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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION,

Plaintiff,

and

SAN FRANCISCO BAYKEEPER,

Plaintiff-Intervenor.

v.

UNITED STATES ARMY CORPS OF ENGINEERS; et al.,

Defendants.

Case No. 3:16-cv-05420-RS

PLAINTIFF AND PLAINTIFF INTERVENOR'S JOINT NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing: July 18, 2019
Time: 1:30 p.m.
Judge: Hon. Richard G. Seeborg
Place: Courtroom 3, 17th Floor

Action Filed: Sept. 22, 2016

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TABLE OF ACRONYMS AND ABBREVIATIONS

404(b)(1) Guidelines	Environmental Protection Agency regulations adopted pursuant to Clean Water Act section 404(b)(1), 33 U.S.C. § 1344(b)(1): 40 C.F.R. Part 230
APA	Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*
AR	Administrative Record
Basin Plan	Water Quality Control Plan for the San Francisco Bay Basin
Bay	San Francisco Bay
Bay Plan	San Francisco Bay Plan
BCDC	San Francisco Bay Conservation & Development Commission
BCDC Ans.	Federal Defendants' Answer to Plaintiff's Supplemental Complaint for Declaratory and Injunctive Relief, ECF Doc. 52
Beneficial Reuse Condition	BCDC June 15, 2015 Letter of Agreement Special Condition II.B
BK Ans.	Federal Defendants' Answer to Plaintiff-Intervenor San Francisco Baykeeper's First Amended Complaint for Declaratory and Injunctive Relief, ECF Doc. 53
CD	Corps' Consistency Determination
CD Decision	November 10, 2015 Corps letter to BCDC rescinding its agreement to the BCDC June 15, 2015 Letter of Agreement and objecting to the Contested Conditions
CDFW	California Department of Fish and Wildlife
CDR	Corps Dredging Regulations
Clean Water Act or CWA	Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.*
COA #2	Corps' January 12, 2017 Course of Action #2 regarding Richmond Outer Harbor and Pinole Shoal Channel
Contested Conditions	BCDC June 15, 2015 Letter of Agreement Special Conditions II.B, II.J.2.a, II.K, II.D
Corps	U.S. Army Corps of Engineers
CZMA	Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq.*
CZMP	Federally-approved State Coastal Zone Management Program
EA	Environmental Assessment
EA/EIR	Corps and San Francisco Bay Regional Water Quality Control Board Final Environmental Assessment/Environmental Impact Report for the "Maintenance Dredging of the Federal

	Navigation Channels in San Francisco Bay, Fiscal Years 2015-2024"
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
ESA	Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*
Federal Standard Alternative	Dredging alternative defined by the Corps under 33 C.F.R. Parts 335 and 336
FONSI	Finding of No Significant Impact
FWS	U.S. Fish and Wildlife Service
LOA	BCDC June 15, 2015 Letter of Agreement for Consistency Determination to the Corps conditionally concurring in the Corps' CD pursuant to the CZMA
LTMS	Long-Term Management Strategy for the Placement of Dredged Material in the San Francisco Bay Region
MSC	Main Ship Channel
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
Provision 10	Provision 10 of the San Francisco Bay Regional Water Quality Control Board's May 13, 2015 Water Quality Certification
Reduced Hydraulic Dredge Condition	BCDC June 15, 2015 Letter of Agreement Special Condition II.J.2.a
Regional Board	San Francisco Bay Regional Water Quality Control Board
Regional Board WQC	Regional Board May 13, 2015 Reissued Waste Discharge Requirements and Water Quality Certification for: U.S. Army Corps of Engineers, San Francisco District, San Francisco Bay Federal Channel Maintenance Dredging Program, 2015—2019
SF DODS	San Francisco Deep Ocean Disposal Site
State	State of California
State Board	State Water Resources Control Board
WDR	Waste Discharge Requirement
WQC	Water Quality Certification
WQC Decision	November 10, 2015 Corps letter to Regional Board objecting to Provision 10 of the Regional Board WQC
WQS	Federally-approved State Water Quality Standards

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NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that on July 18, at 1:30 p.m. in Courtroom 3 of the United States District Court, Northern District of California, Plaintiff San Francisco Bay Conservation and Development Commission (BCDC) and Plaintiff-Intervenor San Francisco Baykeeper (collectively, Plaintiffs) will move for summary judgment against Defendants U.S. Army Corps of Engineers *et al*. (Corps) under Federal Rule of Civil Procedure 56, on the grounds that the Corps has violated the Administrative Procedure Act, 5 U.S.C. § 706 (APA), in adopting several actions regarding its maintenance dredging of the federal navigation channels in San Francisco Bay (Bay). This Motion is based on this notice, the accompanying briefs, the administrative record lodged on December 15, 2017, supplemental record lodged on September 26, 2018, Plaintiffs' motion to supplement the record, and oral argument.

Plaintiffs respectfully request: (1) a declaration that the Corps' November 10, 2015 decisions to refuse to comply with all conditions imposed by the State of California (State) under the Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq*. (CZMA) and Clean Water Act, 33 U.S.C. §§ 1251 *et seq*. (CWA), were unlawful and an order setting aside these actions; (2) a declaration that the Corps' adoption of the so-called "Federal Standard" dredging alternative was unlawful and an order setting aside this action; (3) an order requiring the Corps to define the Federal Standard alternative to include compliance with all State conditions imposed under the CZMA and the CWA; and (4) a declaration that the Corps' adoption of "Course of Action #2" on January 12, 2017 was unlawful and an order setting aside this action.

February 13, 2019

Respectfully submitted,

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SAN FRANCISCO BAYKEEPER

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MEMORANDUM OF POINTS AND AUTHORITIES
INTRODUCTION AND STATEMENT OF THE ISSUES

San Francisco Bay—the largest estuary on the West coast—is home to several major ports that are critical to the local, State, and national economy. The Bay also provides essential habitat for fish and wildlife, and its tidal marshes and wetlands protect billions of dollars of property and infrastructure along the shoreline. The Corps plays a crucial role in promoting commerce and navigational safety in the Bay, as well as in protecting its environment. Congress requires the Corps to maintain the Nation's federal navigation channels, including the Bay's channels, for essential commerce and navigational safety. Without regular dredging, the navigational channels fill in with sediment and large vessels are unable to access the Bay's ports, causing navigational safety and environmental hazards. At the same time, without proper environmental controls, the Corps' dredging activities can significantly impact imperiled fish species and essential habitat for fish and wildlife in the Bay.

Consistent with its Congressional mandate, for many years, the Corps has annually dredged the Bay's deep draft navigation channels to provide critical access to the most heavily-used and economically-important ports and oil refineries. Historically, the Corps disposed 80% of dredged sediment in the Bay, but in 1999 the Corps, in partnership with Plaintiff BCDC, the San Francisco Bay Regional Water Quality Control Board (Regional Board), and other agencies and stakeholders, adopted a "Long-Term Management Strategy for the Placement of Dredged Material in the San Francisco Bay Region" (LTMS). The LTMS limits the amount of dredged sediment that may be dumped in the Bay to 20% and provides that a minimum of 40% of dredged sediment must be beneficially reused (*i.e.*, used for wetlands restoration and other projects that promote shoreline resiliency and adaption to sea level rise). The Corps has consistently recognized that the LTMS goals are appropriate and can be implemented.

Although the Corps has the duty and authority to maintain the Bay's federal navigation channels, Congress has delegated authority to the State to protect its coastal resources and water quality under the CZMA and CWA. These statutes require the Corps to comply with State conditions when dredging in the Bay, as a matter of federal law. In mid-2015, after conferring with the Corps for over a year, BCDC and the Regional Board approved the Corps' dredging program in the Bay. Under their CZMA and CWA

authority, the State agencies imposed conditions necessary to enforce policies in BCDC's federally-approved state coastal zone management program (CZMP) for the Bay and to implement federally-approved State water quality standards (WQS) that protect imperiled fish species, habitat, and migratory corridors in the Bay. Consistent with the LTMS and the Bay CZMP, BCDC required the Corps to limit in-Bay disposal to 20% of its dredged sediment and beneficially reuse at least 40% of the material. To implement the CZMP and WQS, both BCDC and the Regional Board required the Corps to use mechanical dredges in certain channels, which the Corps admits will reduce the number of endangered and threatened fish killed by the use of its hydraulic dredges.

In November 2015, however, the Corps unilaterally declared that it would not comply with the either the State's CZMA or the CWA conditions because they allegedly would increase the Corps' overall dredging costs. The Corps' decisions contradict clear Congressional directives for the Corps to comply with the State CZMA and CWA conditions, as well as its own dredging regulations that require it to dredge in compliance with all federal environmental laws. Thus, the Corps' November 2015 decisions are unlawful and must be set aside.

