debris. California red-legged frogs use small mammal burrows and moist leaf litter (Rathbun et al. 1993, p. 15; Jennings and Hayes 1994, p. 64); incised stream channels with portions narrower and deeper than 18 inches may also provide habitat (61 FR 25814). This type of dispersal and habitat use, however, is not observed in all California red-legged frogs and is most likely dependent on the year-to-year variations in climate and habitat suitability and varying requisites per life stage.

Although the presence of California red-legged frogs is correlated with still water deeper than approximately 1.6 feet, riparian shrubbery, and emergent vegetation (Jennings and Hayes 1994, p. 64), California red-legged frogs appear to be absent from numerous locations in its historical range where these elements are well represented. The cause of local extirpations does not appear

to be restricted solely to loss of aquatic habitat. The most likely causes of local extirpation are thought to be changes in faunal composition of aquatic ecosystems (i.e., the introduction of non-native predators and competitors) and landscape-scale disturbances that disrupt California red-legged frog population processes, such as dispersal and colonization. The introduction of contaminants or changes in water temperature may also play a role in local extirpations. These changes may also promote the spread of predators, competitors, parasites, and diseases.

### **Rangewide Status**

The historical range of the California red-legged frog extended coastally from southern Mendocino County and inland from the vicinity of Redding, California, southward to northwestern Baja California, Mexico (Storer 1925, p. 235; Jennings and Hayes 1985, p. 95; Shaffer et al. 2004, p. 2673). The California red-legged frog has sustained a 70 percent reduction in its geographic range because of several factors acting singly or in combination (Davidson et al. 2001, p. 465).

Over-harvesting, habitat loss, non-native species introduction, and urban encroachment are the primary factors that have negatively affected the California red-legged frog throughout its range (Jennings and Hayes 1985, pp. 99-100; Hayes and Jennings 1988, p. 152). Habitat loss and degradation, combined with over-exploitation and introduction of exotic predators, were important factors in the decline of the California red-legged frog in the early to mid-1900s. Continuing threats to the California red-legged frog include direct habitat loss due to stream alteration and loss of aquatic habitat, indirect effects of expanding urbanization, competition or predation from non-native species including the bullfrog, catfish (*Ictalurus* spp.), bass (*Micropterus* spp.), mosquito fish (*Gambusia affinis*), red swamp crayfish (*Procambarus clarkii*), and signal crayfish (*Pacifastacus leniusculus*). Chytrid fungus (*Batrachochytrium dendrobatidis*) is a waterborne fungus that can decimate amphibian populations, and is considered a threat to California red-legged frog populations.

### **Critical Habitat**

The Service first designated critical habitat for the California red-legged frog on March 13, 2001 (66 FR 14626). We revised the designation in a final rule published on March 17, 2010 (75 FR 12816). The final rule describes 48 separate units, encompassing approximately 1,636,609 acres, in 27 counties in California. The designation includes lands supporting those features necessary for the conservation of the California red-legged frog. In addition, the Service finalized a special rule pursuant to section 4(d) of the Act, associated with final listing of the California red-legged frog as threatened, for existing routine ranching activities (71 FR 19244). A detailed discussion of the history and methods used in developing critical habitat can be found in the final rule (75 FR 12816).

In accordance with section 3(5)(A)(i) of the Act and Federal regulations at 50 CFR 424.12, in determining which areas to designate as critical habitat, we identified the physical or biological

features (PBFs) essential to the conservation of the species which may require special management considerations or protection. Because not all life history functions require all the PBFs, not all areas designated as critical habitat will contain all of the PBFs. Based on our current knowledge of the life history, biology, and ecology of the California red-legged frog, we determined the California red-legged frog's PBFs to consist of: (1) aquatic breeding habitat; (2) aquatic non-breeding habitat; (3) upland habitat, and (4) dispersal habitat. Detailed descriptions of these PBFs can be found in the final rule (75 FR 12816). The following is a brief summary of the PBFs:

1. Aquatic breeding habitat consists of standing bodies of fresh water (with salinities less than 4.5 parts per thousand), including natural and manmade (stock) ponds, slow moving streams or pools within streams and other ephemeral or permanent water bodies that typically become inundated during winter rains and hold water for a minimum of 20 weeks in all but the driest of years.
2. Aquatic non-breeding habitat consists of the freshwater habitats as described for aquatic breeding habitat but which may or may not hold water long enough for the species to complete the aquatic portion of its lifecycle but which provide for shelter, foraging, predator avoidance, and aquatic dispersal habitat of juvenile and adult California red-legged frogs.
3. Upland habitat consists of upland areas adjacent to or surrounding breeding and non-breeding aquatic and riparian habitat up to a distance of one mile in most cases (i.e., depending on surrounding landscape and dispersal barriers), including various vegetation types such as grassland, woodland, forest, wetland, or riparian areas that provide shelter, forage, and predator avoidance for California red-legged frogs. Upland habitat should contain structural features such as boulders, rocks and organic debris (e.g., downed trees, logs), small mammal burrows, or moist leaf litter.
4. Dispersal habitat consists of accessible upland or riparian habitat within and between occupied or previously occupied sites that are located within 1 mile of each other, and that support movement between such sites. Dispersal habitat includes various natural habitats, and altered habitats such as agricultural fields that do not contain barriers (e.g., heavily traveled roads without bridges or culverts) to dispersal. Dispersal habitat does not include moderate- to high-density urban or industrial developments with large expanses of asphalt or concrete, nor does it include large lakes or reservoirs over 50 acres in size, or other areas that do not contain those features identified in PBFs 1, 2, or 3 as essential to the conservation of the species.

## **Recovery**

The 2002 recovery plan for the California red-legged frog (Service 2002) states that the goal of recovery efforts is to reduce threats and improve the population status of the California red-

legged frog sufficiently to warrant delisting. The recovery plan describes a strategy for delisting, which includes: (1) protecting known populations and reestablishing historical populations; (2) protecting suitable habitat, corridors, and core areas; (3) developing and implementing management plans for preserved habitat, occupied watersheds, and core areas; (4) developing land use guidelines; (5) gathering biological and ecological data necessary for conservation of the species; (6) monitoring existing populations and conducting surveys for new populations; and (7) establishing an outreach program. The California red-legged frog will be considered for delisting when:

1. Suitable habitats within all core areas are protected and/or managed for California red-legged frogs in perpetuity, and the ecological integrity of these areas is not threatened by adverse anthropogenic habitat modification (including indirect effects of upstream/downstream land uses).
2. Existing populations throughout the range are stable (i.e., reproductive rates allow for long-term viability without human intervention). Population status will be documented through establishment and implementation of a scientifically acceptable population monitoring program for at least a 15-year period, which is approximately 4 to 5 generations of the California red-legged frog. This 15-year period should coincide with an average precipitation cycle.
3. Populations are geographically distributed in a manner that allows for the continued existence of viable metapopulations despite fluctuations in the status of individual populations (i.e., when populations are stable or increasing at each core area).
4. The species is successfully reestablished in portions of its historical range such that at least one reestablished population is stable/increasing at each core area where California red-legged frog are currently absent.
5. The amount of additional habitat needed for population connectivity, recolonization, and dispersal has been determined, protected, and managed for California red-legged frogs.

The recovery plan identifies eight recovery units based on the assumption that various regional areas of the species' range are essential to its survival and recovery. The recovery status of the California red-legged frog is considered within the smaller scale of recovery units as opposed to the overall range. These recovery units correspond to major watershed boundaries as defined by U.S. Geological Survey hydrologic units and the limits of the range of the California red-legged frog. The goal of the recovery plan is to protect the long-term viability of all extant populations within each recovery unit.

Within each recovery unit, core areas have been delineated and represent contiguous areas of moderate to high California red-legged frog densities that are relatively free of exotic species such as bullfrogs. The goal of designating core areas is to protect metapopulations that combined

with suitable dispersal habitat, will support long-term viability within existing populations. This management strategy allows for the recolonization of habitat within and adjacent to core areas that are naturally subjected to periodic localized extinctions, thus assuring the long-term survival and recovery of the California red-legged frog.

## ENVIRONMENTAL BASELINE

The implementing regulations for section 7(a)(2) (50 CFR 402.02) define the environmental baseline as “the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. The consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency’s discretion to modify are part of the environmental baseline.”

### **Action Area**

The implementing regulations for section 7(a)(2) of the Act (50 CFR 402.02) define the “action area” as all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action. The action area for this biological opinion includes the footprint of the project, including the Water Reclamation Facility, pipeline route, pump stations, injection well sites, and the existing Wastewater Treatment Facility. It also includes all areas used for staging construction equipment and materials, temporary ground disturbance, revegetation, restoration of the creek corridor, and mitigation lands.

### **Habitat Characteristics of the Action Area**

The proposed Water Reclamation Facility and mitigation area would be located in an undeveloped lot that sits on a mix of Copley clay, Diablo and Cibo clays, Zaca clay, Los Osos loam, and Obispo-Rock outcrop complex soils. Annual grassland dominates the lot with a mix of wilds oats and annual brome grasslands and non-native grasslands. Large areas of black mustard (*Brassica nigra*) are present. Surveyors also identified a small patch of riparian scrub and a small patch of native bunchgrass grassland on site. Two seasonal drainages flow through the lot and merge to drain towards Highway 1. The lot is currently grazed by cattle, and much of the vegetation along the drainage corridors has been denuded by animal use.

The pipeline route mostly follows a road right-of-way. The action area of the pipeline sits on Diablo clay, Baywood fine sand, Psammments and Fluvents, and dune land soils. The surface is comprised of pavement, ruderal/disturbed areas, iceplant, ornamental vegetation, and some

sections of riparian scrub. It runs near three unnamed drainages, referred to as Drainage 1, Drainage 2A, and Drainage 2B in the biological resources assessment (Merk 2017, Figure 3). A small wetland exists along Drainage 1, and is adjacent to the pipeline route. The western end of the pipeline would cross over Morro Creek via a pipeline bridge. At this location, part of the south bank of Morro Creek is stabilized with rip rap, which is over grown by cape ivy (*Delairea odorata*) and other non-native plants. There is a patch of riparian scrub along the existing bike path bridge. The north bank of Morro Creek does not have rip rap and is vegetated with weedy upland vegetation. The ordinary high water mark for Morro Creek is 25 feet wide.

One lift station is located on the south side of Atascadero Lane, near the existing Wastewater Treatment Plant. This area is disturbed and/or paved, and provides no habitat for California red-legged frog. The other lift station would be located in a paved lot owned by the applicant at the corner of Main Street, Quintana Road, and Highway 1.

Both the east and west injection well areas include annual grassland, coastal scrub, riparian scrub, riverine and pockets of wetland habitat along Morro Creek and Little Morro Creek. There is significant ruderal/disturbed areas in both injection well areas. Both drainage features are disturbed from homeless encampments and the presence of non-native invasive species such as cape ivy.

### **Condition (Status) of the Species in the Action Area**

While the applicant contracted general surveillance surveys of the action area to document habitat types, they did not conduct protocol-level surveys for California red-legged frogs to determine their presence or absence. Based on the information presented below, California red-legged frogs likely use the action area for dispersal or movement between sites.

As discussed in the Status of the Species section, California red-legged frogs can move up to 1.7 miles in search of breeding opportunities during the rainy season (Bulger et al. 2003, p. 90). While dispersing, California red-legged frogs may use waterways for dispersal that would otherwise be unsuitable for breeding or non-breeding occupation and may make straight-line migrations across the landscape, without apparent regard for topographic features. According to the California Natural Diversity Database (CNDDDB), there is an observation of an adult California red-legged frog approximately 1.02 miles from the proposed Water Reclamation Facility in 1996 (CNDDDB 2019).

Additionally, there are numerous records of California red-legged frogs in Chorro Creek and its tributaries. Chorro Creek flows into the Morro Bay estuary, passing within 0.4 mile of the pipeline route, and within 0.5 mile of the proposed Water Reclamation Facility. Based on aerial imagery, Chorro Creek provides contiguous habitat between the known locations, approximately 5.5 miles to the southwest, and the nearest location to the project. Between Chorro Creek and the project, there is an estimated 65 acres of mapped freshwater emergent wetland and freshwater forested/shrub wetland. Based on the proximity of potential habitat and a known location within

dispersal distance, we conclude that the portion of the project within critical habitat provides dispersal habitat for the California red-legged frog.

There are no recorded occurrences of California red-legged frogs near the portion of the project outside of critical habitat for the California red-legged frog, including most of the pipeline route and Morro Creek (CNDDDB 2019). However, there are multiple records of California red-legged frogs within dispersal distance of Morro Creek, and its tributary, Little Morro Creek. Thus, the Morro Creek watershed may be occupied, but we do not know whether California red-legged frogs occur in the specific reach of Morro Creek where the project would take place.