In addition, in January 2017, the Corps determined it will not annually dredge two of the Bay's most critical deep draft navigation channels—Richmond Outer Harbor and Pinole Shoal Channel, despite previously prioritizing these channels for annual dredging. The Corps adopted the decision, referred to as "Course of Action #2" (COA #2), not because it determined that it was no longer necessary to dredge these channels, but solely to avoid its legal obligations under the CZMA, the CWA, and its own regulations. The Corps concedes that not dredging these channels annually will cause significant impacts to the environment, navigational safety, and the local, regional and national economy. Yet, the Corps did not satisfactorily explain or justify its decision, nor did it evaluate these impacts as required by the National Environmental Policy Act (NEPA). Thus, COA #2 also is unlawful and must be set aside.

LEGAL BACKGROUND

I. COASTAL ZONE MANAGEMENT ACT

The CZMA declares that "[t]here is a national interest in the effective management, beneficial use, protection and development of the coastal zone" and that "[t]he key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their *full authority*

over" coastal lands and waters by developing a CZMP. 16 U.S.C. § 1451(a) (emphasis added). Under the CZMA, a coastal state may obtain approval of its CZMP by the Office of Coastal Management in the National Ocean and Atmospheric Administration (NOAA) in the U.S. Department of Commerce. *Id.* § 1454. To be approved, state CZMPs must meet the stringent requirements of the CZMA and its implementing regulations. *See id.* § 1455(d); 15 C.F.R. Part 923. The CZMA "effect[s] a federal-state partnership to ensure water quality and coastal management around the country, so that state standards approved by the federal government *become the federal standard for that state*." *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 143-44 (2nd Cir. 2008) (emphasis added & citation omitted).

Once OCM approves a CZMP, the state obtains delegated federal authority to review and approve any federal agency activity within or outside the state coastal zone "that affects any land or water use or natural resource of the coastal zone." 16 U.S.C. § 1456(c)(1)(A). The CZMA requires that all such federal agency activities "be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies" of the state's approved CZMP. *Id.*; 15 C.F.R. §§ 930.30, 930.39(c). The CZMA requires each federal agency that proposes to carry out an activity that may affect any land or water use or natural resource in the coastal zone to provide a "consistency determination" to the designated state coastal zone management agency (here, BCDC) at least ninety days prior to the federal agency's final approval of the activity. 16 U.S.C. § 1456(c)(1)(C); 15 C.F.R. § 930.36(b)(1). The consistency determination must explain whether and how the proposed federal activity is "consistent to the maximum extent practicable" with the "enforceable policies" of the federally-approved state CZMP. 15 C.F.R. §§ 930.36(a), 930.39(a), (c).[1] "Consistent to the maximum extent practicable" means "*fully consistent* with the enforceable policies of management programs *unless* full consistency is prohibited by existing law applicable to the Federal agency." *Id.* § 930.32(a)(1) (emphasis added). The state may concur, conditionally concur, or object to the federal agency's consistency determination. *Id.* § 930.41(a). If the federal agency does not agree with conditions imposed by the state, then the federal agency may not proceed with the action unless it finds that: (1) its proposed action is fully consistent with the state CZMP

[1] "Enforceable policies" are "[s]tate policies which are legally binding through constitutional provisions, law, regulations, land use plans, ordinances, or judicial or administrative decisions, *by which a State exerts control over* private and public land and water uses and natural resources in the coastal zone." 16 U.S.C. § 1453(6a); 15 C.F.R. § 930.11(h) (emphasis added).

notwithstanding the state's objections; or (2) consistency with the enforceable policies of the state's CZMP is legally prohibited and the federal agency has "clearly described, in writing, to the State agency the legal impediments to full consistency." *Id.* § 930.43(d).

II. CLEAN WATER ACT

A. Water Quality Standards and 401 Certification

The objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To do so, the CWA requires each state to prepare WQS that "protect the public health or welfare, enhance the quality of water and serve the purposes of the [CWA]." *Id.* § 1313(c)(2)(A). WQS "designat[e] the use or uses to be made of the water and [set] criteria that protect the designated uses." 40 C.F.R. § 131.2. The CWA mandates that WQS provide for the "protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. §§ 1251(a)(2), 1313(c)(2)(A); 40 C.F.R. § 131.2. The U.S. Environmental Protection Agency (EPA) reviews the state WQS and determines whether they meet the CWA's requirements. 33 U.S.C. § 1313(c)(3). Once approved by the EPA, the WQS are federally-enforceable standards under the CWA. *Id.*

Section 401 of the CWA gives states authority to ensure that activities in navigable waters in the state meet federally-approved state WQS. *See* 33 U.S.C. § 1341. Whenever an entity applies for a federal license or permit for an activity that "may result in any discharge into navigable waters," that applicant must first obtain a water quality certification (WQC) from the applicable state that the applicant's activity will not violate state WQS. *Id.* § 1341(a)(1). If necessary, the WQC must include "limitations" to assure that the activity meets the requirements of the CWA and "any other appropriate requirement of State law." *Id.* § 1341(d); *see also* 40 C.F.R. § 121.2(a)(4) (authorizing the state to include "any conditions which the [state] deems necessary or desirable with respect to the discharge of the activity"). The Corps' maintenance dredging operations are subject to the CWA, including section 401. 33 U.S.C. §§ 1344(t), 1323. The CWA expressly mandates that federal agencies "engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants. . . comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution." *Id.* § 1323(a).

B. CWA Section 404

CWA section 404 requires a person to obtain a permit from the Corps for any discharge of dredged sediment into navigable waters. 33 U.S.C. § 1344(a), (d). Pursuant to section 404(b)(1), the EPA has adopted criteria for CWA section 404 permits to protect aquatic fish, wildlife, and ecosystems and ensure compliance with state WQS. *See generally* 40 C.F.R. Part 230 (404(b)(1) Guidelines); 40 C.F.R. §§ 230.10(b), (c), 230.12(a)(3). Discharges do not comply with the 404(b)(1) Guidelines if there is a practicable alternative that would have less adverse effect on the aquatic ecosystem or if there are appropriate and practicable measures to minimize potential harm to the aquatic ecosystem. *Id.* §§ 230.10(a), (d), 230.12(a)(3)(i), (iii). When the Corps is the discharger, it does not need to obtain a section 404 permit from itself; however, the Corps is required to comply with "all applicable substantive legal requirements, including. . . application of the section 404(b)(1) guidelines." 33 C.F.R. § 336.1(a).

III. CORPS DREDGING REGULATIONS

The Corps has also adopted regulations governing its maintenance dredging operations, which require the Corps to comply with the CZMA, CWA, and other environmental laws. *See, generally* 33 C.F.R. Parts 335-338 (CDR); *see also* 33 C.F.R. §§ 335.2, 335.5(a), 335.6(h), 336.1(a), 336.1(b)(4). The CDR reiterates that the Corps must submit a CZMA consistency determination and obtain and comply with a WQC for its maintenance dredging activities. *Id.* §§ 336.1(a), (b)(3), (8), (9), 337.2(a). The CDR also sets forth the Corps' general "policy" governing its maintenance dredging operations:

> to regulate the discharge of dredged material from its projects to assure that dredged material disposal occurs in the *least costly, environmentally acceptable manner*, consistent with engineering requirements established for the project. . . *The least costly alternative*, consistent with sound engineering practices and selected through the 404(b)(1) guidelines or ocean disposal criteria, *will be designated the Federal standard for the proposed project.*

Id. § 336.1(c)(1) (emphases added); *see also id.* § 335.4 (dredging will be done "in the least costly manner…, and consistent with engineering and environmental requirements"). The Corps refers to this as the "Federal Standard" dredging alternative. *See id.* § 335.7 (definition of the "Federal Standard").

IV. NATIONAL ENVIRONMENTAL POLICY ACT

NEPA requires federal agencies to take a "hard look" at the environmental and economic impacts of their proposed actions. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1500.1(b). NEPA does so by requiring federal agencies, including the Corps, to prepare an environmental assessment (EA) to determine if their

proposed actions will have a significant impact on the environment. *Id*. § 1501.4; 33 C.F.R. § 230.10. If the EA concludes that the action will have a significant impact on the environment, the agency must prepare a detailed environmental impact statement (EIS) analyzing the action's environmental effects. 42 U.S.C. § 4332(2)(C). If the EA concludes that an action will not have a significant impact on the environment, the federal agency must prepare a Finding of No Significant Impact (FONSI), explaining why the action "will not have a significant effect on the human environment." 40 C.F.R. § 1508.13. Federal agencies have an ongoing duty to prepare a supplement to an EA or EIS if "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns" or "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *Id*. § 1502.9(c)(1); 33 C.F.R. § 230.13(b).