Based on the presence of California red-legged frogs within dispersal distance of the action area, the fact that a large portion of the action area is designated critical habitat for this species, and that the applicant did not conduct protocol-level surveys to confirm their absence from the action area, we conclude that California red-legged frogs are likely present in the action area, especially during periods of wet weather when frogs are likely to move through the area.

### **Recovery**

The action area is within the Estero Bay Core Area of Recovery Unit 5 (Central Coast) identified within the recovery plan for the California red-legged frog (Service 2002). The Estero Bay Core Area was identified as important to the recovery of California red-legged frogs because it is currently occupied, it may provide a source population for California red-legged frogs to colonize nearby areas, and because it provides necessary connectivity between known populations. The recovery plan identified several threats to the Recovery Unit 5, which include: urbanization, agriculture, water management (water impoundments, channelization and flood control), livestock grazing, timber harvest, recreation and off-road vehicles, and mining. The recovery plan did not identify specific goals for Recovery Unit 5. However, the recovery plan did identify specific goals for the Estero Bay Core Area. The recovery goals for the Estero Bay Core Area, and thus the action area, are to protect existing populations, protect habitat connectivity, control non-native predators, and reduce water diversions to ensure adequate flows.

### **Condition (Status) of Critical Habitat in the Action Area**

The action area is located partially within California red-legged frog Critical Habitat Unit SLO-3 and the Estero Bay Core Area, beginning approximately 150 feet east of La Loma Avenue towards South Bay Boulevard and including the footprint of the Water Reclamation Facility. The pipeline would run along Quintana Road and then up South Bay Boulevard, which is in critical habitat. As the pipeline would run through disturbed road right-of-way areas, the critical habitat along these roads does not provide aquatic breeding or non-breeding habitat or upland habitat. California red-legged frogs could potentially disperse through this area, but the already developed areas do not provide the function of dispersal.

The WRF site would be located in upland habitat adjacent to Drainage 3. The upland area is dominated by annual grassland with large areas of non-native black mustard and other non-native plants. This grassland has been grazed by cattle for many years. Grazing can be beneficial to California red-legged frog upland habitat, depending on the intensity of grazing. Grazing can keep vegetation short, which is thought to be easier for frogs to move through (Ford et al. 2013, p. 40). We do not have any additional information about the intensity of grazing or the height of vegetation at the WRF site.

Small mammals are frequently present in annual grasslands and their associated burrows are likely to be present. These burrows can be an important source of refuge for California red-legged frogs in terrestrial habitat, depending on the availability of other moist refuges (Managing Rangelands). The applicant did not specifically survey for small mammal burrows at the WRF site, but it is likely they are present.

The WRF site and the adjacent Drainage 3 is unlikely to provide aquatic breeding or non-breeding habitat, but may provide upland habitat and dispersal habitat. California red-legged frogs may use Drainage 3 and nearby upland habitat as a dispersal corridor for moving to or from Chorro Creek, Little Morro Creek, San Bernardo Creek, or through the undeveloped upland area north of Highway 1. Drainage 3A and Drainage 3B flow into Drainage 3. These drainages contain water seasonally, and are not expected to hold water year round. The vegetation along these drainages mostly consists of annual grasses, shrubs such as coyote brush, and other non-wetland species. A small portion of Drainage 3B contains a low canopy of arroyo willow and riparian scrub. The vegetation along these drainages may provide cover for dispersing California red-legged frogs, especially when water is present.

## EFFECTS OF THE ACTION

The implementing regulations for section 7(a)(2) define effects of the action as “all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action” (50 CFR 402.02).

### **Effects of the Proposed Action on the California red-legged frog**

#### Construction

We expect the construction phase to be the period that poses the greatest threat to California red-legged frogs. However, we expect project impacts would be reduced with implementation of the proposed conservation measures to avoid and minimize temporary and permanent effects to California red-legged frogs.

All California red-legged frogs that occur within the action area could be adversely affected by project activities. Injury or mortality could occur from animals being crushed by heavy equipment, vehicles, debris, and worker foot traffic and activities such as excavation, stockpiling of materials and fill, and vegetation clearing. Individuals could become trapped and die in sheltering habitat or exposed to predators if burrows are crushed or covered. California red-legged frogs may experience a disruption of normal behavioral patterns from worker foot traffic and activities and their associated noise and vibration to the point that reaches the level of harm. This disruption could cause individuals to leave or avoid suitable habitat and may increase the potential for predation, desiccation, competition for food and shelter, or strike by vehicles. Pre-construction surveys, placing exclusion fencing around the work site during wet periods following site grading, and the relocation of individuals from work areas by a Service-approved biologist would reduce these impacts.

California red-legged frogs may be affected by the exclusion fencing put in place during project construction. While the fence will greatly reduce the risk of individuals entering the immediate work area, the fence may create a movement barrier that they must navigate. Fencing that is improperly installed or improperly maintained may entangle California red-legged frogs or force them into less suitable areas, increasing the risk of injury or death to frogs. Predators may more easily discover California red-legged frogs along the fence, increasing their risk of predation. These risks will be minimized by having a Service-approved biologist oversee the installation of exclusion fencing, having a Service-approved biological monitor check the fencing on a daily basis to ensure proper maintenance and having a Service-approved biologist capture and relocate any California red-legged frog that may be entangled along the fence.

California red-legged frogs could become trapped and die in excavated or backfilled trenches or holes. Examination of trenches and holes before the start of work, the capture and relocation of trapped frogs by the Service-approved biologist, use of exclusion fencing, and creation of escape ramps or covers should minimize this impact.

Soil stockpiles and erosion control materials stored onsite can attract California red-legged frogs seeking upland refugia, and lead to injury or death if individuals become entrapped or are present when these materials are moved. Covering stockpiles at night with tarps or surrounding them with exclusion fencing and keeping erosion control materials in closed containers or elevated above the ground would discourage habitation by animals, inspecting these materials for California red-legged frogs prior to disturbance, and checking installed erosion control materials daily for frogs during the rainy season and prior to their removal should minimize these effects.

Accidental spills of hazardous materials or careless fueling or oiling of vehicles or equipment could degrade water quality or upland habitat to a degree where California red-legged frogs are injured or killed. The potential for this effect to occur would be reduced by thoroughly informing workers of the importance of preventing hazardous materials from entering the environment, locating staging and fueling areas away from aquatic habitat, and by having an effective spill response plan in place.

California red-legged frogs can disperse overland in mesic conditions if substantial rainfall (greater than 0.5 inch of rain in a 24-hour period) occurs. During such periods of rainfall, we expect a higher likelihood of California red-legged frogs occurring within the action area. Any amphibians moving through the project site would be at risk of injury or death caused by vehicles, equipment, or workers, and fencing and excavation of linear trenches could entrap frogs and interfere with their movement. Having a Service-approved biological monitor on site during the winter rain season would reduce effects from these impacts.

Capture and relocation of California red-legged frogs could result in injury or death as a result of improper handling, containment, transport, or release into unsuitable habitat. Although survivorship for translocated California red-legged frogs has not been estimated, survivorship of translocated wildlife in general is reduced due to intraspecific competition, lack of familiarity with the location of potential breeding, feeding, and sheltering habitats, and increased risk of predation. Using Service-approved biologists, limiting the duration of handling, and requiring proper transport of individuals should reduce these impacts, and overall the relocation of individuals from work areas should reduce the level of mortality that otherwise would occur if individuals were not removed.

Biologists frequently observe diseased and parasite-infected amphibians. Releasing amphibians following a period of captivity, during which time they can be exposed to infections, may cause an increased risk of mortality in wild populations. Amphibian pathogens and parasites can also be carried between habitats on the hands, footwear, or equipment of fieldworkers, which can spread them to localities containing species that have had little or no prior contact with such pathogens or parasites. Chytrid fungus is a water-borne fungus that can spread through direct contact between aquatic animals and by a spore that can move short distances through the water. The fungus only attacks the parts of an animal's skin that have keratin (thickened skin), such as the mouthparts of tadpoles and the tougher parts of adults' skin, such as the toes. It can decimate amphibian populations, causing fungal dermatitis, which usually results in death in 1 to 2 weeks. Infected animals may spread the fungal spores to other ponds and streams before they die. Once a pond has become infected with chytrid fungus, the fungus stays in the water for an undetermined amount of time. Relocation of individuals captured from the project area could contribute to the spread of chytrid fungus. In addition, infected equipment or footwear could introduce chytrid fungus into areas where it did not previously occur. Having EPA and applicant follow the Declining Amphibian Populations Task Force's Fieldwork Code of Practice should minimize the spread of chytrid fungus and other pathogens during the project.

Trash left during or after project activities could attract predators to the work site, which could in turn prey upon California red-legged frogs. For example, raccoons (*Procyon lotor*) and feral cats (*Felis catus*) are attracted to trash and also prey opportunistically on the California red-legged frog. This potential impact would be reduced or avoided by the control of waste products at all work sites.

Uninformed workers could disturb, injure, or kill California red-legged frogs. The potential for this to occur would be reduced by educating workers on the presence and protected status of these species and the measures that are being implemented to protect them during project activities. The use of flagging to demarcate work areas would further reduce these potential impacts by preventing workers from encroaching into environmentally sensitive habitat.

#### Operations and Maintenance

Operations and maintenance of the Water Reclamation Facility will pose some risk to California red-legged frogs in the action area. Dispersing individuals may be injured or killed by vehicle traffic on the road that runs parallel to Drainage 3, but the operational traffic along the road is estimated at only 320 vehicle trips per month. Most trips would be during daylight hours and outside of the winter rain season, when California red-legged frogs are much less likely to move through the area.

California red-legged frogs may be attracted to the water retention ponds located within the WRF or the drainages swales located within the proposed conservation acres. However, we expect that the well-maintained fencing around the facility will be sufficient to exclude California red-legged frogs from the WRF. California red-legged frogs may use the drainage swales when there is water in them, but we expect that they will be able to readily enter or exit them at will. We do not expect that other operations and maintenance of pipelines and facilities will adversely affect the California red-legged frog.

#### On-site Conservation

The 19.5 acres that the applicant proposed to protect on-site would provide similar dispersal habitat to the 7.1 acres removed by the Water Reclamation Facility. Grazing will continue on these acres, and California red-legged frogs will be able to freely move through the acres from the north and west. Nine of the conservation acres will be disturbed during the construction phase, however the applicant will revegetate these areas with native plants. In the long term, restoration efforts will improve the function of the dispersal habitat for California red-legged frogs in the temporarily disturbed area, as we assume that at least some of those nine acres is currently occupied by non-native plants.

The applicant will enhance 1.5 acres of riparian habitat along Drainage 3 as a condition of their Coastal Development Permit. This area will connect with the on-site conservation acres at the north end of the Water Reclamation Facility, which will facilitate dispersal for California red-legged frogs along Drainage 3. We expect that the riparian enhancement zone will provide California red-legged frogs with improved cover as they move along the drainage, allowing them to more easily move up the drainage and into the conservation area.

#### **Effects of the Proposed Action on Critical Habitat of the California red-legged frog**

Critical Habitat Unit SLO-3 for the California red-legged frog comprises approximately 116,517 acres, of which approximately 17 acres are in the action area. We expect proposed activities to

result in 7.1 acres of permanent loss of California red-legged frog critical habitat. This represents a very small portion of Critical Habitat in Unit SLO-3. The affected area includes primarily dispersal (PCE 4) habitat. The Project would have a small negative effect on dispersal habitat, as California red-legged frogs would have to navigate around the Water Reclamation Facility if they disperse through the area. The restoration of the riparian zone would partially compensate for this negative impact to dispersal habitat by creating a corridor along Drainage 3, which California red-legged frogs could use as cover as they move through the area. We expect that California red-legged frogs would continue to be able to disperse through the area of the Project that affects Critical Habitat Unit SLO-3.

### **Effects on Recovery**

We anticipate that effects on recovery of the California red-legged frog would be minimal. As stated above in the Status of the Species in the Action Area section, the action area lies within the SLO-3 Critical Habitat Unit and within the Estero Bay Core Area. The proposed project would not increase the threats posed by urbanization, agriculture, water management, livestock grazing, timber harvest, recreation and off-road vehicles, and mining which currently affect the California red-legged frog in this Recovery Unit. The project would not reduce the important characteristics of the Estero Bay Core Area, which are that it is currently occupied, it provides a source population for California red-legged frogs to colonize nearby areas, and that it provides necessary connectivity between known populations. The project would not preclude the Service's ability to implement recovery actions (Service 2002, p. 45), or to protect existing populations, protect habitat connectivity, control non-native predators, or reduce water diversions within the Estero Bay Core Area. Project impacts would be primarily during the construction phase, and with implementation of the proposed conservation measures, would result in minimal change in population numbers and distribution.