FACTUAL AND PROCEDURAL BACKGROUND

I. THE CORPS' MAINTENANCE DREDGING OPERATIONS PROGRAM IN THE BAY

The Corps is charged with protecting the navigability of the Nation's waters by maintaining federal navigational channels. AR13073-74.[2] The Corps conducts maintenance dredging of eleven federal navigation channels in and into the Bay. AR13046, 13081; Federal Defendants' Answer to Baykeeper's First Amended Compl., ECF Doc. 53 (BK Ans.) ¶73. Six of these channels are deep draft (*i.e*., greater than 15 feet deep), to allow access for oil tankers and other deep draft vessels: Oakland Harbor, Richmond Inner and Outer Harbors, Redwood City Harbor, Pinole Shoal Channel, Suisun Bay Channel/New York Slough, and the Main Ship Channel (MSC). *See* AR13081, 13086-88; BK Ans. ¶74. The Corps dredges all of these channels annually, except for Redwood City Harbor, which it dredges every one to two years. AR13086-88; BK Ans. ¶74. The Corps conducts more than 70% of the dredging that occurs in the Bay. AR12856, 14024; BK Ans. ¶76.

Dredging involves removing accumulated sediment from the channel bed and transporting and placing the sediment at a designated site for disposal or beneficial reuse. AR13072; BK Ans. ¶77. The Corps uses two different types of dredges in the Bay: hydraulic dredges and mechanical dredges. AR13047; BK Ans. ¶77. Hydraulic "hopper" dredges use suction pumps to draw sediment and water into

[2] Citations to specific pages in the Administrative Record and Supplemental Record appear herein as: "AR [page #(s)]." Citations to whole documents appear herein as "Ex. [#(s)]."

a draghead that is pulled over the bottom of a channel. AR13119-25; BK Ans. ¶77. Mechanical "clamshell" dredges use buckets that scoop material from the channel bed. AR13125-26; BK Ans. ¶77.

Dredged sediment is managed at three different types of sites: 1) ocean disposal sites; 2) in-Bay disposal sites; and 3) beneficial reuse sites, such as wetland restoration, beach nourishment, and levee maintenance. AR13104-09; BK Ans. ¶78. Currently, three ocean disposal sites exist for Bay sediment. AR13105; BK Ans. ¶79. The largest—the San Francisco Deep Ocean Disposal Site (SF DODS)—is located 55 miles west of the Golden Gate. AR13105; BK Ans. ¶79. There are four in-Bay dredged sediment disposal sites (AR13104-05; BK Ans. ¶80), and several beneficial reuse placement sites are approved to accept dredged sediment or are in the process of being approved. AR13106-09, 15649-50, 15803-07, 15884-87; BK Ans. ¶81.

II. STATE REGULATION OF CORPS DREDGING OPERATIONS IN THE BAY

A. San Francisco Bay Segment of California's Federally-Approved CZMP

BCDC is the designated state coastal zone management agency under the CZMA for the Bay. Federal Defendants' Answer to Plaintiff BCDC's Supp. Compl., ECF Doc. 52 (BCDC Ans.) ¶18. In 1969, BCDC prepared, and the California Legislature adopted, the San Francisco Bay Plan (Bay Plan). Ex.1021; AR22980. The Bay Plan is "a comprehensive and enforceable plan for the conservation of the water[s] of the bay and the development of its shoreline." Cal. Gov't Code § 66603; *see also id*. § 66651. On February 16, 1977, OCM approved the entirety of the Bay Plan as part of California's CZMP, and has approved several amendments to the Bay Plan since that time. BCDC Ans. ¶53. The federally-approved San Francisco Bay segment of California's CZMP also includes, *inter alia*, the McAteer-Petris Act, Cal. Gov't Code §§ 66600 *et seq*., and BCDC's regulations, 14 Cal. Code. Regs., Divn. 5, ch. 1-24, §§ 10110 *et seq*. AR22992.

The Bay Plan and McAteer-Petris Act contain numerous enforceable policies regarding the importance of and public interest in: (1) preventing uncoordinated and haphazard filling of the Bay; (2) encouraging maximum beneficial reuse of dredged sediment and limiting unconfined in-Bay disposal of such sediment; (3) protecting the Bay and its land and water uses and natural resources, including wildlife, wetlands and water quality through, *inter alia*, wetland restoration and avoidance, minimization and mitigation of harm to native species and habitats; and (4) ensuring safe navigation and public safety and

preventing environmental hazards from physical obstructions to safe navigation. *See* Bay Plan Findings and Policies, Fish, Other Aquatic Organisms and Wildlife, Subtidal Areas, Dredging, Water Quality, Mitigation, Public Trust, and Navigational Safety and Oil Spill Prevention (AR22999-3002, 23010-12, 23027-32, 23067-73); Cal. Gov't Code §§ 66600-66605, 66663.1, 66663.2; *see* App. A.

B. Federally-Approved WQS Applicable to the Bay

The Regional Board is the state agency responsible for promulgating WQS for the Bay and for implementing and ensuring compliance with these WQS pursuant to section 401 and other provisions of the CWA. AR13074, 23446, 23448; BK Ans. ¶61. The Regional Board has adopted the Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan). AR13172, *see generally* Ex. 1048. The designated beneficial uses and water quality objectives in the Basin Plan constitute all applicable WQS for the Bay and were approved by EPA pursuant to CWA section 303. 33 U.S.C. § 1313; AR14039, 23448; BK Ans. ¶62. The Basin Plan designates, *inter alia*, preservation of rare and endangered species, marine habitat, estuarine habitat, fish migration, and navigation as designated (*i.e.*, protected) uses of the Bay. AR14040, 23447, 23453-56, 23497-98.

C. Long-Term Management Strategy for Dredged Material Management in the Bay

In 2001, the Corps, EPA, BCDC, Regional Board and State Water Resources Control Board (State Board) (collectively, "LTMS agencies") adopted the comprehensive LTMS. AR8279-80. The LTMS is designed to produce a "technically feasible, environmentally suitable and economically prudent long-range approach to meeting the [] Bay region's dredging and disposal needs over the next 50 years." AR6002, 6021. The impetus for the LTMS was to reduce the significant environmental effects caused by decades of dumping 80% of dredged material in the Bay and to "increase the recycling of dredged material as a useful resource" for wetland restoration and other beneficial uses. AR6001, 9350. The LTMS sets forth the following overarching goals: (1) maintain navigation channels in an economically and environmentally sound manner and eliminate unnecessary dredging activities in the Bay and Estuary; (2) conduct dredged material disposal in the *most* environmentally sound manner; (3) maximize beneficial use of dredged material as a resource; and (4) develop a coordinated and cooperative permitting framework for dredging operations and dredged material disposal in the Bay. AR6001, 6022.

As a foundation for this program, in 1999, the Corps and the EPA signed a federal Record of Decision (ROD) for the LTMS, which was based on a programmatic environmental document prepared by the LTMS agencies, including the Corps, under NEPA and the California Environmental Quality Act, Cal. Pub. Res. Code §§ 21000 *et seq*. (CEQA). Exs.18, 21; BCDC Ans. ¶58. The LTMS agencies selected an environmentally preferred alternative to "guide federal dredged material disposal decisions in the San Francisco Bay Region for the next 50 years." AR7974. This alternative sets a maximum of 20% in-Bay disposal and 40% ocean disposal and a minimum of 40% beneficial reuse of dredged sediment. AR 6011, 6015-16. The LTMS agencies determined that the selected alternative "provides the best balance of the overall goals and objectives of the LTMS" by balancing environmental benefits and risks and is "economically implementable in the long term." AR6016. The ROD likewise states that the chosen alternative "is a long-term approach that emphasizes beneficial reuse and ocean disposal of dredged material, with limited in-Bay disposal," and that this alternative:

> provides the greatest environmental benefit of the action alternatives because it has the greatest amount of upland/wetland reuse for habitat restoration projects (which can benefit water quality, fish and wildlife habitat, and special status species) or other projects such as levee maintenance or construction fill (which can have flood control benefits or reduce cumulative effects)…In addition, Alternative 3 best reflects the national dredging policy as it encourages the beneficial reuse of dredged material as a resource.

AR7975-76.

The selected alternative was to "be phased in over time" through an LTMS management and review process overseen by the LTMS agencies. AR6016, 6024-25; *see also* AR7976, 9352-53. In 2001, BCDC and the Regional Board adopted Bay Plan and Basin Plan amendments implementing the LTMS goals and policies. *See* AR23028-32, 23596-602. Likewise, in 2001, the LTMS agencies adopted an LTMS Management Plan implementing the environmentally preferred LTMS alternative adopted by the Corps and EPA in the 1999 ROD. Ex. 24, AR8280. Among other things, the Management Plan established a four-phase, twelve-year transition period for achieving the LTMS goals of reducing in-Bay disposal to a maximum of 20% (*i.e*., up to 1.25 million cubic yards of dredged material annually Bay-wide) (AR8346) and increasing beneficial reuse of dredged material to a minimum of 40% (AR8323). The Management Plan also sets dredging allocations for individual dredgers, including the Corps, that are

triggered if the in-Bay disposal volume reductions are not met. AR10120, 16078.

The LTMS twelve-year transition period "was successfully concluded in 2012" (AR10120-21) and "the final annual in-Bay limit of 1.25 million cy [of dredged sediment] is in place" (AR10896). In August 2013, the LTMS agencies published a twelve-year report on implementation of the LTMS, which concluded that "the LTMS goals remain appropriate and largely implementable" and recommended that "the basic program continue into the future." Ex. 165; AR10141. The report also concludes, among other things, that: (1) beneficial reuse sites are available and substantial capacity for beneficial reuse remains; (2) due to climate change and increasing loss of habitat in the Bay, achieving the LTMS beneficial reuse goal is even more important now and into the future; and (3) the LTMS 20% maximum in-Bay disposal and 40% minimum beneficial reuse goals both were met during the first twelve years of program implementation and should continue to be met. AR10128-29, 10131-32; *see also* AR10113-14.

III. ENVIRONMENTAL IMPACTS OF CORPS DREDGING OPERATIONS IN THE BAY

A. Environmental Assessment of Corps Bay Dredging Operations

In 2015, the Corps and the Regional Board published a Final Environmental Assessment/ Environmental Impact Report for the "Maintenance Dredging of the Federal Navigation Channels in San Francisco Bay, Fiscal Years 2015-2024" (EA/EIR) under NEPA and CEQA. BCDC Ans. ¶63; BK Ans. ¶82; Ex. 484; AR13072. The EA/EIR assumes that all of the Bay's deep draft navigation channels would be dredged annually, except for Redwood City Harbor. AR13135-36, 13080, 13085, 13096; *see also* AR15791, 16063-75. The EA/EIR states the objectives of the Corps maintenance dredging program are to: (1) "[p]rovide safe, reliable, and efficient navigation through federal channels in [the Bay] in a feasible manner"; (2) "[e]nsure consistency, to the maximum extent practicable, with the goals of the LTMS program"; and (3) "[c]onduct dredging in a manner that adequately protects the environment, including listed species." AR13074.

The EA/EIR incorporates the LTMS goals and reiterates the basic conclusions of the LTMS 12-year report, stating that the Corps will "beneficially reuse dredged material to the maximum extent authorities allow." AR13049; *see also* AR13045 13074-78. In the EA/EIR, the Corps designates (without supporting analysis) four in-Bay disposal sites and three ocean disposal sites as the Federal Standard placement sites for disposing the vast majority of its dredged sediment. AR13050-51. The Corps

designates beneficial reuse ("upland") sites as the Federal Standard placement sites only when there is a "local sponsor" (*i.e.* another entity that agrees to pay any difference in the cost of disposal at an in-Bay or ocean disposal site versus a beneficial reuse site). AR13049-51.

The EA/EIR also evaluated the impact of dredging operations on imperiled fish species, in particular, Delta smelt and longfin smelt. AR13045, 13062. Delta smelt is a native fish that is only found in the San Francisco Bay-Delta Estuary and is "at imminent danger of extinction." AR13230-31, 13250. Delta smelt is listed as threatened under the federal Endangered Species Act (ESA) and endangered under the California ESA. AR13230; BK Ans. ¶93. Longfin smelt is another native Bay fish and, in recent decades, its populations have declined by 90%. AR13229. Longfin smelt is listed as threatened under the California ESA and the U.S. Fish and Wildlife Service (FWS) has determined that listing of the Bay-Delta population is warranted under the federal ESA. AR13230; Ex. 947; BK Ans. ¶94.

As recognized by the Corps and federal resource agencies, dredging with hydraulic dredges has significant adverse impacts on these species because the fish get sucked into the dredge (*i.e.*, entrained) and are killed. AR13246, 13254. In 2013, the Corps studied the impacts of hydraulic dredges on Delta and longfin smelt. AR13247; Ex. 957. The study found that up to 29% of the population of Delta smelt and up to 8% of the population of longfin smelt would be killed annually by using hydraulic dredges in the in-Bay channels. AR13252, 13257; BCDC Ans. ¶69. In contrast, using a mechanical dredge in the in-Bay channels essentially eliminates the entrainment of fish because the fish do not get trapped in the mechanical dredge bucket. AR13055, 13254, 13260-61.

After reviewing the Corps' entrainment study, the California Department of Fish and Wildlife (CDFW) found that the Corps' dredging as proposed (*i.e.*, primarily using hydraulic dredges in the in-Bay channels) "would substantially reduce the number of" these listed fish species and cause significant cumulative impacts to those species. AR12552, 14034, 14052. CDFW thus recommended to "reduce hopper dredging to a minimum in [the] Bay." AR12552, 14034-35, 14052. The Regional Board also determined that hydraulic dredges would significantly impact Delta and longfin smelt by substantially reducing their populations. AR13250-51, 13257-58.

Because of the impact on Delta and longfin smelt, the EA/EIR included two Reduced Hydraulic Dredge Alternatives, which would require the Corps to use mechanical dredges rather than hydraulic

dredges in certain in-Bay channels, while still annually dredging these channels. AR13052-55, 13252-54, 13259-61; *see also* AR23848-49, 23852.[3] Under Reduced Hydraulic Dredge Alternative 1, starting in fiscal year 2017, the Corps could use a hydraulic dredge only in the MSC and either the Richmond Outer Harbor or Pinole Shoal Channel; the Corps would purchase mitigation credits for the take of imperiled fish in the hydraulically dredged channel and would use a mechanical dredge in the other channel. AR13053-54, 14036. Under Reduced Hydraulic Dredge Alternative 2, starting in fiscal year 2017, the Corps could use a hydraulic dredge only in the MSC. AR13054, 14037. The Regional Board found that the Corps could feasibly implement either alternative, as each alternative provided a two-year phase-in period to allow the Corps to budget for the change in equipment use. AR13139, 13581-82, 14037.

B. Federal Wildlife Agencies' Assessments of Corps Bay Dredging Operations

Since 2014, FWS has reviewed and approved the Corps' maintenance dredging operations in the Suisun Channel on an annual basis under the ESA. *See* Exs. 977, 981, 987, 988. Since 2015, FWS has refused to approve the Corps' use of a hydraulic dredge in Suisun Channel because of its impacts on Delta smelt. AR21745, 21839, 21842-43, 21862, 21865, 24353. Both the Corps and FWS acknowledge the record low Delta smelt populations in recent years and that use of hydraulic dredges would likely jeopardize the continued existence of the species. Ex. 983; AR21799, 21839. The FWS estimates that "about 10 percent of the current population" of Delta smelt is killed by the Corps' hydraulic dredges in Suisun Channel alone. AR21839; *see also* AR21794, 21797. Thus, to minimize take of Delta smelt, FWS now requires the Corps to conduct maintenance dredging activities in Suisun Channel using only a mechanical dredge between August 1 and November 30 of each year.[4] The Corps is complying with these FWS limitations on its dredging operations. *See* Exs. 704, 722, 983; AR21837, 21846, 21862.

In addition to these FWS requirements, the National Marine Fisheries Service (NMFS) imposes significant restrictions on the Corps' dredging program to protect ESA-listed salmon and other species under NMFS jurisdiction. In accordance with the project description agreed to by all LTMS agencies, including the Corps (AR9346-47), NMFS generally limits in-Bay maintenance dredging activities to a

[3] The EA/EIR refers to these two alternatives as the "Reduced Hopper Dredge Alternatives." AR13052-55. "Hopper" and "hydraulic" dredge are used interchangeably.
[4] *See* AR21745-46, 21842-43, 21849, 21862, 21865-67, 24353-54, 24356; *see also* AR14972, 21794, 21797, 21837.

"work window" of June 1 to November 30, but if dredging occurs outside of this window, all dredged material must be placed at a beneficial reuse site that will provide benefits for fishery habitat. AR9393, 9478; BCDC Ans. ¶75. The Corps is complying with these NMFS ESA requirements. *See, e.g.*, Exs. 704, 706, 712, 720, 722, 731, 738, 741, 743, 776; *see also* AR13047, 18433, 24264, 24372.

IV. STATE APPROVAL OF CORPS' DREDGING OPERATIONS UNDER THE CZMA AND CWA

A. Corps' Consistency Determination for Bay Dredging and BCDC Conditional Concurrence in that Determination Pursuant to the CZMA

In spring of 2015, the Corps submitted to BCDC a consistency determination (CD) pursuant to the CZMA for its annual maintenance dredging operations of the five deep-draft in-Bay navigation channels for FY 2015-2017. Exs. 649, 650, 662, 663. The CD identified a number of existing and future beneficial reuse sites, but designated only in-Bay disposal sites and SF DODS as the Federal Standard placement sites. *See* AR15882-87, 15895-96. The CD proposed to dispose up to 48% of the dredged sediment in the Bay and up to 55% at SF DODS, and did not commit to beneficially reuse any dredged sediment. AR15895-96, 15900, 16089-91, 17705, 17620-21. In the CD, the Corps did not commit to use mechanical dredges, instead of hydraulic dredges, in any navigation channel in order to avoid entrainment of threatened and endangered fish species. AR15890-93, 15895-96, 15910, 16093-94, 16103-04.