### **Summary of Effects**

The proposed project would affect all California red-legged frogs moving through the action area, and we cannot determine whether this will be few or many individuals, in the absence of protocol-level surveys conducted for this species. However, with the implementation of the proposed avoidance and minimization measures, especially relocating California red-legged frogs out of harm's way by a Service-approved biologist, we expect that few individuals would be killed or injured. We anticipate no long-term effects to the overall population, or the breeding and reproductive capacity of the California red-legged frog due to the proposed activities. We do not expect that the proposed project would reduce the likelihood of recovery within the Estero Bay Core Area or rangewide.

The effects of the proposed action on designated critical habitat for the California red-legged frog would affect a small portion of Critical Habitat Unit SLO-3. We do not expect long-term adverse effects to the primary constituent elements of dispersal habitat from the proposed action. The function of dispersal habitat in the action area may decrease slightly if California red-legged

frogs must navigate around the Water Reclamation Facility. The existing conservation function of critical habitat for the California red-legged frog in the action area will be maintained due to the small area of impact and the protection of 19.5 acres which serve as dispersal habitat within Critical Habitat Unit SLO-3. Thus we expect no long-term adverse effects to Critical Habitat Unit SLO-3 to result from the action.

#### CUMULATIVE EFFECTS

Cumulative effects include the effects of future State, tribal, local or private actions that are reasonably certain to occur in the action area considered in this biological opinion. We do not consider future Federal actions that are unrelated to the proposed action in this section because they require separate consultation pursuant to section 7 of the Act. We are unaware of any other projects reasonably certain to occur in any other part of the action area.

#### CONCLUSION

##### **California red-legged frog**

The regulatory definition of “to jeopardize the continued existence of the species” focuses on assessing the effects of the proposed action on the reproduction, numbers, and distribution, and their effect on the survival and recovery of the species being considered in the biological opinion. For that reason, we have used those aspects of the California red-legged frog’s status as the basis to assess the overall effect of the proposed action on the species.

##### Reproduction

Construction activities in dispersal habitat could injure or kill adult California red-legged frogs dispersing through the project area. The loss of reproductive individuals could temporarily lower the reproductive capacity of the local population. However, we expect such impacts to be small due to the absence of aquatic breeding habitat in the action area and the measures the applicant has proposed to protect California red-legged frogs surveying for and relocating California red-legged frogs out of harm’s way. Therefore, we expect the proposed project to result in minimal impacts to breeding California red-legged frogs and conclude that the project will not appreciably reduce the reproduction of the species locally or rangewide.

##### Numbers

Potentially suitable habitat and records of California red-legged frog occur within dispersal distance of the action area. Without protocol-level surveys of the action area, it is unknown how many California red-legged frogs may be in the action area. However, we anticipate that most individuals moving through the action area will be captured and relocated by a Service-approved biologist, thus we expect only a small number of California red-legged frogs would be injured or killed as a result of the project. Any individuals lost as a result as a result of project activities are

likely to be replaced in the population during the next breeding cycle. Therefore, we conclude that the loss of the small number of individuals which may occur during the proposed project would not appreciably reduce the local or rangewide population of the California red-legged frog.

### Distribution

The proposed project could injure, kill, or temporarily displace a small number of California red-legged frogs. The applicant has proposed conservation measures to minimize the risk of adverse effects on individuals. Construction activities would remove a small amount of dispersal habitat, but California red-legged frogs will still be able to disperse through the project area, thus their distribution would not be reduced or negatively impacted. Therefore, we conclude that the project will not appreciably reduce the distribution of the California red-legged frog at the local or rangewide level.

### Recovery

The proposed project would not increase the threats currently impacting the California red-legged frog in Recovery Unit 5 and Estero Bay Core Area or preclude the Service's ability to implement recovery actions. Although the project would adversely affect dispersal habitat for the California red-legged frog and may injure or kill a small number of individuals, impacts would mostly occur during the construction phase and would be mitigated through on-site protection and restoration of habitat. Thus, we do not expect project effects to be of a magnitude that would affect the ability of the Estero Bay Core Area to remain occupied by the species, provide connectivity between occupied areas, or provide dispersing individuals to colonize other areas as specified in the recovery plan.

### Conclusion for the California red-legged frog:

After reviewing the current status of California red-legged frog, the environmental baseline for the action area, the effects of the proposed Water Reclamation Facility Project and the cumulative effects, it is the Service's biological opinion that the proposed action is not likely to jeopardize the continued existence of the California red-legged frog because:

1. The project would not appreciably reduce reproduction of the species either locally or rangewide.
2. The project would not appreciably reduce numbers of the California red-legged frog either locally or rangewide.
3. The project would not appreciably reduce the species' distribution either locally or rangewide.
4. The project would not cause any effects that would preclude our ability to recover the species.

Conclusion for Critical Habitat of the California red-legged frog:

We expect that the proposed action will result in small permanent impacts on Critical Habitat Unit SLO-3. The 10 acres of temporary impacts will be revegetated and restored to equal or better condition than before the project. The 7.1 acres of permanent impacts will have a minor negative effect on the dispersal function (PCE 4) in the action area, and will have an insignificant effect on PCE 4 of the critical habitat unit as a whole. The on-site conservation efforts will partially compensate for the negative effects on PCE 4, and facilitate dispersal around the area of permanent structures of the project.

After reviewing the current status of the critical habitat of California red-legged frog, the environmental baseline of critical habitat for the action area, the effects of the proposed project on critical habitat, and the cumulative effects, it is the Service's biological opinion that the project action is not likely to result in the destruction or adverse modification of critical habitat of the California red-legged frog because:

1. The effects on PCE 4 will be minor and will be partially compensated for by on-site conservation efforts.
2. The overall function and conservation value of PCE 4 would not be appreciably reduced by the project locally or in Critical Habitat Unit SLO-3.

#### INCIDENTAL TAKE STATEMENT

Section 9 of the Act and Federal regulation pursuant to section 4(d) of the Act prohibit the take of endangered and threatened wildlife species, respectively, without special exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. Harm is further defined by the Service to include significant habitat modification or degradation that results in death or injury to wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not the purpose of the agency action is not considered to be prohibited taking under the Act provided that such taking is in compliance with the terms and conditions of this incidental take statement.

In June 2015, the Service finalized new regulations implementing the incidental take provisions of section 7(a)(2) of the Act. The new regulations also clarify the standard regarding when the Service formulates an Incidental Take Statement [50 CFR 402.14(g)(7)], from "...if such take may occur" to "...if such take is reasonably certain to occur." This is not a new standard, but merely a clarification and codification of the applicable standard that the Service has been using and is consistent with case law. The standard does not require a guarantee that take will result;

only that the Service establishes a rational basis for a finding of take. The Service continues to rely on the best available scientific and commercial data, as well as professional judgment, in reaching these determinations and resolving uncertainties or information gaps.

#### AMOUNT OR EXTENT OF TAKE

We anticipate that some California red-legged frogs could be taken as a result of the proposed action. We expect the incidental take to be in the form of capture, injury, and death. We cannot quantify the precise number of California red-legged frogs that may be taken as a result of the action that EPA and applicant have proposed because California red-legged frogs move over time; for example, animals may have entered or departed the action area since the time of pre-construction surveys. Other individuals may not be detected due to their cryptic nature, small size, and low mobility. The protective measures proposed by EPA and applicant are likely to prevent mortality or injury of most individuals. In addition, finding a dead or injured California red-legged frog is unlikely.

Consequently, we are unable to reasonably anticipate the actual number of California red-legged frogs that would be taken by the proposed project; however, we must provide a level at which formal consultation would have to be reinitiated. The Environmental Baseline and Effects Analysis sections of this biological opinion indicate that adverse effects to California red-legged frogs would primarily occur during the construction period, and most take would be in the form of capture, which would further minimize adverse effects to California red-legged frogs. We anticipate that take in the form of injury or mortality would be low. We also recognize that for every California red-legged frog found dead or injured, other individuals may be killed or injured that are not detected, so when we determine an appropriate take level we are anticipating that the actual take would be higher and we set the number below that level.

Similarly, for estimating the number of California red-legged frog that would be taken by capture, we cannot predict how many may be encountered for reasons stated earlier. While the benefits of relocation (i.e., minimizing mortality) outweigh the risk of capture, we must provide a limit for take by capture at which consultation would be reinitiated because high rates of capture may indicate that some important information about the species' in the action area was not apparent (e.g., it is much more abundant than thought). Conversely, because capture can be highly variable, depending upon the species and the timing of the activity, we do not anticipate a number so low that reinitiation would be triggered before the effects of the activity were greater than what we determined in the Effects Analysis.

Therefore, if 4 adult, subadult, or juvenile California red-legged frogs are found dead or wounded or if 30 are captured, EPA must contact our office immediately to reinitiate formal consultation. Project activities that are likely to cause additional take should cease as the exemption provided pursuant to section 7(o)(2) may lapse and any further take could be a violation of section 4(d) or 9.

## REASONABLE AND PRUDENT MEASURES

The measures described below are non-discretionary, and must be undertaken by the EPA or made binding conditions of any grant or permit issued to the (applicant), as appropriate, for the exemption in section 7(o)(2) to apply. The EPA has a continuing duty to regulate the activity covered by this incidental take statement. If the EPA (1) fails to assume and implement the terms and conditions or (2) fails to require the applicant to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant document, the protective coverage of section 7(o)(2) may lapse. To monitor the impact of incidental take, the EPA or applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement [50 CFR 402.14(i)(3)].

The Service believes the following reasonable and prudent measures are necessary and appropriate to minimize the impacts of the incidental take of California red-legged frogs:

1. The EPA or applicant will provide the qualifications of all biologists and biological monitors employed to conduct project activities to the Service.
2. A Service-approved biologist must identify appropriate locations to receive California red-legged frogs from the action area prior to the onset of project-related activities.
3. Biological monitoring for the California red-legged frog will occur in the action area on a daily basis during the winter rain season, and on an as-needed basis throughout the rest of the year.

## TERMS AND CONDITIONS

To be exempt from the prohibitions of section 9 of the Act, the EPA must comply with the following terms and conditions, which implement the reasonable and prudent measures described above and outline reporting and monitoring requirements. These terms and conditions are non-discretionary.

1. The following term and condition implements reasonable and prudent measure 1:

The EPA or applicant must request our approval of any biologists or biological monitors that they, the City, or their contractors employ to conduct project activities associated with the California red-legged frog pursuant to this biological opinion. Such requests must be in writing, and be received by the Ventura Fish and Wildlife Office at least 14 days prior to any such activities being conducted. Please be advised that possession of a 10(a)(1)(A) permit for the California red-legged frog does not substitute for the implementation of this measure. Authorization of Service-approved biologists is valid for this project only.

2. The following term and condition implements reasonable and prudent measure 2:

Prior to the onset of any project-related activities, a Service-approved biologist must identify appropriate locations to receive California red-legged frogs from the action area in the event that any need to be relocated. These locations must be in proximity to the action area, contain suitable habitat for the species, not be affected by project activities, and be free of exotic predatory species (i.e., bullfrogs, crayfish) to the best of the Service-approved biologist's knowledge.

3. The following term and condition implements reasonable and prudent measure 3:

A Service-approved biological monitor will be present in work areas on a daily basis during the winter rain season, defined as from October 15 to April 15. Outside of the winter rain season, the Service-approved biological monitor may provide biological monitoring on an as-needed basis. Situations which would constitute monitoring on an as-needed basis include the following:

- a. During or within 24 hours after any rain. A rain event is considered any precipitation resulting in 0.2 inch or greater of precipitation. A Service-approved biological monitor will survey the action area immediately before resuming project activities.
- b. Any other situation which the applicant or Service-approved biologist believe to be at an increased risk of encountering a California red-legged frog during project activities.

## REPORTING REQUIREMENTS

Pursuant to 50 CFR 402.14(i)(3), EPA must report the progress of the action and its impact on the species to the Service as specified in this incidental take statement. The applicant, through a qualified botanist, will monitor the success of revegetation actions on areas of temporary disturbance for a period of 5 years after revegetation takes place. The EPA or applicant will provide yearly reports to the Service by January 31 of each year during the construction phase of the project. These reports will include the number and age class of California red-legged frogs that have been captured and relocated, and that have been found injured or dead. These reports will also include the dates and results of inspections of the chain link fence, as well as any repairs that were made to the fence, an analysis of whether the chain link fence is successful in excluding California red-legged frogs, and any suggestions to improve the efficacy of the fence.

## DISPOSITION OF DEAD OR INJURED SPECIMENS

As part of this incidental take statement and pursuant to 50 CFR 402.14(i)(1)(v), upon locating a dead or injured California red-legged frog, initial notification within 3 working days of its finding must be made by telephone and in writing to the Ventura Fish and Wildlife Office (805-644-1766). The report must include the date, time, location of the carcass, a photograph, cause of death or injury, if known, and any other pertinent information.

The applicant must take care in handling injured animals to ensure effective treatment and care, and in handling dead specimens to preserve biological material in the best possible state. The EPA or the applicant must transport injured animals to a qualified veterinarian. Should any treated California red-legged frogs survive, the EPA or the applicant must contact the Service regarding the final disposition of the animal(s).

The remains of California red-legged frogs found in the Project area must be placed with the Santa Barbara Natural History Museum (Contact: Paul Collins, Santa Barbara Natural History Museum, Vertebrate Zoology Department, 2559 Puesta Del Sol, Santa Barbara, California 93460, (805) 682-4711, extension 321). The EPA or applicant must make arrangements regarding proper disposition of potential museum specimens prior to implementation of any actions conducted pursuant to this biological opinion.

### CONSERVATION RECOMMENDATIONS

Section 7(a)(1) of the Act directs Federal agencies to use their authorities to further the purposes of the Act by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information.

1. We recommend that the Service-approved biologist(s) relocate any other native reptiles or amphibians found within work areas to suitable habitat outside of project areas if such actions are in compliance with State laws.
2. We recommend that dead California red-legged frogs and identified in the action area be tested for amphibian disease.

The Service requests notification of the implementation of any conservation recommendations so we may be kept informed of actions minimizing or avoiding adverse effects or benefitting listed species or their habitats.

### REINITIATION NOTICE

This concludes formal consultation on the action(s) outlined in the request. As provided in 50 CFR 402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in this opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, the exemption issued pursuant to

section 7(o)(2) may have lapsed and any further take could be a violation of section 4(d) or 9. Consequently, we recommend that any operations causing such take cease pending reinitiation.

If you have any questions about this biological opinion, please contact Danielle Fagre of my staff at 805-677-3339 or by electronic mail at [danielle\\_fagre@fws.gov](mailto:danielle_fagre@fws.gov).

Sincerely,



Stephen P. Henry  
Field Supervisor

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## APPENDIX A

### **The Declining Amphibian Populations Task Force Fieldwork Code of Practice**

1. Remove mud, snails, algae, and other debris from nets, traps, boots, vehicle tires, and all other surfaces. Rinse cleaned items with sterilized (e.g., boiled or treated) water before leaving each work site.
2. Boots, nets, traps, and other types of equipment used in the aquatic environment should then be scrubbed with 70 percent ethanol solution and rinsed clean with sterilized water between study sites. Avoid cleaning equipment in the immediate vicinity of a pond, wetland, or riparian area.
3. In remote locations, clean all equipment with 70 percent ethanol or a bleach solution, and rinse with sterile water upon return to the lab or "base camp" Elsewhere, when washing-machine facilities are available, remove nets from poles and wash in a protective mesh laundry bag with bleach on the "delicates" cycle.
4. When working at sites with known or suspected disease problems, or when sampling populations of rare or isolated species, wear disposable vinyl gloves and change them between handling each animal. Dedicate sets of nets, boots, traps, and other equipment to each site being visited. Clean them as directed above and store separately at the end of each field day.
5. When amphibians are collected, ensure that animals from different sites are kept separately and take great care to avoid indirect contact (e.g., via handling, reuse of containers) between them or with other captive animals. Isolation from unsterilized plants or soils which have been taken from other sites is also essential. Always use disinfected and disposable husbandry equipment.
6. Examine collected amphibians for the presence of diseases and parasites soon after capture. Prior to their release or the release of any progeny, amphibians should be quarantined for a period and thoroughly screened for the presence of any potential disease agents.
7. Used cleaning materials and fluids should be disposed of safely and, if necessary, taken back to the lab for proper disposal. Used disposable gloves should be retained for safe disposal in sealed bags.

The Fieldwork Code of Practice has been produced by the Declining Amphibian Populations Task Force with valuable assistance from Begona Arano, Andrew Cunningham, Tom Langton, Jamie Reaser, and Stan Sessions.

For further information on this Code, or on the Declining Amphibian Populations Task Force, contact John Wilkinson, Biology Department, The Open University, Walton Hall, Milton Keynes, MK7 6AA, UK. E-mail: [DAPTF@open.ac.uk](mailto:DAPTF@open.ac.uk) Fax: +44 (0) 1908-654167

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<sup>1</sup> Do not use latex gloves. Latex is toxic to amphibians.



AGENDA NO: A-7

MEETING DATE: September 28, 2021

# Staff Report

**TO:** Honorable Mayor and City Council **DATE:** September 17, 2021

**FROM:** Sarah Johnson-Rios, Assistant City Manager/Admin. Services Director  
Dana Swanson, City Clerk/Human Resources Manager

**SUBJECT:** Adopt Resolution No. 61-21 Establishing an Electronic Signature Use Policy

## **RECOMMENDATION**

Staff recommends the City Council adopt Resolution No. 61-21. which establishes Electronic Signature Use Policy (Policy) for the City and authorizes the City Manager to amend the Policy and adopt additional guidelines as necessary to implement the Policy’s stated purpose.

## **ALTERNATIVES**

- 1) Take no action
- 2) Provide alternative direction to staff

## **FISCAL IMPACT**

Utilizing digital signatures will create administrative efficiencies that may result in marginal cost savings over time.

## **BACKGROUND**

The City has been using traditional “wet” signatures for documents between the City and external parties. Many individuals, businesses, vendors, contractors, and agencies regularly use electronic signatures to conduct transactions. As a result of state and local directives limiting travel and implementing social distancing protocols to respond to the COVID-19 pandemic, many individuals and entities are working remotely, and the use of electronic signatures has increased.

Under California law, the use of electronic signatures is at the option of the parties, including public agencies, involved in a transaction. The federal Electronic Signatures in Global and National Commerce Act permits, but does not require, parties to use electronic signatures. Two state laws govern the use of electronic signatures for public agencies. The Uniform Electronic Transactions Act (Civil Code section 1633.1 *et seq.*) governs “electronic signatures”, and Government Code Section 16.5 governs “digital signatures.”

An “electronic signature” is “an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.” (Civ. Code §16.33.2(h).) A “digital signature” is an electronic identifier, created by a computer, intended by the party using it to have the same force and effect as the use of a manual signature. (Gov. Code, §16.5(d).) A digital signature is a subset of an electronic signature and is more secure and reliable than other forms of electronic signatures. Electronic signatures vary in their

<b>Prepared By:</b> _DS/SJR_	<b>Dept Review:</b> _____
<b>City Manager Review:</b> __SC__	<b>City Attorney Review:</b> ____JWP____

level of security, user-friendliness, and verifiability, the conditions under which they are accepted for public records are a governmental affair for the City to determine and for which the City may set policy.

### **DISCUSSION**

The City is seeking additional methods to streamline its document signing process with external partners to improve productivity and save resources. Using appropriate electronic signature technology would allow the City to collect and preserve signatures on documents quickly, securely, and efficiently, and also reduce use of paper, facilitate document retention, and generally contribute to a sound City-wide records management system.

The City seeks to provide its residents, businesses, vendors, and contractors the opportunity to submit information or transact business with the City electronically to the great extent practicable. City staff has increasingly been asked to execute contracts electronically under the provisions of the Uniform Electronic Transaction Act (UETA). A policy from the City Council authorizing electronic signatures would allow the City to do so.

The Electronic Signature Use Policy (Policy) establishes guidelines for the use and acceptance of electronic signatures in lieu of manual signatures, when permitted by law, and establishes when an electronic signature may replace a manual signature.

### **CONCLUSION**

Staff recommends the Council adopt Resolution No. 61-21 approving the Policy and authorizing the City Manager to approve the additional regulations to implement the Policy.

### **ATTACHMENT**

1. Resolution No. 61-21

**RESOLUTION NO. 61-21**

**RESOLUTION OF THE CITY COUNCIL  
OF THE CITY OF MORRO BAY, CALIFORNIA  
ESTABLISHING AN ELECTRONIC SIGNATURE USE POLICY  
FOR SELECT CITY DOCUMENTS**

**THE CITY COUNCIL  
City of Morro Bay, California**

**WHEREAS**, electronic signatures have become increasingly common in public and private transactions, particularly during the COVID-19 pandemic, when much public and private business continues to be conducted remotely; and

**WHEREAS**, under California law, the use of electronic signatures is at the option of the parties, including public agencies, involved in a transaction; and

**WHEREAS**, the Uniform Electronic Transactions Act (“UETA” codified at Civ. Code §1633.1 *et seq.*) generally governs the use of “electronic signatures” by parties to a transaction, and Government Code section 16.5 governs the specific use of “digital signatures” (a type of electronic signature) by and in transactions with public entities; and

**WHEREAS**, a digital signature is a digital code that uniquely identifies and authenticates the sender (and is subject to State regulations on approved technologies), an electronic signature is broadly defined to include a typed name concluding an email, a digital image of a handwritten signature, and the click of an “I accept” button on an e-commerce site; and

**WHEREAS**, using appropriate electronic signature technology would allow the City to collect and preserve signatures on documents quickly, securely, and efficiently, and also reduce use of paper, facilitate document retention, and generally contribute to a sound City-wide records management system; and

**WHEREAS**, electronic signatures vary in their level of security, user-friendliness, and verifiability, the conditions under which they are accepted for public records are a governmental affair for the City to determine and for which the City may set policy; and

**WHEREAS**, City staff has increasingly been asked to execute contracts electronically under the provisions of the UETA, but has been unable to do so without a policy from the City Council authorizing electronic signatures; and

**WHEREAS**, City staff has increasingly been asked to execute contracts electronically under the provisions of the UETA, but has been unable to do so without a policy from the City Council authorizing electronic signatures; and

**WHEREAS**, the City seeks to provide its residents, businesses, vendors, and contractors the opportunity to submit information or transact business with the City electronically to the greatest extent practicable.

**NOW, THEREFORE, BE IT RESOLVED** by the City Council of the City of Morro Bay, California, as follows:

Section 1. The foregoing recitals are true and correct.

Section 2. The City of Morro Bay Electronic Signature Use Policy (Policy), attached as Attachment A to this Resolution, is hereby adopted. The City Manager or his designee, in consultation with the City Attorney, may subsequently amend the Policy and adopt additional guidelines, as necessary to implement the Policy's stated purpose.

Section 3. This Resolution will become effective immediately upon adoption.

**PASSED AND ADOPTED** by the City Council of the City of Morro Bay at a regular meeting thereof held on this 28<sup>th</sup> day of September 2021 on the following vote:

AYES:  
NOES:  
ABSENT:  
ABSTAIN:

\_\_\_\_\_  
JOHN HEADDING, Mayor

ATTEST:

\_\_\_\_\_  
DANA SWANSON, City Clerk

**CITY OF MORRO BAY  
ELECTRONIC SIGNATURE USE POLICY**

**I. Purpose**

The City of Morro Bay ("City") seeks in this Electronic Signature Use Policy ("Policy") to implement guidelines for the use and acceptance of electronic signatures used to conduct official business in the City. This Policy allows the use of electronic signature in lieu of manual signatures, when permitted by law, and establishes when an electronic signature may replace a manual signature.

**II. Legal Background**

California has adopted statutes regulating the use of electronic signatures including California Civil Code section 1633.1 *et seq.*, otherwise known as the "Uniform Electronic Transactions Act" ("UETA") and California Government Code section 16.5. This Policy and the guidelines and procedures included hereunder are intended to comply entirely with all applicable laws and regulations including, without limitation, the aforementioned statutes. To the extent any procedure, policy, or guideline contained herein conflicts with applicable law, City staff, officials, and agents and all other persons subject to this Policy are required and expected to comply with the requirements of the applicable law(s).

**III. Findings and Declarations**

- A. The use of electronic signature technology will allow the City to collect and preserve signatures on documents quickly, securely, and efficiently.
- B. The conditions under which the City will accept electronic signatures on City records or documents are a municipal affair for the City to determine and for which the City may set policy.
- C. The City has a vital interest in reducing the waste of paper, increasing the efficient use of public resources, and ensuring the security and authenticity of electronic records, including electronic signatures.
- D. This Policy seeks to mitigate the risks associated with conducting transactions, transmitting information, and maintaining public records that use electronic signatures.

**IV. Definitions**

- A. "Approved List of Digital Signature Certification Authorities" means the list of Certification Authorities approved by the California Secretary of State to issue certification for digital signature transactions involving public entities in California.
- B. "Certification Authority" means a person or entity that issues certification for a digital signature transaction.