On June 4, 2015, BCDC conditionally concurred with the CD. BCDC memorialized its conditions in a June 15, 2015 Letter of Agreement for Consistency Determination to the Corps (LOA). Ex. 1109. Consistent with the CZMA, the LOA included a number of special conditions designed to ensure full consistency with the enforceable policies of the Bay Plan and the McAteer-Petris Act, including:

1) Beginning in 2017, the Corps must comply with, *inter alia*, Bay Plan Dredging Policies 1 and 5 to maximize the beneficial reuse of dredged sediment as a resource by meeting the LTMS goals that a minimum of 40% of the dredged material be beneficially reused and that a maximum of 20% of dredged material be disposed of in the Bay (Special Condition II.B—hereafter the "**Beneficial Reuse Condition**");

2) Beginning in federal fiscal year 2017, the Corps must use a maximum of one hydraulic dredge in either the Richmond Outer Harbor or Pinole Shoal Channel in order to protect Delta smelt and longfin smelt and their habitat as required by, *inter alia*, Bay Plan Fish, Other Aquatic Organisms and Wildlife Policies 1 and 2 (Special Condition II.J.2.a—hereafter the "**Reduced Hydraulic Dredge Condition**");[5]

[5] This condition is the same as Reduced Hydraulic Dredge Alternative 1 in the EA/EIR.

3) Within three months of the LOA, the Corps must develop and implement a strategy to obtain additional funds to implement the Beneficial Reuse and Reduced Hydraulic Dredge Conditions. Beginning in July 2015, and every quarter thereafter, the Corps is required to report to BCDC and other LTMS agencies on the Corps' efforts and progress in securing additional funding to satisfy these conditions (Special Condition II.K); and

4) At least thirty days prior to commencement of any dredging episode, the Corps must submit to BCDC's Executive Director a WQC from the Regional Board, as required by Bay Plan Water Quality Policy 2. The Corps' failure to obtain such certification prior to the commencement of any dredging episode terminates BCDC's concurrence for that episode (Special Condition II.D).

AR24197, 24201, 24206 (collectively referred to herein as the "Contested Conditions").

At the June 4, 2015 BCDC hearing on the CD, Lt. Colonel Morrow, Commander for the Corps' San Francisco District, expressed general support for the staff recommendation that BCDC ultimately adopted and his commitment to "working through the process" with BCDC by seeking additional funding, if necessary, to implement the Contested Conditions. AR17780-85, 17850, 24177-79, 24183-84. On June 23, 2015, Lt. Colonel Morrow signed the LOA on behalf of the Corps. AR17896.

B. The Regional Board's CWA Section 401 WQC for Corps Dredging Operations

On May 13, 2015, the Regional Board approved the "Reissued Waste Discharge Requirements and Water Quality Certification for: U.S. Army Corps of Engineers, San Francisco District, San Francisco Bay Federal Channel Maintenance Dredging Program, 2015-2019" (Regional Board WQC).[6] Ex. 513; BK Ans. ¶104. To ensure compliance with WQS, particularly the preservation of rare and endangered species and fish habitat and migration, **Provision 10** of the WQC requires that the Corps implement either Reduced Hydraulic Dredge Alternative 1 or 2, as described in the EA/EIR. AR14023, 14044-45.

V. THE CHALLENGED CORPS ACTIONS

A. Corps' November 2015 Decisions Refusing to Comply with BCDC Conditional Concurrence and the Regional Board WQC

In a letter dated November 10, 2015, the Corps rescinded its agreement to the LOA and objected to the Contested Conditions (CD Decision). Ex. 719. The CD Decision states that the Contested Conditions "exceed the constraints established by the federal standard." AR18074 (*citing* 33 C.F.R. § 336.1(c)(1)).

[6] The Regional Board issued both waste discharge requirements (WDRs) under the state Porter Cologne Water Quality Control Act and a WQC under CWA section 401. AR13575. WDRs permit discharges into state waters and, like a WQC, must include conditions to protect state WQS. Cal. Water Code § 13263(a).

The Corps asserts that, because it allegedly would cost more to implement the Contested Conditions, it is legally prohibited from doing so, based on its interpretation that the CDR requires it to adopt the "least costly" alternative. *Id.* The Corps further states that it is not authorized to seek "special funding" for state conditions that merely implement "a state's own local preference" and that it would only implement the Contested Conditions if the State or another entity pays the unspecified additional cost. AR18074-75. Finally, the CD Decision states that "it remains [the Corps'] position that the dredging program [without the Contested Conditions] is fully compliant with the legally enforceable action items of the Bay Plan and that [BCDC's] conditional concurrence continues to be valid." AR18075.

The Corps sent a similar letter to the Regional Board, also dated November 10, 2015, objecting to Provision 10 of the Regional Board WQC (WQC Decision). Ex. 522. The Corps states that it cannot legally comply with Provision 10 and implies that the condition exceeds the Regional Board's CWA authority. AR 14086. The Corps further states that "in the event the [Regional] Board does not amend the [WQC] to remove Provision 10, we will have no choice but to defer dredging of the navigation channels to which this Provision applies." *Id.*

In sum, the Corps takes the position that, because of the Federal Standard, it lacks authority to implement any conditions imposed by the State under either the CZMA or CWA that may increase its dredging costs. *See* Exs. 522, 719. Further, the Corps asserts that it will not seek any additional funding that may be needed to implement those conditions. *Id.* Thus, contrary to Lt. Colonel Morrow's representations at the June 2015 BCDC hearing, the Corps has not made any efforts to seek additional funding to implement the Beneficial Reuse and Reduced Hydraulic Dredge Conditions, as required by Special Condition II.K. *See* AR14966, 24206; Exs. 709, 710.[7]

A. Corps' January 2017 Decision Refusing to Dredge Certain Deep Draft Federal Navigation Channels

On January 12, 2017, the Army Director of Civil Works approved COA #2. Ex. 595. For FY

[7] On March 10, 2016, BCDC and the Regional Board each sent a letter to the Corps, explaining why the Corps is not legally prohibited from implementing, and is required to comply with, the Contested Conditions and Provision 10 under the CZMA and the CWA, respectively. Exs. 524, 736. BCDC's letter also requested that the OCM mediate the dispute as authorized under the CZMA regulations. AR18234; *see* 15 C.F.R. Part 930, Subpart G. On March 22, 2016, the Corps declined to participate in mediation, stating that it "is unable to mediate on the federal standard, which is a federal regulatory requirement." AR18235. The Corps did not respond to the Regional Board's letter.

2017, COA #2 states that the Corps will: (1) dredge Suisun Bay Channel with a mechanical dredge; (2) not dredge the Richmond Outer Harbor at all; and (3) dredge the Pinole Shoal Channel with a hydraulic dredge. AR14972. In 2018 and beyond, COA #2 states that the Corps will dredge the Richmond Outer Harbor and Pinole Shoal Channel only in alternating years, instead of annually as they had been for many years and the Corps had previously planned to do through 2024. *Id*., AR13050, 13085-87, 13096, 14025, 14974, 16067-71. The Corps claims that it adopted COA #2 in order to "comply" with the Regional Board WQC, as well as the Federal Standard. AR14792. The Corps also concluded that COA #2 is "compliant with the [CZMA]." *Id*.

The Corps admits that not dredging these deep draft federal navigation channels annually will cause significant economic and environmental impacts. AR14957. The EA/EIR also stated that deferred dredging would adversely affect international and other commerce in the Bay and increase navigational hazards and have other effects that would increase the potential for oil spills. AR13151,13310. However, the EA/EIR did not evaluate these potential impacts in detail because, at the time, it was "unknown whether, to what extent, or for how long, dredging could be deferred, the impacts of deferred dredging would be speculative and variable," and thus the EIR only included a "brief qualitative assessment" of these impacts. AR13151. The Corps did not conduct any further environmental review of deferred dredging before or after it adopted COA #2.

VI. PROCEDURAL HISTORY OF THE LITIGATION

BCDC filed this action challenging the CD Decision on September 22, 2016. ECF Doc. 1. The Court granted Baykeeper's motion to intervene as a plaintiff on April 25, 2017. ECF Doc. 37. In addition to the claims raised by BCDC regarding the Corps' failure to comply with the CZMA, CDR and APA, Baykeeper challenges the WQC Decision under the CWA and APA. BCDC and Baykeeper filed supplemental and first amended complaints, respectively, on June 20, 2017, also challenging COA #2 under the APA and NEPA. ECF Docs. 50, 51. The Corps filed answers to both complaints on July 10, 2017. ECF Docs. 52, 53. The Corps lodged the Administrative Record on December 15, 2017 and a Supplemental Record on September 26, 2018. ECF Docs. 63, 79. On February 5, 2019, this Court granted the parties' amended stipulated briefing and hearing schedule on cross-motions for summary judgment on the merits, pursuant to which this brief is filed. ECF Doc. 87.