- C. "Digital signature" means an electronic identifier, created by computer, intended by the party using it to have the same force and effect as the use of a manual signature. A digital signature is a type of "electronic signature.
- D. "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
- E. "Electronic record" means an official public record or file, resolution, ordinance or other public document created, generated, sent, communicated, received, or stored by electronic means. An electronic record generally contains information or a data file that was created and stored in digitized form through the use of computers, machines, and software applications.
- F. "Electronic signature" means an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record. For purposes of this Policy, a digital signature is a type of electronic signature.
- G. "External document" means any document generated by or required to be signed by persons other than the City. Examples of external documents include contracts to which the City is a party that must be signed by a non-City party or applications completed by the members of the public and submitted to the City.
- H. "Internal document" means any document created by the City and for use exclusively by the City in which a signature is required or used.
- I. "Manual signature" means an original wet signature is applied to a document.
- J. "Transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.

**V. General Policy Rules**

- A. Compliance with Law, Policy. To the extent permitted by law and this Policy, the City accepts electronic signatures as legally binding.
- B. Use Optional. The use or acceptance of electronic signatures shall be at the option of the non-City signatories. Nothing in this Policy shall require the City to use or permit the use of electronic signatures.
- C. Consent. All parties that wish to use electronic signatures shall agree to follow this Policy, shall provide written or electronic consent as to the use of electronic signatures, and shall agree to indemnify the City against any liability associated with transmitting an electronic signature or an electronically signed record by electronic transmission.

- D. Signature Use. The City Manager or designee may require the use of manual, electronic, or digital signatures at his or her discretion.
- E. Internal City Business
- a. The City requires various internal documents be approved by an employee, supervisor, department head, or other City staff and approvals for internal documents may be signified by electronic means as a replacement for a manual signature.
  - b. Internal documents that create or impose a legal or fiduciary duty may require a digital signature, as determined by the City Manager, or designee.
  - c. The use of electronic records, electronic signatures, and digital signatures by the City for internal City business and internal documents shall be in accordance with administrative procedures as designated and amended from time to time by the City Manager or designee (see Exhibit A).
- F. External Documents and Transactions
- a. If an electronic signature is used for an external document involving a transaction with the City which creates or imposes a legal duty, the City Manager may require a digital signature.
  - b. Design professionals, such as architects and engineers, wishing to use an electronic seal and signature may do so as allowed by State Business and Professions Code. Non-design professionals may sign plans via use of any valid electronic signature technology that complies with the requirements of this Policy including, but not limited to, a digital signature.
  - c. For any City business involving a non-City party, including without limitation external documents, the use and acceptance of electronic records, electronic signatures, and digital signature by the City shall be in accordance with administrative procedures as designated and amended from time to time by the City Manager or designee (see Exhibit A).
- G. Documents for which Electronic Signatures are Prohibited
- a. Civil Code section 1633.3 contains a list of transactions for which electronic signatures are unavailable.
  - b. Signatures that must be made in the presence of a notary public.
  - c. Unless otherwise allowed documents that are recorded with the County of San Luis Obispo.
- H. Valid Electronic Signatures. When a signature is required, the parties may agree that an electronic signature satisfies the requirement if:
- a. The signature is in accordance with the requirements of the UETA,
  - b. The signature is created using an electronic signature technology that has been approved by the City Manager, or designee, in accordance with the provisions of this Policy, and

- c. The signature is in accordance with any and all other applicable laws and regulations.
- I. Valid Digital Signatures. Digital signatures used in compliance with this Policy shall have the same force and effect as the use of a manual signature provided that the digital signature has all of the following attributes:
  - a. It is unique to the person using it;
  - b. It is capable of verification;
  - c. It is under the sole control of the person using it;
  - d. It is linked to data in such a manner that if the data is changed, the digital signature is invalidated; and
  - e. It conforms to the regulations adopted by the California Secretary of State including, but not limited to, the acceptable technology requirements set forth under the California Code of Regulations, title 2, section 22003.
  - f. The Certification Authority issuing the certification for the digital signature transaction must appear on the "Approved List of Digital Signature Certification Authorities" authorized by the California Secretary of State.
  - g. Prior to accepting a digital signature, City staff shall ensure that the level of security used to identify the signer of a document is sufficient for the transaction being conducted, that the level of security used to transmit the signature is sufficient for the transaction being conducted, and that the certificate format used by the signer is sufficient for the security and interoperability needs of the City.
- J. Minimum Standards. These are minimum standards. Any transaction must be analyzed under the facts and circumstances existing at the time a transaction has been executed. Depending upon the circumstances, the City may require a higher level of signature verification (i.e., out-of-state signatory). Nothing in this Policy prohibits a City official or employee, with the consent from the City Manager, from requiring a wet signature or higher form of secure electronic signature if he or she believes it is prudent or necessary.
- K. Acceptable Electronic Signature Technologies. The City Manager or designee shall identify the level of security procedures required for particular documents. The City Manager or designee shall also identify vendors and technology to execute those security procedures using industry best standards.
- L. Further Acts. Nothing in this Policy shall prevent the City Manager or designee, from adopting additional guidelines or taking further actions to implement this Policy or to add other permissible forms of electronic signatures to this Policy.

**VI. Sanctions**

Any person that makes inappropriate, illegal, or fraudulent use of electronic signatures, digital signatures, or electronic records in violation of this Policy or of any applicable law or regulation is subject to sanctions up to and including dismissal, suspension, and criminal prosecution as specified in published City policies, and state and federal law, regardless of whether such sanctions are directly referenced in this Policy. All inappropriate, illegal, or fraudulent uses of any electronic means of transmission shall be prosecuted to the fullest extent permitted by law, including the recovery of attorneys' fees and administrative costs.

CITY OF MORRO BAY

Exhibit "A"

Administrative Procedures for Acceptance of External Documents  
and/or Transactions with Electronic Signatures

I. PURPOSE

The purpose of these procedures is to document and implement the acceptance of external documents and/or transactions with electronic signatures in compliance with the City's Signature Use Policy.

II. CLASSES OF DOCUMENTS PERMITTED BY THE CITY MANAGER FOR ELECTRONIC SIGNATURE

The security requirements for electronic signatures range from simple to the more complex, depending upon the level of transaction. The following are the classes of documents permitted for electronic signature. It is not intended to be an exhaustive list, nor does it impose electronic signature as a requirement for any particular transaction.

- A. Contracts and Amendments
- B. Grant Documents
- C. Applications
- D. Invoices and Purchase Orders
- E. Certificates and Permits, as allowed by law
- F. Correspondence

Approved by:

\_\_\_\_\_  
Scott Collins, City Manager



AGENDA NO: A-8

MEETING DATE: September 28, 2021

# Staff Report

**TO:** Honorable Mayor and City Council

**DATE:** September 23, 2021

**FROM:** Daniel McCrain, Fire Chief

**SUBJECT:** Adopt Resolution No. 62-21 Revising the Terms of the City's Reimbursement Agreement with the California Governor's Office of Emergency Services to add the Division Chief Classification and Receive Portal to Portal Reimbursement for all Fire Department Classifications

## RECOMMENDATION

Council adopt Resolution No. 62-21 rescinding Resolution No. 56-20 and revising the terms of the City's reimbursement agreement to include the classification of Division Chief and provide all job classifications with portal to portal pay.

## ALTERNATIVES

Take no action. This would prevent the position of Division Chief from receiving reimbursement from the California Governor's Office of Emergency Services, Fire Rescue Division and maintain reimbursement for only hours worked for the Fire Chief classification.

## FISCAL IMPACT

The recommended action will have a positive fiscal impact on the City. The impact will vary each year depending on the number of hours that the Morro Bay fire personnel are committed to mutual Aid Assignments. The wages paid to classified employees are reimbursed at their actual rate of pay by the California Office of Emergency Services ("OES") Mutual Aid Agreements. An additional 21.967% administrative fee is paid to the City for all hours reimbursed. Portal to portal pay would result in a larger administrative fee than direct hours worked. The salary schedule on file with the State of California is updated each time there is a salary adjustment within the department.

## BACKGROUND

Fire Department response personnel in Resolution No. 56-20 adopted in June 2020 included Fire Chief, Fire Marshal, Fire Captain Paramedic, Engineer, Engineer Paramedic, Firefighter, Firefighter Paramedic, Reserve Engineer, and Reserve Firefighter. This resolution was in place before the creation of the Division Chief rank at the Morro Bay Fire Department. The Fire Chief job classification

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Prepared By: DM \_\_\_\_\_

Dept Review: \_\_\_\_\_

City Manager Review: \_\_\_\_\_

City Attorney Review: MCH

was excluded in the portal-to-portal compensation in that resolution.

## **DISCUSSION**

The compensation of a classified employee at "Portal-to-Portal" means that the employee is paid from the time they depart their home station for a Mutual Aid assignment until the time that they return to their duty station. They are compensated for all hours away from home assisting the State Mutual Aid System. The employee's compensation during this assignment is reimbursed at an agreed upon rate equal to the employees' actual rate of pay. The Fire Chief and Division Chief will be paid at their base straight time hourly rate. These are the only FLSA-exempt Fire Department classifications, and they may be paid straight time for additional hours worked for these emergency services without losing FLSA-exempt status. All other job classifications will be eligible to be paid at an overtime rate of 1.5 times their base hourly wage in accordance with the City's Personnel Rules and MBFFA Memorandum of Understanding.

Since the creation of a Division Chief classification within the Morro Bay Fire Department occurred earlier this year, there must be a resolution adding this position for the state to reimburse the City at the appropriate pay scale. This standard of portal-to-portal compensation of all classified employees is consistent with the other municipal fire Departments within San Luis Obispo County. While assigned to an incident the employee is committed to the incident and must remain available to perform their assigned duties including during rest periods.

The State OES reimbursement is intended to eliminate any financial burden of the employee's agency by allowing participation in the Mutual Aid System without encumbering any additional costs. These agreed upon rates provide a framework to compensate these highly trained and experienced managers for their participation in these crucial Emergency Management roles during Mutual Aid incidents. The advancement of digital technology has made it possible for executive employees to continue performing a majority of their assigned City duties while assigned to these Mutual Aid assignments further reducing the impact on City operations.

## **CONCLUSION**

Adding the Division Chief job classification to the current resolution and compensating this classification and the Fire Chief classification portal-to-portal, will ensure that the City of Morro Bay will be reimbursed for all time the Fire Chief or Division Chief are assigned to a reimbursable Mutual Aid incident. There is no additional financial burden to the City or Fire Department.

## **ATTACHMENTS**

1. Existing Resolution No. 56-20
2. Proposed Resolution No. 62-21

**RESOLUTION NO. 56-20**

**RESOLUTION OF THE CITY COUNCIL  
OF THE CITY OF MORRO BAY, CALIFORNIA IDENTIFYING THE TERMS  
AND CONDITIONS FOR FIRE DEPARTMENT RESPONSE AWAY FROM  
THEIR OFFICIAL DUTY STATION AND ASSIGNED TO AN EMERGENCY  
MUTUAL AID INCIDENT RESCINDING RESOLUTION NO. 36-15**

**THE CITY COUNCIL  
City of Morro Bay, California**

**WHEREAS**, the City of Morro Bay Fire Department is a public agency located in the County of San Luis Obispo, State of California; and

**WHEREAS**, it is the City of Morro Bay's desire to provide fair and legal payment to all its employees for time worked; and

**WHEREAS**, the City of Morro Bay Fire Department has in its employ designated Fire response personnel as follows: Fire Chief, Fire Captain, Fire Captain Paramedic, Engineer, Engineer Paramedic, Firefighter, Firefighter Paramedic, Reserve Engineer, and Reserve Firefighter; and

**WHEREAS**, the City of Morro Bay Fire Department desires to add the position of Fire Marshall to designated Fire response personnel; and

**WHEREAS**, the City of Morro Bay will compensate its employees portal to portal while in the course of their employment and away from their official duty station and assigned to an emergency incident, in support of an emergency incident, or pre-positioned for emergency response; and

**NOW, THEREFORE, BE IT HEREBY RESOLVED** by the City Council of the City of Morro Bay, California, as follows:

1. Resolution No. 36-15 is hereby rescinded.
2. Personnel shall be compensated according to Memorandum of Understanding (MOU), Personnel Rules and Regulations, and/or other directive that identifies personnel compensation in the workplace.
3. In the event a personnel classification does not have an assigned compensation rate, a "Base Rate" as set forth in an organizational policy, administrative directive or similar document will be used to compensate such personnel.
4. The City of Morro Bay Fire Department will maintain a current salary survey or acknowledgement of acceptance of the "base rate" on file with the California Governor's Office of Emergency Services, Fire Rescue Division.

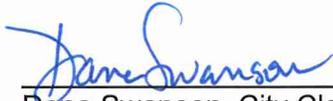
5. All personnel with the exception of the Fire Chief will be compensated (portal to portal) beginning at the time of dispatch to the return to jurisdiction when equipment and personnel are in service and available for agency response.
6. The Fire Chief will be compensated actual hours worked on the incident.
7. Fire department response personnel include: Fire Chief, Fire Marshal, Fire Captain, Fire Captain Paramedic, Engineer, Engineer Paramedic, Firefighter, Firefighter Paramedic, Reserve Engineer, and Reserve Firefighter.

**PASSED AND ADOPTED** by the City Council of the City of Morro Bay at a regular meeting thereof held on the 23<sup>rd</sup> day of June, 2020 on the following vote:

AYES:           Headding, Addis, Davis, Heller, McPherson  
NOES:           None  
ABSENT:       None

  
\_\_\_\_\_  
John Headding, Mayor

ATTEST:

  
\_\_\_\_\_  
Dana Swanson, City Clerk

**RESOLUTION NO. 62-21**

**RESOLUTION OF THE CITY COUNCIL  
OF THE CITY OF MORRO BAY, CALIFORNIA IDENTIFYING THE TERMS  
AND CONDITIONS FOR FIRE DEPARTMENT RESPONSE AWAY FROM  
THEIR OFFICIAL DUTY STATION AND ASSIGNED TO AN EMERGENCY  
MUTUAL AID INCIDENT AND RESCINDING RESOLUTION NO. 56-20**

**THE CITY COUNCIL  
City of Morro Bay, California**

**WHEREAS**, the City of Morro Bay Fire Department is a public agency located in the County of San Luis Obispo, State of California; and

**WHEREAS**, it is the City of Morro Bay's desire to provide fair and legal payment to all its employees for time worked; and

**WHEREAS**, the City of Morro Bay Fire Department has in its employ designated Fire response personnel as follows: Fire Chief, Division Chief, Fire Marshal, Fire Captain, Fire Captain Paramedic, Engineer, Engineer Paramedic, Firefighter, Firefighter Paramedic, Reserve Engineer, and Reserve Firefighter; and

**WHEREAS**, the City of Morro Bay Fire Department desires to add the position of Division Chief to designated Fire response personnel; and

**WHEREAS**, the City of Morro Bay will compensate its employees portal to portal while in the course of their employment and away from their official duty station and assigned to an emergency incident, in support of an emergency incident, or pre-positioned for emergency response; and

**WHEREAS**, the City of Morro Bay will seek reimbursement for qualifying mutual aid responses such that all City Costs, including but not limited to personnel, apparatus, equipment, and administrative costs, incurred in connection with qualifying mutual aid responses do not have a net negative impact on the City's financial position.

**NOW, THEREFORE, BE IT HEREBY RESOLVED** by the City Council of the City of Morro Bay, California, as follows:

1. Resolution No. 56-20 is hereby rescinded.
2. Personnel shall be compensated according to Memorandum of Understanding (MOU), Personnel Rules and Regulations, and/or other directive that identifies personnel compensation in the workplace.
3. In the event a personnel classification does not have an assigned compensation rate, a "Base Rate" as set forth in an organizational policy, administrative directive or similar document will be used to compensate such personnel.

4. The City of Morro Bay Fire Department will maintain a current salary survey or acknowledgement of acceptance of the “base rate” on file with the California Governor’s Office of Emergency Services, Fire Rescue Division.
5. All personnel will be compensated (portal to portal) beginning at the time of dispatch to the return to jurisdiction when equipment and personnel are in service and available for agency response.
6. Fire Department response personnel include: Fire Chief, Division Chief, Fire Marshal, Fire Captain, Fire Captain Paramedic, Engineer, Engineer Paramedic, Firefighter, Firefighter Paramedic, Reserve Engineer, and Reserve Firefighter.
7. The Fire Chief and Division Chief, as FLSA-exempt employees, shall be compensated at their base hourly wage, when providing such emergency response services. All other classified response personnel shall be eligible for overtime compensation when providing such emergency response services, in accordance with personnel rules and regulations, their current Memorandum of Understanding, and all other applicable state and federal laws.

**PASSED AND ADOPTED** by the City Council of the City of Morro Bay at a regular meeting thereof held on the 28th day of September 2021 on the following vote:

AYES:  
NOES:  
ABSENT:

\_\_\_\_\_  
JOHN HEADDING, Mayor

ATTEST:

\_\_\_\_\_  
DANA SWANSON, City Clerk



AGENDA NO: A-9

MEETING DATE: September 28, 2021

# Staff Report

**TO:** Honorable Mayor and City Council

**DATE:** September 22, 2021

**FROM:** Scott Collins, City Manager  
Dana Swanson, City Clerk/Human Resources Manager

**SUBJECT:** Adopt Resolution No. 63-21 Approving an Increase to the City’s Contribution to Employee Health Care Coverage

## RECOMMENDATION

Staff recommends the City Council adopt Resolution No. 63-21 approving amended Memoranda of Understanding (MOU’s) as agreed to by each represented bargaining group [Morro Bay Police Officers Association (“MBPOA”), Morro Bay Fire Fighters Association (“MBFFA”) and Service Employees International Union (“SEIU”) Local 620], establishing an increase to the City’s contribution to employee health care coverage effective January 2022, and extending the same benefits to unrepresented Confidential, Management and Executive employees.

## ALTERNATIVES

The Council may choose not to adopt Resolution No. 63-21 and provide alternative direction to staff.

## FISCAL IMPACT

If the recommendation is approved, the total cost to the City in Fiscal Year 2021/22 is approximately \$64,000 spread over all funds (7 months, given that costs are paid in advance so increase City contributions would take effect in December to cover January premiums). The total cost for a full fiscal year is estimated to be \$110,000.

## BACKGROUND

The Morro Bay community is best served by attracting and retaining experienced, talented, and well-trained staff, minimizing turnover to the greatest extent possible. The Council has expressed a commitment to providing competitive and fair compensation that will facilitate recruitment and retention of City employees.

In August of each year, the City is advised of the PERS health insurance rates for the upcoming calendar year. Because the new rates are not known during labor negotiations which typically wrap up in the May-June timeframe, the Memorandum of Understanding with each represented employee group (MBPOA, MBFFA and SEIU) include “reopener” language where both the City and the groups retain the option to reopen collective bargaining to discuss any health provider rate changes effective January 1<sup>st</sup> of the following year. The City currently offers five plan options to City employees through CalPERS (one additional plan “PORAC” is available only to POA members). The City’s employees have the ability to change plans each year to minimize expense, if desired.

Prepared By: ___DS___	Dept Review: _____
City Manager Review: ___SC___	City Attorney Review: __MCH__

Human Resources staff provided the 2022 Health Rates to all full-time staff on August 3, 2021 and informed them of the CalPERS open enrollment period which runs from September 20 – October 15. The open enrollment period is the employee's opportunity to choose a different health coverage for the next calendar year. The City's contribution to employee health care premiums (called the "City health bank") have not been increased since 2018. The most popular Health Maintenance Organization (HMO) Plan, United Healthcare, was an affordable alternative for employees during the time span between 2017 through 2020. However, the cost of that plan has risen rather significantly the past two years. More than 1/3 of City employees are enrolled in United Healthcare HMO plan and have absorbed an increase of \$333.94 per month in health care costs over the past four years. On the Preferred Provider Organization (PPO) side, the 2022 health premium rates for the PERS Select – Gold Plan are actually lower than they were in 2017, though employees who select a PPO plan often incur higher costs for using health care beyond their monthly premium costs. Thus, health plan premiums as well as copays or coinsurance vary significantly by plan.

The City currently offers five plan options to City employees through CalPERS (one additional plan "PORAC" is available only to POA members). The City's employees have the ability to change plans each year to minimize expense, if desired.

### **DISCUSSION**

On August 13, 2021, SEIU requested to reopen collective bargaining to discuss the provider health premium rate changes to be effective January 1, 2022 (Attachment 1). City representatives met and conferred with SEIU to reach a tentative agreement and amended memorandum of understanding (MOU), with regard to the City's health bank contribution for the 2022 health rates. The 2022 Health Bank amounts shown below cover 50% of the average premium cost increase for the City's health plans during the period 2018-2022. A proposal with terms tentatively agreed to with SEIU were provided to the Morro Bay Firefighters Association and Morro Bay Peace Officers Association and are recommended to be extended to unrepresented Confidential, Management and Department Head employees. The monthly cost for health care is paid in advance so the new health bank contribution would take effect December 2021 for the January 2022 health care coverage.

#### **Monthly City Health Bank for 2022**

Employee only - \$767 (currently \$715)

Employee + 1 - \$1,232 (currently \$1,135)

Employee +1+1 (Family) - \$1,589 (currently \$1,460)

The CalPERS open enrollment period and opportunity for employees to choose different health care coverage for the upcoming calendar year is September 20 through October 15. As of the publishing of this report, MBPOA and SEIU have approved the revised health bank amounts and its anticipated MBFFA will meet to consider the proposal prior to the September 28<sup>th</sup> Meeting. The timeline for approval of this item by Council at the September 28 meeting would allow employees to have clear information when making their open enrollment decisions.

### **CONCLUSION**

Staff recommends the City Council adopt Resolution No. 63-21 approving amended Memorandums of Understanding (MOU's) as agreed to by each of the bargaining groups, establishing an increase to the City's contribution to employee health care coverage effective January 2022, and extending the same benefits to unrepresented Management, Confidential and Executive employees.

### **ATTACHMENTS**

1. 2021-22 Health Care Rates
2. Resolution No. 63-21 with Exhibits 1, 2 & 3

**CITY OF MORRO BAY**  
**HEALTH CARE INCREASES TO EEs, Monthly Based Plans and 2022 PROPOSED City Health Bank Contribution**  
**FOR ALL BENEFITTED GROUPS**

CalPERS Health Rates

	2021 rates			2022 rates		
	<u>Emp</u>	<u>Emp + 1</u>	<u>Emp +1++</u>	<u>Emp</u>	<u>Emp + 1</u>	<u>Emp +1++</u>
PPO'S						
PERSChoice - PERS Platinum	\$783.19	\$1,566.38	\$2,036.29	\$882.18	\$1,764.36	\$2,293.67
PERS Select - PERS Gold	\$476.92	\$953.84	\$1,239.99	\$587.78	\$1,175.56	\$1,528.23
PORAC (members only)	\$749.00	\$1,499.00	\$1,960.00	\$775.00	\$1,550.00	\$2,010.00
HMO'S						
Blue Shield - Access +	\$938.96	\$1,877.92	\$2,441.30	\$900.22	\$1,800.44	\$2,340.57
Blue Shield Trio	\$722.56	\$1,445.12	\$1,878.66	\$742.70	\$1,485.40	\$1,931.02
United Healthcare	\$723.84	\$1,447.68	\$1,881.98	\$775.09	\$1,550.18	\$2,015.23

<b>CITY HEALTH BANK</b>	<b>\$715</b>	<b>\$1,135</b>	<b>\$1,460</b>	<b>\$767</b>	<b>\$1,232</b>	<b>\$1,589</b>
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	EMPLOYEE IS PAYING IN 2021, PER MONTH			EMPLOYEE WILL PAY IN 2022, PER MONTH			MONTHLY COST INCREASE TO EMPLOYEE IN 2022		
	<u>Emp</u>	<u>Emp + 1</u>	<u>Emp +1++</u>	<u>Emp</u>	<u>Emp + 1</u>	<u>Emp +1++</u>	<u>Emp</u>	<u>Emp + 1</u>	<u>Emp +1++</u>
PERSChoice - PERS Platinum	\$ 68.19	\$ 431.38	\$ 576.29	\$ 115.18	\$ 532.36	\$ 704.67	\$ 46.99	\$ 100.98	\$ 128.38
PERS Select - PERS Gold	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
PORAC (members only)	\$ 34.00	\$ 364.00	\$ 500.00	\$ 8.00	\$ 318.00	\$ 421.00	\$ (26.00)	\$ (46.00)	\$ (79.00)
Blue Shield - Access +	\$ 223.96	\$ 742.92	\$ 981.30	\$ 133.22	\$ 568.44	\$ 751.57	\$ (90.74)	\$ (174.48)	\$ (229.73)
Blue Shield Trio	\$ 7.56	\$ 310.12	\$ 418.66	\$ -	\$ 253.40	\$ 342.02	\$ (7.56)	\$ (56.72)	\$ (76.64)
United Health Care	\$ 8.84	\$ 312.68	\$ 421.98	\$ 8.09	\$ 318.18	\$ 426.23	\$ (0.75)	\$ 5.50	\$ 4.25