STANDARD OF REVIEW

Summary judgment is appropriate when the record shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Judicial review of federal agency compliance with federal environmental laws is governed by Section 706 of the Administrative Procedure Act (APA), 5 U.S.C. § 706. *See, e.g., Churchill Cty. v. Norton*, 276 F.3d 1060, 1071 (9th Cir. 2001). Agency actions are subject to reversal where they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[,]" "in excess of statutory jurisdiction, authority, or limitations[,]" "without observance of procedure required by law[,]" or not supported by substantial evidence. 5 U.S.C. § 706(2). A court also must set aside agency action where the agency fails to "examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted) ("*State Farm*"). An agency decision is arbitrary and capricious if the agency:

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id.

ARGUMENT

I. THE CORPS' CD DECISION IS UNLAWFUL BECAUSE IT VIOLATES THE CORPS' OBLIGATIONS UNDER THE CZMA AND THE CDR.

The CD Decision should be held unlawful and set aside because it is based on a flawed interpretation of the Corps' authority that is contrary to the CZMA, NOAA's regulations implementing the CZMA, and the CDR. 5 U.S.C. § 706(2)(A), (C). The CZMA provides that:

> [e]ach Federal agency activity within . . . the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of the approved State management programs.

16 U.S.C. § 1456(c)(1)(A), (C); *see also* 15 C.F.R. §§ 930.30, 930.39(c). The CZMA's consistency requirement is implemented through: (1) the federal agency's submission of a consistency determination to the state coastal agency, indicating whether the federal agency activity at issue "is consistent to the maximum extent practicable with the enforceable policies" of the State CZMP; and (2) the state agency's

concurrence or conditional concurrence in, or objection to, that determination. 16 U.S.C. § 1456(c)(1)(C); 15 C.F.R. §§ 930.4(a)(1), 930.36(a), (b)(1), 930.43(a). NOAA's CZMA regulations define "consistent to the maximum extent practicable" as "*fully consistent* with the enforceable policies" of the state's coastal program "*unless* full consistency is *prohibited* by existing law applicable to the Federal agency." 15 C.F.R. § 930.32(a)(1) (emphasis added).

The Corps does not dispute that its Bay maintenance dredging operations is a "federal agency activity" subject to the CZMA's consistency requirement. *See* 15 C.F.R. § 930.31(a); 33 C.F.R. § 336.1(a)(2), (b)(9); AR15861, 15863. However, the CD Decision states that the Corps' objects to, and will not comply with, the Contested Conditions, which BCDC imposed in order to ensure that Corps dredging operations are fully consistent with the state CZMP as required by the CZMA. AR18074-75; *see* Ex. 1109. The CD Decision converted BCDC's conditional concurrence to an objection. 15 C.F.R. § 930.4(b). In these circumstances, the CZMA regulations permit the Corps to proceed with dredging only if makes one of the following findings: (1) the federal agency activity "is fully consistent with the enforceable policies of" the state CZMP, notwithstanding the State's objections; or (2) full consistency "is prohibited by existing law applicable to the Federal agency and the Federal agency has clearly described, in writing, to the State agency the legal impediments to full consistency." 15 C.F.R. § 930.43(d). Here, the CD Decision purports to make both findings. AR18074-75. For the reasons described below, both findings are inconsistent with the CZMP, the CZMA, and the CDR, are not entitled to deference, and must be set aside.

A. Dredging Absent Compliance with the Contested Conditions Is Not Fully Consistent with the CZMP.

Contrary to the Corps' first finding that its dredging operations are fully consistent with the CZMP absent the Contested Conditions, compliance with the Contested Conditions is necessary to ensure that such operations are fully consistent with enforceable policies of the CZMP. These policies include but are not limited to: Bay Plan Dredging Policies 1-3 and 5; Fish, Other Aquatic Organisms and Wildlife Policies 1, 2, and 4; Water Quality Policies 1 and 2; Subtidal Areas Policy 1; and Mitigation Policy 1 (AR22998-306, 23010-12, 23027-31, 23067-69), and other requirements of the McAteer-Petris Act, Cal. Gov't Code §§ 66600-66605, 66663.1, 66663.2. These policies require, *inter alia*: (1) maximum feasible reuse of

dredged sediment as a resource for wetlands restoration, levee maintenance and other beneficial purposes; (2) minimization of unconfined in-Bay disposal of dredged sediment; (3) avoidance, minimization and mitigation of harm to listed aquatic species and their habitat; and (4) protection of Bay water quality, including protection of fish and fish habitat. *See* App. A.

The Corps' decision that dredging without implementing the Contested Conditions "is fully compliant with the legally enforceable" policies of the CZMP is arbitrary and capricious, an abuse of discretion, and not supported by substantial evidence. AR18075. First, absent the Beneficial Reuse Condition, the Corps would dredge without ensuring that in-Bay disposal of sediment is minimized, beneficial reuse of dredged sediment is maximized, and that Bay habitats are protected and restored, as required by the CZMP. *See* Ex. 678; AR15895-96. Furthermore, the Beneficial Reuse Condition merely implements the LTMS goals, which were incorporated into the Bay Plan in 2001 and which the Corps agreed to implement in 1999. *See* AR7973-80, 23028-30, 24211-18. Second, the Reduced Hydraulic Dredge Condition is necessary to ensure that dredging does not significantly adversely affect threatened and endangered fish species. The Bay Plan requires protection of listed fish species, including the endangered and threatened Delta and longfin smelt, and requires that any adverse impacts to these species and their habitat from dredging operations be avoided, minimized, and mitigated. *See* App. A; AR22998-99, 23011-12, 23067-69. Here, the Corps admits that hydraulic dredges kill imperiled Delta and longfin smelt and that use of mechanical dredges significantly reduces the level of take from its dredging operations.[8] Thus, the Reduced Hydraulic Dredging Condition, which limits hydraulic dredging to one in-Bay deep draft channel per year in order to minimize significant impacts on protected fish species, is necessary to ensure full consistency with the Bay Plan. *See* AR24219-22, 24225-30.

In sum, maintenance dredging conducted without complying with the Contested Conditions is not fully consistent with the enforceable policies of the CZMP and is therefore inconsistent with the CZMA and its regulations. The Corps' contrary finding in its CD Decision is arbitrary and capricious and not entitled to any deference. *See Ohio v. U.S. Army Corps of Engr's.*, 259 F.Supp.3d 732, 755 (N.D. Ohio 2017) ("*Ohio*") (Corps' interpretation of state CZMP not entitled to deference).

[8] *See* Exs. 946, 957, 975, 978, 983; AR13045, 13062, 13073, 13244-48, 13253-56, 13260-61, 15910, 20090-98, 20838-40, 21794, 21839, 24221, 24226-29, 24335; BCDC Ans. ¶¶67, 114(b).

B. The Corps Is Not Legally Prohibited from Implementing the Contested Conditions Under Either the CZMA or the CDR.

The CD Decision also concludes that the Corps is legally prohibited from implementing the Contested Conditions and from achieving full consistency with the CZMP. AR18074-75; *see* 15 C.F.R. § 930.32(a)(1). The Corps states that the Contested Conditions "exceed the constraints established by the federal standard," which require it to undertake dredging in the "least costly" manner. AR18074 (*citing* 33 C.F.R. § 336.1(c)(1)). This determination contravenes the CZMA and CDR, both of which require the Corps to implement state conditions imposed under the CZMA. Contrary to the Corps' contention, the Federal Standard does not supersede the CZMA's clear statutory command that the Corps comply with the CZMP. But even if the Federal Standard could do so, there is in fact no legal prohibition in the CDR on the Corps' implementation of a more expensive state dredging alternative since the CDR itself requires the Federal Standard Alternative to comply with a state CZMP.

1. The CZMA expressly requires the Corps to comply with state conditions imposed pursuant to the CZMA and to seek additional funding, if necessary, to do so.

As part of its rationale for concluding that the Federal Standard legally prohibits it from implementing the Contested Conditions, the CD Decision states that the Corps is not authorized to "seek special funding for [state CZMA] conditions," which it claims are based solely on the "state's own local preference." AR18074. However, BCDC imposed the Contested Conditions pursuant to the State's delegated federal authority under the CZMA to ensure consistency with the federally-approved State CZMP. As such, the Contested Conditions are not based on the "state's own local preference" (AR18074) but rather are enforceable under federal law. *Islander E. Pipeline*, 525 F.3d at 143-44. Under the CZMA, lack of funding does not excuse a federal agency activity from being fully consistent with the enforceable policies of the CZMP. *See* 16 U.S.C. § 1456(c)(1)(B). There is only one exception to this obligation: when the President has requested and been denied funding from Congress and then exempts the federal agency from compliance with the CZMP. *Id.*; *see also* 15 C.F.R. § 930.32(a)(3) (under the CZMA, "[t]he only circumstance where a Federal agency may rely on a lack of funding as a limitation on being fully consistent with an enforceable policy is the Presidential exemption" in 16 U.S.C. § 1456(c)(1)(B)).