**RESOLUTION NO. 63-21**

**A RESOLUTION OF THE CITY COUNCIL  
OF THE CITY OF MORRO BAY, CALIFORNIA  
ADOPTING AMENDMENTS TO THE MEMORANDA  
OF UNDERSTANDING BETWEEN THE CITY OF MORRO BAY AND THE MBPOA, MBFFA,  
AND SEIU LOCAL 621, AND AMENDING RESOLUTION NUMBERS 34-21, 35-21 AND 36-  
21 TO PROVIDE INCREASED CITY CONTRIBUTIONS TO EMPLOYEE HEALTH CARE  
PREMIUMS EFFECTIVE JANUARY 1, 2022**

**THE CITY COUNCIL  
City of Morro Bay, California**

**WHEREAS**, the City of Morro Bay (hereinafter the “City”) has, and continues to, recognize the Morro Bay Peace Officers’ Association (“MBPOA”) as the sole exclusive bargaining agent for those City employees designated as being in the Law Enforcement Unit, including the classification of Police Officer, Senior Officer, Administrative Sergeant, and Sergeant, for all matters concerning wages, hours and working conditions; and

**WHEREAS**, the current Memorandum of Understanding between the City and the MBPOA (“MBPOA MOU 2021-2022”), was duly approved by the City Council on June 22, 2021; and

**WHEREAS**, the City has, and continues to, recognize the Morro Bay Firefighters Association, IAFF Local 3725 (“MBFFA”) as the sole exclusive bargaining agent for those City fire fighting employees, for all matters concerning wages, hours and working conditions; and

**WHEREAS**, the current Memorandum of Understanding between the City and the MBFFA (“MBFFA MOU 2020-2022”), was duly approved by the City Council on June 22, 2021; and

**WHEREAS**, the City has, and continues to, recognize the Service Employees International Union (“SEIU”), Local 620, as the sole exclusive bargaining agent for the City’s miscellaneous employees, for all matters concerning wages, hours and working conditions; and

**WHEREAS**, the current Memorandum of Understanding between the City and SEIU (“SEIU MOU 2021-2022”), was duly approved by the City Council on June 22, 2021; and

**WHEREAS**, the City’s labor relations representatives and MBPOA, MBFFA and SEIU, Local 620 representatives have successfully met and conferred to negotiate amendments to their respective memoranda of understanding with the City, pursuant to both the Meyers-Milias-Brown Act (“MBA”) (Gov’t Code §§ 3500-3511) and the City’s Employer-Employee Relations Resolution No. 08-17; and

**WHEREAS**, pursuant to Gov’t Code § 3505.1, the City Council must approve the terms of any memoranda of understanding or amendment thereto reflecting an agreement between the City and MBPOA, MBFFA and SEIU, Local 620; and

**WHEREAS**, Resolution No. 34-21, which was adopted by the City Council on June 22, 2021, sets forth the compensation ranges and benefits for the City’s unrepresented confidential employees, namely Human Resources Analyst I, Human Resources Analyst II, Senior Accounting Technician, and Executive Assistant/ Deputy City Clerk; and

**WHEREAS**, Resolution No. 35-21, which was adopted by the City Council on June 22, 2021, sets forth the compensation ranges and benefits for the City's unrepresented management employees, namely Police Commander, Division Chief/Fire Marshal, Utility Division Manager, City Engineer, City Clerk/Human Resources Manager, Finance Manager, Senior Civil Engineer, Senior Administrative Services Analyst, Information Systems Technician, Environmental Programs Manager, Senior Planner, Recreation Services Manager, Consolidated Maintenance Superintendent, Management Analyst and Police Support Services Manager; and

**WHEREAS**, Resolution No. 36-21, which was adopted by the City Council on June 22, 2021, sets forth the compensation ranges and benefits for the City's department heads, including the Administrative Services Director/Assistant City Manager, Community Development Director, Fire Chief, Harbor Director, Police Chief, and Public Works Director (collectively referred to as "Directors"); and

**WHEREAS**, the City's City Council now desires to provide increased City contributions to employee health care premiums effective January 1, 2022, as set forth in this resolution.

**NOW, THEREFORE, BE IT RESOLVED**, by the City Council of the City of Morro Bay, California, as follows:

**Section 1.** The City Council hereby authorizes the following health care contributions to MBPOA-represented employees, MBFFA-represented employees, SEIU, Local 621-represented employees, unrepresented confidential designated employees, unrepresented management employees, and Directors effective January 1, 2022:

Employee only - up to \$767/month or cost of insurance, whichever is less  
Employee + 1 – up to \$1,232/month or cost of insurance, whichever is less  
Employee + family - up to \$1,589/month or cost of insurance, whichever is less

**Section 2.** The Amendment No. 1 to the MBPOA MOU 2021-2022, attached hereto as Exhibit "1," is hereby approved.

**Section 3.** The Amendment No. 1 to the MBFFA MOU 2020-2022, attached hereto as Exhibit "2," is hereby approved.

**Section 4.** The Amendment No. 1 to the SEIU, Local 621 MOU 2021-2022, attached hereto as Exhibit "3," is hereby approved.

**Section 5.** Section I of Resolution No. 34-21 providing for the compensation and benefits for the unrepresented confidential designated employees of the City, is amended to read, in its entirety as follows (additions shown in ***bold italics***):

**"I. HEALTH/LIFE/VISION/DENTAL INSURANCE**

Effective July 1, 2021, all employees receive the following contribution toward the purchase of CalPERS health insurance, which includes the required CalPERS monthly contribution:

Employee only - up to \$715/month or cost of insurance, whichever is less  
Employee + 1 - up to \$1,135/month or cost of insurance, whichever is less  
Employee + family - up to \$1,460/month or cost of insurance, whichever is less

**Effective January 1, 2022, all employees shall receive the following contribution toward the purchase of CalPERS health insurance, which includes the required CalPERS monthly contribution:**

**Employee only - up to \$767/month or cost of insurance, whichever is less**  
**Employee + 1 – up to \$1,232/month or cost of insurance, whichever is less**  
**Employee + family - up to \$1,589/month or cost of insurance, whichever is less**

Life insurance is provided at \$50,000 and is paid for by the City for the employee only.

Effective July 1, 2021, all employees receive the following contribution toward the purchase of Life, Vision and Dental insurances:

	<u>Life</u>	<u>Vision</u>	<u>Dental</u>	<u>Total</u>	<u>Bank</u>	<u>EE Pays</u>
Employee only	\$8.70	\$ 8.73	\$ 56.68	\$ 74.11	\$ 71.18	\$ 2.93
Employee + 1	\$8.70	\$ 16.40	\$156.84	\$181.94	\$170.19	\$11.75
Employee + 2+	\$8.70	\$ 23.34	\$156.84	\$188.88	\$176.67	\$12.21

City will pay the remaining premium for life, vision and dental.

For retired employees, City contributes the required CalPERS monthly contribution towards CalPERS health plans, as selected by retiree.”

**Section 6.** Section I of Resolution No. 35-21 providing for the compensation and benefits for the unrepresented management designated employees of the City, is amended to read, in its entirety as follows (additions shown in **bold italics**):

**“I. HEALTH/LIFE/VISION/DENTAL INSURANCE**

Effective July 1, 2021, all employees receive the following contribution toward the purchase of CalPERS health insurance, which includes the required CalPERS monthly contribution:

Employee only - up to \$715/month or cost of insurance, whichever is less  
 Employee + 1 - up to \$1,135/month or cost of insurance, whichever is less  
 Employee + family - up to \$1,460/month or cost of insurance, whichever is less

**Effective January 1, 2022, all employees shall receive the following contribution toward the purchase of CalPERS health insurance, which includes the required CalPERS monthly contribution:**

**Employee only - up to \$767/month or cost of insurance, whichever is less**  
**Employee + 1 – up to \$1,232/month or cost of insurance, whichever is less**  
**Employee + family - up to \$1,589/month or cost of insurance, whichever is less**

Life insurance is provided at \$50,000 and is paid for by the City for the employee only.

Effective July 1, 2021, all employees receive the following contribution toward the purchase of Life, Vision and Dental insurances:

	<u>Life</u>	<u>Vision</u>	<u>Dental</u>	<u>Total</u>	<u>Bank</u>	<u>EE Pays</u>
Employee only	\$8.70	\$ 8.73	\$ 56.68	\$ 74.11	\$ 71.18	\$ 2.93
Employee + 1	\$8.70	\$ 16.40	\$156.84	\$181.94	\$170.19	\$11.75
Employee + 2+	\$8.70	\$ 23.34	\$156.84	\$188.88	\$176.67	\$12.21

For retired employees, City contributes the required CalPERS monthly contribution towards CalPERS health plans, as selected by retiree.”

**Section 7.** Section 4(J) of Resolution No. 36-21 providing for the compensation and benefits for the Directors, is amended to read, in its entirety, as follows (additions shown in ***bold italics***):

“J. Health, Life Dental and Vision. Effective July 1, 2021, all Directors shall receive the following contribution toward the purchase of CalPERS health insurance, which includes the required CalPERS monthly contribution:

Employee only - up to \$715/month or cost of insurance, whichever is less  
Employee + 1 - up to \$1,135/month or cost of insurance, whichever is less  
Employee + family - up to \$1,460/month or cost of insurance, whichever is less

***Effective January 1, 2022, all Directors shall receive the following contribution toward the purchase of CalPERS health insurance, which includes the required CalPERS monthly contribution:***

***Employee only - up to \$767/month or cost of insurance, whichever is less  
Employee + 1 – up to \$1,232/month or cost of insurance, whichever is less  
Employee + family - up to \$1,589/month or cost of insurance, whichever is less***

Life insurance is provided at \$50,000 and is paid for by the City for the employee only.

Effective July 1, 2021, all Directors shall receive the following contribution toward the purchase of Life, Vision and Dental insurances:

	<u>Life</u>	<u>Vision</u>	<u>Dental</u>	<u>Total</u>	<u>Bank</u>	<u>EE Pays</u>
Employee only	\$8.70	\$ 8.73	\$ 56.68	\$ 74.11	\$ 71.18	\$ 2.93
Employee + 1	\$8.70	\$ 16.40	\$156.84	\$181.94	\$170.19	\$11.75
Employee + 2+	\$8.70	\$ 23.34	\$156.84	\$188.88	\$176.67	\$12.21

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For retired Directors, City contributes the required CalPERS monthly contribution towards CalPERS health plans, as selected by retiree.”

**PASSED AND ADOPTED** by the City Council, City of Morro Bay at a regular meeting thereof held on the 28<sup>th</sup> day of September, 2021 by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

---

JOHN HEADDING, Mayor

ATTEST:

---

DANA SWANSON, City Clerk

# Exhibit 1

# Exhibit 2

# Exhibit 3

AMENDMENT NO. 1 TO THE MEMORANDUM OF UNDERSTANDING  
BETWEEN THE CITY OF MORRO BAY AND THE MORRO BAY POLICE  
OFFICERS' ASSOCIATION FOR THE PERIOD OF JANUARY 1, 2021  
THROUGH JUNE 30, 2022

WHEREAS, the City of Morro Bay (hereinafter the "City") has, and continues to, recognize the Morro Bay Peace Officers' Association ("MBPOA") as the sole exclusive bargaining agent for those City employees designated as being in the Law Enforcement Unit, including the classification of Police Officer, Senior Officer, Administrative Sergeant, and Sergeant, for all matters concerning wages, hours and working conditions; and

WHEREAS, the current Memorandum of Understanding between the City and the MBPOA ("MBPOA MOU 2021-2022"), was duly approved by the City Council on June 22, 2021; and

WHEREAS, the City's labor relations representatives and MBPOA representatives have successfully met and conferred to negotiate an amendment to the MBPOA MOU 2021-2022 to reflect increased City contributions to employee health care premiums effective January 1, 2022, pursuant to both the Meyers-Milias-Brown Act ("MMBA") (Gov't Code Section 3500-3511) and the City's Employer-Employee Relations Resolution No. 08-17, and have jointly prepared and executed this Amendment No. 1 to the MBPOA MOU 2021-2022 ("First Amendment"), which was ratified by the MBPOA on September 17, 2021 and remains subject to City Council determination and approval; and

WHEREAS, this First Amendment shall not be in full force and effect until adopted by resolution by the City Council of the City; and

WHEREAS, except as provided in this First Amendment, all other provisions of the MBPOA MOU 2021-2022 shall remain in full force and effect.

NOW, THEREFORE, it is hereby agreed that the MBPOA MOU 2021-2022 is amended in the following particulars only:

Section 1. A new subsection 15.1.2 is added to Section 15.1 of the MBPOA MOU 2021-2022, entitled "Health Insurance," to read as follows (additions shown in ***bold italics***):

"15.1 HEALTH INSURANCE

15.1.1 Effective July 1, 2018, UNIT employees shall receive a cafeteria plan contribution, including the amount required by CalPERS, as follows:

Employee only - up to \$715/month or cost of insurance, whichever is less  
Employee + 1 – up to \$1,135/month or cost of insurance, whichever is less  
Employee + family - up to \$1,460/month or cost of insurance, whichever is less

***15.1.2 Effective January 1, 2022, UNIT employees shall receive a cafeteria plan contribution, including the amount required by CalPERS, as follows:***

*Employee only - up to \$767/month or cost of insurance, whichever is less  
Employee + 1 – up to \$1,232/month or cost of insurance, whichever is less  
Employee + family - up to \$1,589/month or cost of insurance, whichever is less”*

Section 2. Section 15.4 of the MBPOA MOU 2021-2022 shall be amended to read, in its entirety, as follows (deletions shown in ~~strikethrough~~).

“15.4 CITY contributions pursuant to this Article 15.0 shall remain effective through June 30, 2022. ~~The CITY and ASSOCIATION agree herewith to retain the option to re-open collective bargaining, with respect to this Article 15, to discuss any health provider rate changes effective January 1, 2022.”~~

Section 3. Except as expressly provided in this First Amendment, all other provisions of the MBPOA MOU 2021-2022 shall remain in full force and effect.

Section 4. This First Amendment shall not be in full force and effect until adopted by resolution by the City Council of the City.

**IT IS SO AGREED:**

**MORRO BAY PEACE OFFICERS’  
ASSN.**

**CITY OF MORRO BAY**

\_\_\_\_\_  
William Marvos, President

\_\_\_\_\_  
Scott Collins, City Manager

\_\_\_\_\_  
Stacie Casabian, Chief Labor Negotiator

\_\_\_\_\_  
Colin J. Tanner, Deputy City  
Attorney/Labor Negotiator

\_\_\_\_\_  
Tony Mosqueda, Employee  
Representative

\_\_\_\_\_  
Dana Swanson, City Clerk/ HR Manager

\_\_\_\_\_  
Laurie Goforth, Human Resources Analyst  
II

AMENDMENT NO. 1 TO THE MEMORANDUM OF UNDERSTANDING  
BETWEEN THE CITY OF MORRO BAY AND THE MORRO BAY FIRE  
FIGHTERS ASSOCIATION, IAFF LOCAL 3725, FOR THE PERIOD OF  
JULY 1, 2020 THROUGH JUNE 30, 2022

WHEREAS, the City of Morro Bay (hereinafter the "City") has, and continues to, recognize the Morro Bay Firefighters Association, IAFF Local 3725 ("MBFFA") as the sole exclusive bargaining agent for the City's fire fighting employees as defined by the parties in their labor agreements, for all matters concerning wages, hours and working conditions; and

WHEREAS, the current Memorandum of Understanding between the City and the MBFFA ("MBFFA MOU 2020-2022"), was duly approved by the City Council on June 22, 2021; and

WHEREAS, the City's labor relations representatives and MBFFA representatives have successfully met and conferred to negotiate an amendment to the MBFFA MOU 2020-2022 to reflect increased City contributions to employee health care premiums effective January 1, 2022, pursuant to both the Meyers-Milias-Brown Act ("MMBA") (Gov't Code Section 3500-3511) and the City's Employer-Employee Relations Resolution No. 08-17, and have jointly prepared and executed this Amendment No. 1 to the MBFFA MOU 2020-2022 ("First Amendment"), which was ratified by the MBFFA on September \_\_, 2021 and remains subject to City Council determination and approval; and

WHEREAS, this First Amendment shall not be in full force and effect until adopted by resolution by the City Council of the City; and

WHEREAS, except as provided in this First Amendment, all other provisions of the MBFFA MOU 2020-2022 shall remain in full force and effect.

NOW, THEREFORE, it is hereby agreed that the MBFFA MOU 2020-2022 is amended in the following particulars only:

Section 1. Section 14.2 of the MBFFA MOU 2020-2022, entitled "Health Insurance," shall be amended to read, in its entirety, as follows (additions shown in ***bold italics***):

"14.2 HEALTH INSURANCE

For 2020 and 2021, MBFFA shall receive a cafeteria plan contribution, including the amount required by CalPERS, as follows:

Employee only - up to \$715/month or cost of insurance, whichever is less  
Employee + 1 - up to \$1,135/month or cost of insurance, whichever is less  
Employee + family - up to \$1,460/month or cost of insurance, whichever is less

***Effective January 1, 2022, MBFFA employees shall receive a cafeteria plan contribution, including the amount required by CalPERS, as follows:***

***Employee only - up to \$767/month or cost of insurance, whichever is less***

***Employee + 1 – up to \$1,232/month or cost of insurance, whichever is less  
Employee + family - up to \$1,589/month or cost of insurance, whichever is less”***

Section 2. Section 14.4 of the MBFFA MOU 2020-2022 shall be amended to read, in its entirety, as follows (deletions shown in ~~strike through~~):

“14.4 The provisions of this ARTICLE shall be binding on the parties through the remainder of the term of this MOU, which will be effective upon City Council approval. ~~The parties agree herewith to re-open discussion with respect to this ARTICLE, for any changes to 2022 health rates.~~”

Section 3. Except as expressly provided in this First Amendment, all other provisions of the MBFFA MOU 2020-2022 shall remain in full force and effect.

Section 4. This First Amendment shall not be in full force and effect until adopted by resolution by the City Council of the City.

**IT IS SO AGREED:**

**MORRO BAY FIRE FIGHTERS  
ASSOCIATION, IAFF LOCAL 3725**

**CITY OF MORRO BAY**

\_\_\_\_\_  
Travis Hasch

\_\_\_\_\_  
Scott Collins, City Manager

\_\_\_\_\_  
Scott Subler

\_\_\_\_\_  
Colin J. Tanner, Deputy City  
Attorney/Labor Negotiator

\_\_\_\_\_  
Michael Hoese

\_\_\_\_\_  
Dana Swanson, City Clerk/ HR Manager

\_\_\_\_\_  
Laurie Goforth, Human Resources Analyst  
II

AMENDMENT NO. 1 TO THE MEMORANDUM OF UNDERSTANDING  
BETWEEN THE CITY OF MORRO BAY AND THE SERVICE EMPLOYEES  
INTERNATIONAL UNION (SEIU), LOCAL 620, FOR THE PERIOD OF  
JANUARY 1, 2021 THROUGH JUNE 30, 2022

WHEREAS, the City of Morro Bay (hereinafter the “City”) has, and continues to, recognize the Service Employees International Union (“SEIU”), Local 620, as the sole exclusive employee organization representing the City’s miscellaneous employees for all matters concerning wages, hours and working conditions; and

WHEREAS, the current Memorandum of Understanding between the City and SEIU Local 620 (“SEIU MOU 2021-2022”), was duly approved by the City Council on June 22, 2021; and

WHEREAS, the City’s labor relations representatives and SEIU Local 620 representatives have successfully met and conferred to negotiate an amendment to the SEIU MOU 2021-2022 to reflect increased City contributions to employee health care premiums effective January 1, 2022, pursuant to both the Meyers-Milias-Brown Act (“MMBA”) (Gov’t Code Section 3500-3511) and the City’s Employer-Employee Relations Resolution No. 08-17, and have jointly prepared and executed this Amendment No. 1 to the SEIU MOU 2021-2022 (“First Amendment”), which was ratified by the SEIU on September 22, 2021 and remains subject to City Council determination and approval; and

WHEREAS, this First Amendment shall not be in full force and effect until adopted by resolution by the City Council of the City; and

WHEREAS, except as provided in this First Amendment, all other provisions of the SEIU MOU 2021-2022 shall remain in full force and effect.

NOW, THEREFORE, it is hereby agreed that the SEIU MOU 2021-2022 is amended in the following particulars only:

Section 1. Section 15.1 of the SEIU MOU 2021-2022, entitled “Health Insurance,” shall be amended to read, in its entirety, as follows (additions shown in ***bold italics***):

“15.1 Health Insurance

15.1.1 Employees of this UNIT shall participate in the CalPERS medical insurance plans on a cafeteria style basis, with the CITY contributing the CalPERS minimum (currently \$143/month) to the active employee’s medical insurance, and \$1.00/month, or the amount required by CalPERS, to retiree medical insurance. Any costs in excess of these contribution rates shall be paid by the employee and retiree.

15.1.2 For 2021, UNIT employees shall receive a cafeteria plan contribution (including the amount required by CalPERS in 15.1.1 above), as follows:

Employee only - up to \$715/month or cost of insurance, whichever is less  
Employee + 1 – up to \$1,135/month or cost of insurance, whichever is less  
Employee + family - up to \$1,460/month or cost of insurance, whichever is less

**15.1.3. Effective January 1, 2022, UNIT employees shall receive a cafeteria plan contribution (including the amount required by CalPERS in 15.1.1 above), as follows:**

***Employee only - up to \$767/month or cost of insurance, whichever is less  
Employee + 1 – up to \$1,232/month or cost of insurance, whichever is less  
Employee + family - up to \$1,589/month or cost of insurance, whichever is less***

**15.1.4** Effective 2013, UNIT employees who select plans with an actual cost less than the City contribution are not entitled to cash-back.”

Section 2. Section 15.4 of the SEIU MOU 2021-2022 shall be amended to read, in its entirety, as follows (deletions shown in ~~strikethrough~~):

“15.4 The provisions of this ARTICLE shall be binding on the parties through the remainder of the term of this MOU, which will be effective upon City Council approval. ~~The parties agree herewith to re-open discussion with respect to this ARTICLE, for any changes to 2022 health rates.~~”

Section 3. Except as expressly provided in this First Amendment, all other provisions of the SEIU MOU 2021-2022 shall remain in full force and effect.

Section 4. This First Amendment shall not be in full force and effect until adopted by resolution by the City Council of the City.

**IT IS SO AGREED:**

**SEIU LOCAL 620**

**CITY OF MORRO BAY**

\_\_\_\_\_  
Robert MacLeod, Field Representative

\_\_\_\_\_  
Scott Collins, City Manager

\_\_\_\_\_  
Lori Stilts, Shop Steward

\_\_\_\_\_  
Colin J. Tanner, Deputy City  
Attorney/Labor Negotiator

\_\_\_\_\_  
Kyle Quaglino, Team Member

\_\_\_\_\_  
Dana Swanson, City Clerk/ HR Manager

\_\_\_\_\_  
Dylan Pruitt, Team Member

\_\_\_\_\_  
Laurie Goforth, Human Resources Analyst II

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Dana Stein, Team Member

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Learn more at <https://www.emergencyslo.org/en/covid19.aspx>.

Given these continued challenges and staffing issues, the City has modified some of its office hours. City Hall, the Shasta building (Community Development and Public Works), and the Harbor Office are open Monday through Thursday with modified hours (8:00 a.m. to 12 noon). The Police and Fire administration buildings remain open during normal business hours. The Community Center and Senior Center are open Monday through Friday 9:00 a.m. to 4:00 p.m.

Staff is working closely with AGP Video to be able to provide for hybrid in-person/virtual City Council meetings in the near future. However, with the recent surge in cases in our region, it is unknown at this time when in-person meetings will resume. With that in mind, on September 16, 2021, the Governor signed Assembly Bill 361 ("AB 361"). This bill amended Government Code section 54953 so as to authorize cities to continue to meet remotely during proclaimed states of emergency (with certain conditions) in a manner similar to those under the Brown Act Orders.

The amendments were made on an urgency basis and are effective now. The current applicable amendments to the Government Code under AB 361 are set to expire January 1, 2024.

Government Code section 54953(e)(1)(A) now provides that teleconferencing (with certain conditions) for City Council meetings may be used "during a proclaimed state of emergency" when "state or local officials have imposed or recommended measures to promote social distancing." If these two conditions are met, then consistent with a number of teleconferencing requirements in Government Code section 54953(e)(2), the City Council may continue to hold its meetings generally as they have been held during the pandemic by teleconferencing.

### **DISCUSSION**

If a state of emergency remains active, or state or local officials have imposed or recommended measures to promote social distancing, AB 361 imposes certain requirements to continue use of its provisions. Government Code section 54953(e)(3) provides that "not later than 30 days after teleconferencing for the first time pursuant" to AB 361, "and every 30 days thereafter," the City Council shall make the following findings by majority vote to continue using the teleconferencing provisions of AB 361: 1) the City Council has reconsidered the circumstances of the state of emergency; and 2) either the state of emergency continues to directly impact the ability of the members to meet safely in person, or State or local officials continue to impose or recommend measures to promote social distancing.

Should the number of new COVID-19 cases remain high, staff will bring forward a report including the necessary documents for Council consideration and direction regarding the continued use of teleconferencing at the October 26<sup>th</sup> Meeting.

### **ATTACHMENT**

- 1) [Link](#) to Most Recent COVID-19 Health Data