The CZMA regulations further elaborate on the CZMA's statutory command, stating that "whenever legally permissible, Federal agencies shall consider the enforceable policies of [CZMPs] as

requirements to be adhered to in addition to existing Federal agency statutory mandates." 15 C.F.R. § 930.32(a)(2). The CZMA regulations also expressly require federal agencies to seek additional funding to cover the cost of complying with additional state requirements imposed under the CZMA:

> Federal agencies shall not use a general claim of a lack of funding or insufficient appropriated funds or failure to include the cost of being fully consistent in Federal budget and planning processes as a basis for being consistent to the maximum extent practicable with an enforceable policy of a management program.. . . In cases where the cost of being consistent with the enforceable policies of a management program was not included in the Federal agency's budget and planning processes, the Federal agency should determine the amount of funds needed and seek additional federal funds. Federal agencies should include the cost of being fully consistent with the enforceable policies of management programs in their budget and planning processes, to the same extent that a Federal agency would plan for the cost of complying with other federal requirements.

Id. § 930.32(a)(3).

In *City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004), the Ninth Circuit rejected the National Park Service's position, identical to the Corps' here, that its land use plan for Fort Baker was consistent to the maximum extent practicable with the Bay Plan because the agency lacked sufficient funding to be fully consistent with applicable Bay Plan policies. *Id*. at 1221-23. The Court held that "lack of funds is explicitly forbidden as a criterion for finding consistency under 15 C.F.R. § 930.32(a)(3)," and that the Park Service's consistency determination thus "was improper under the CZMA." *Id*. at 1222 (citation omitted). Likewise, in *Ohio*, 259 F.Supp.3d at 754-57, the U.S. District Court invalidated the Corps' refusal to comply with Ohio's CZMA condition requiring dredged sediment to be disposed of in a confined disposal facility. Similar to the Corps' position here, the Corps asserted that the Federal Standard required open water disposal because that was the least cost alternative. The court rejected this position, stating that:

> the phrase "maximum extent practicable" does not give the Corps unbridled discretion to refuse the costs of compliance, nor does it legitimize the Corps' position that the Federal Standard can operate to override its obligation to abide by state environmental standards…. Allowing [the Corps'] own Federal Standard determination to super[s]ede its obligations under the CZMA is unlawful because it gives the agency power in excess of its Congressionally delegated authority.

Id. at 756-57; *see also id*. at 747-48 (Corps has been given no discretion "to delegate the costs associated with" compliance with the CZMA (or CWA) to the State). Therefore, the Corps cannot rely on lack of

funding as a justification for not complying with the Contested Conditions.[9]

The Corps' interpretation of its Federal Standard regulation cannot override the CZMA's clear statutory command to implement State CZMA conditions, and the Corps' assertion to the contrary is entitled to no deference. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984) ("[t]he judiciary …must reject administrative constructions which are contrary to clear congressional intent"); *see also Ohio*, 259 F.Supp.3d at 756-57 (Federal Standard cannot "override [Corps'] obligation to abide by state environmental standards") (citation omitted); *id*. at 747-49, 751, 760-61. The Corps' interpretation also is not entitled to deference because it is not charged with interpreting and implementing the CZMA; rather, NOAA is. *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001) (*Chevron* deference inapplicable where Congress has not delegated authority to agency to interpret the statute); *accord Ohio*, 259 F.Supp.3d at 756-57. Thus, the Corps cannot rely on its regulatory Federal Standard as a justification for refusing to comply with the CZMA's clear statutory directive that each federal agency ensure that its activities are consistent with a federally-approved CZMP, including seeking additional funds, if necessary, to comply. 16 U.S.C. § 1456(c)(1)(B).

2. The CDR itself requires the Federal Standard Alternative to comply with the CZMA and other environmental laws.

Even if the CDR could override the clear requirements of the CZMA and its regulations, the Corps misinterprets the plain language of its own regulations in order to manufacture a legal prohibition on CZMA compliance. *See Decker v. Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 613 (2013) (agency construction of its own regulations not entitled to deference where "plainly erroneous or inconsistent with the regulation"); *accord Ohio*, 259 F.Supp.3d at 749. In fact, the CDR *itself* requires the Corps to comply with the CZMA, and there is nothing in the CDR that reasonably can be interpreted as legally prohibiting the Corps from implementing state CZMA conditions *solely* on account of their potentially increased costs.[10] *See Ohio*, 259 F.Supp.3d at 761.

[9] The Corps' current stance also is arbitrary because it contravenes its prior commitment to seek additional funding to implement the Contested Conditions. *See* AR17780-85; 24177-79. Special Condition II.K delayed implementation of the Reduced Hydraulic Dredge Condition until 2017 to provide the Corps time to do so. AR24216-17.

[10] The Corps has not documented the precise increased costs of implementing the Contested Conditions in the Bay's federal navigation channels. Nor has the Corps provided evidence that it does not have sufficient funds to cover this additional cost or that the additional cost otherwise renders the Corps' maintenance dredging of the Bay's federal navigation channels economically

The Corps myopically focuses on the "least cost" aspect of the Federal Standard, ignoring the co-equal requirements that the selected dredging alternative also be "environmentally acceptable" and in compliance with all applicable federal environmental laws, including the CZMA (and the CWA, as discussed in Argument Section II.B.2 *infra*). *See* 33 C.F.R. §§ 335.2, 335.4, 336.1(a)(2), (b)(9), (c)(1)-(3), (10). Consequently, in order for the Corps' dredging alternative to satisfy the "environmentally acceptable" criterion, it must comply with the 404(b)(1) Guidelines *and* any additional requirements imposed pursuant to the CZMA, CWA section 401, and other applicable federal environmental laws. *Id.*[11] The CDR further requires the Corps to reduce "the unavoidable adverse impacts of dredging and disposal activities[,]" and to give "[f]ull consideration" to all practicable disposal alternatives, including upland disposal, beach nourishment, and beneficial reuse. *Id.* §§ 336.1(c)(8)(ii), 337.9(a). Finally, the CDR provides that all practicable and reasonable alternatives will be "fully considered on an equal basis." *Id.* § 335.4. Thus, the CDR's reference to the "least costly" alternative is most reasonably read as requiring the Corps to select the least costly alternative among those alternatives that *otherwise satisfy* the requirements of all applicable federal environmental laws and the CDR. The Corps' interpretation that it always must implement the least cost alternative, regardless of any other legal requirements or environmental considerations, is unreasonable and contrary to the plain meaning of the CDR, CZMA and CWA. *See Ohio*, 259 F.Supp.3d at 748-61.

As explained in Argument Section I.A, *supra*, the Contested Conditions are designed to ensure that the Corps' maintenance dredging is conducted in an "environmentally acceptable manner" that maximizes the beneficial reuse of dredged material, minimizes in-Bay disposal, protects listed fish species and their habitat, and otherwise complies with the federally-enforceable CZMP policies. The Corps' determination that it will not comply with the Contested Conditions does not constitute an "environmentally acceptable" alternative within the meaning of the CDR because it does not comply with the CZMA. Indeed, the Corps *itself* has concluded that beneficial reuse (*e.g.*, disposal at an "upland site") is an environmentally preferable alternative. *See, e.g.*, AR14844, 14851, 14857. The Corps also has concluded that use of a

impracticable to conduct. In fact, the evidence shows that compliance with the Contested Conditions is feasible, as discussed in Argument Section I.C *infra*.

[11] The CDR also requires the Corps to "cooperate to the maximum extent practicable with state agencies" and "make all reasonable efforts to comply with" federally-approved CZMPs and state WQS. 33 C.F.R. §§ 337.2(a), 336.1(c)(10); *see also id.* § 337.2(b).

mechanical dredge in Suisun Channel as required by FWS meets its obligations under 33 C.F.R. § 336.1(c)(8)(ii) to reduce the unavoidable adverse impacts of its dredging operations, and that "[t]he incremental additional cost weighed against the detriments of causing the possible extinction of an endangered species, tips the balance in favor of changing our operations." AR21797. The same rationale necessarily applies to the Corps' use of a hydraulic dredge in other in-Bay channels where listed fish species are present and can be harmed.

C. Even If CZMA Practicability Includes Economic Considerations, the Contested Conditions Are Practicable for the Corps to Implement.

As explained above, under the CZMA, a state condition is not "practicable" only if it is legally prohibited by other federal law. 15 C.F.R. § 930.32(a)(2). But even if "practicability" under the CZMA also includes other factors such as cost, as the Corps incorrectly contends, the record indicates that it is economically feasible and otherwise practicable for the Corps to comply with the Contested Conditions. Indeed, the Corps admits that "[t]here are multiple possible scenarios under which the dredging could be executed in accordance with" the Contested Conditions. AR14958. In fact, since 2015, the Corps has implemented similar conditions imposed by NMFS and FWS pursuant to the ESA, indicating that it is economically practicable *and* legally possible for the Corps to comply with the Contested Conditions.

1. Practicability of Beneficial Reuse Condition

As discussed, the Beneficial Reuse Condition implements the longstanding LTMS goals to limit in-Bay disposal to a maximum of 20% and to beneficially reuse a minimum of 40% of dredged sediment. The Corps agreed to these goals in 1999 and BCDC incorporated them into the Bay Plan's enforceable policies in 2001. Exs. 18, 21; AR24207-18. The Corps repeatedly has expressed its strong commitment to beneficial reuse and implementing the LTMS. *See* AR24059 (2015 letter stating that the Corps "remain[s] committed to doing everything in our power to achieve all of the goals established by the LTMS program"), 15864-65 (Corps has "strong commitment" to beneficial reuse under the LTMS), 19132 ("our goal is to maximize beneficial reuse of dredged material" and to comply with the LTMS).[12] The Corps also has acknowledged that 20% maximum in-Bay disposal/40% minimum beneficial reuse is the "main goal" of the LTMS and that the LTMS goals "remain appropriate and largely implementable."

[12] *See also* Exs. 841, 1100; AR8513-14, 8771-74, 8793-8801, 9258-59, 9346-47, 9350-56, 12054, 13074-76, 14831-32, 14670, 15629, 15639-41, 16059, 16081-83, 16090-91, 19114-15, 19216.

AR8797, 8877, 9937, 10118-19, 10128, 13076; *see also* AR9346.

Moreover, the Corps is able to implement the Beneficial Reuse Condition because there are several local beneficial reuse sites that currently need dredged sediment, and other beneficial reuse sites are in the process of being approved. AR9933, 10898-99, 13106-110, 15649-50, 15699-700, 15884-87, 22820. In 2012 and 2013, as part of the LTMS 12-year review process, the LTMS agencies, including the Corps, found that substantial capacity for beneficial reuse still exists and that beneficial reuse sites are available and need material. AR9779-82, 9355-56, 10073, 10128-29, 10132. Further, beneficial reuse of dredged sediment is practicable because the Corps is already doing it. Since 2015, pursuant to the ESA, NMFS has required the Corps to deposit all material dredged outside of the "work window" between December 1 and May 31 to a beneficial reuse site that provides benefits for fish habitat, such as a wetland restoration site. AR9393, 9478; *see also* AR10901, 19292. The Corps consistently has complied with this NMFS requirement.[13]

Finally, contrary to the Corps' assertion that beneficial reuse is *always* more costly, beneficial reuse actually can be the same as or less than the cost of transporting material to SF DODS (55 miles west of the Golden Gate) or another disposal site. *See* Exs. 394, 565, 567, 568; AR9749, 12815, 14860-62, 15872-73, 15875, 15877, 22784, 23971, 23983-84. On numerous occasions in recent years, the Corps has found that beneficial reuse was the "least cost," most "environmentally acceptable" or "environmentally preferable" alternative, and has deposited material to Bay beneficial reuse sites.[14] In a June 2014 letter to BCDC, the Corps stated that, in certain circumstances, "beneficial reuse of dredged material . . . can meet the cost requirements of the Federal Standard." AR19208-09; *see also* AR14831-32. The Corps also has noted that "having the option for upland placement [*i.e.* beneficial reuse] may, in some instances, be advantageous to our contractors when inclement weather makes SF DODS unavailable." AR14841. Moreover, the record contains no evidence that the Corps documented the specific extent to which complying with the Beneficial Reuse Condition would, in fact, cost more than in-Bay or ocean disposal.[15]

[13] *See* Exs. 575, 704, 706, 720, 731, 738, 741, 743, 765, 1121; AR10901, 13047 n. 6, 14877, 15697, 18043-44, 18110-11, 18158, 18216-17, 18433, 18643, 22784, 24060, 24264, 24334.

[14] *See* Exs. 395, 399, 404, 407, 409, 416, 418, 565, 567, 568, 570, 573, 704, 765, 841, 845, 1121; AR8841-43, 14831-32, 14853-54, 14876-79, 22382-84, 23926.

[15] To the extent that beneficial reuse may be more expensive than in-Bay or ocean disposal, the LOA delayed the effective date of the Beneficial Reuse Condition for two years to allow the Corps time to

2. Practicability of Reduced Hydraulic Dredge Condition

It is likewise practicable for the Corps to implement the Reduced Hydraulic Dredge Condition (and similarly, Regional Board Provision 10), as evidenced by the Corps' past practice and findings. Since 2015, the Corps has mechanically dredged the Suisun Channel to prevent take of threatened Delta smelt as required by the FWS under the ESA. Exs. 978, 981, 988; AR14960, 14972, 21738-39, 21839, 24348, 24353. In 2015, the Corps dredged *all* in-Bay deep draft channels using a mechanical dredge via government contract. AR10900, 12355, 14073, 24274. The Corps admits that it is possible to maintain the Richmond Outer Harbor and Pinole Shoal Channel with a mechanical dredge (*see* AR8841-42, 13085-87, 13096, 14695, 14705, 14910, 14938, 14963, 15785, 16076, 16094, 17778, 17791-93, 19089, 19099), and it has done so several times in recent years (AR11414, 11422, 11430, 14905, 15872, 15877, 17603, 17982, 18043, 18108-09).[16]

For the foregoing reasons, the Corps' CD Decision conflicts with the CZMA and the plain language of the CDR, both of which require the Corps to comply with state CZMA conditions necessary to ensure full consistency with the CZMP, including seeking additional funding if necessary, and do not impose any legal prohibition on such compliance. Because the Corps cannot lawfully find that it is legally prohibited by any law from complying with the Contested Conditions, or that it is otherwise impracticable for it to comply, the CD Decision is unlawful and must be set aside.

II. THE CORPS' WQC DECISION IS UNLAWFUL BECAUSE IT VIOLATES THE CORPS' OBLIGATIONS UNDER THE CWA AND THE CDR.

Like the CD Decision, the WQC Decision states that the Corps will not comply with Provision 10, because it purportedly "exceeds the constraints established by the federal standard." AR14086. The WQC Decision similarly is based on a flawed interpretation of the Corps' obligations under the CWA and

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seek additional funding. AR24216-17.

[16] The Corps' 404(b)(1) analysis states that reducing hydraulic dredging is not practicable because hydraulic dredging costs about three times as much as mechanical dredging and the Corps may not be able to obtain additional funds to cover these costs. AR13360. But Corps management did not even attempt to request any additional funding. AR14966 ("since we are not authorized to request the funding, there is no funding strategy to share"); *see also* AR14912.

The real motivation behind the Corps' rejection of the Reduced Hydraulic Dredge Condition appears to be not its *inability* to comply due to increased costs, but rather the "concern that if the in-bay projects (Pinole, Richmond, and Suisun) are done with a contract [mechanical] dredge, the stakeholders may begin to suggest that this plan be followed every year instead of using the government [hydraulic] dredges." AR12473; *see also* AR21799-800 (changing to mechanical dredge will result in "perceived precedent that [the Corps] has discretion to change to a more expensive dredge type").

the CDR. Under CWA section 401, the State has broad authority to impose any condition on the Corps' dredging operations it deems necessary to protect designated uses of the Bay and to ensure compliance with federally-approved state WQS. *See PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 713-14 (1994). Congress has broadly waived sovereign immunity under the CWA, requiring all federal agencies to comply with all State requirements imposed under CWA section 401. The CDR also requires such compliance. Accordingly, the Corps' Federal Standard Alternative must comply with the Regional Board WQC, including Provision 10.

A. Provision 10 Is Within the State's Authority Under CWA Section 401.

Under the CWA, Congress gave primary authority to the states to establish and enforce WQS in waters within their jurisdiction. 33 U.S.C. §§ 1313, 1323, 1341; *PUD No. 1*, 511 U.S. at 707. By granting states the right to certify any activity that requires a federal permit or license and that "may result in any discharge" into waters within their jurisdiction, CWA section 401 is one of the primary methods by which states exercise this authority. 33 U.S.C. § 1341(a). "States may condition a certification upon any limitation necessary to ensure compliance with state [WQS] or any other 'appropriate requirement of State law." *PUD No. 1*, 511 U.S. at 713-14. Pursuant to that authority, the Regional Board included Provision 10 in the Regional Board WQC to protect special-status fish species, including Delta and longfin smelt, and their habitat, which are designated beneficial uses of the Bay in the federally-approved Basin Plan. *See* AR13576, 13579, 13582, 14049, 23453-56. Provision 10 reduces the entrainment and killing of imperiled Delta and longfin smelt by reducing the number of navigation channels that the Corps may dredge annually with a hydraulic dredge. *See* AR13053-56, 14033-37, 14044-45.

The Corps objected to Provision 10 in part because it claims that the State does not have authority under CWA section 401 to impose conditions on the method or manner of dredging, but only on the discharge of dredged material. AR13556-57. In *PUD No. 1*, the U.S. Supreme Court squarely rejected this interpretation of the State's authority under CWA section 401. In that case, the State of Washington issued a WQC for the construction and operation of a federally-licensed dam. *See PUD No. 1*, 511 U.S. at 709. The state included a condition in the WQC that required minimum instream flows in order to protect the river as fish habitat. *Id.* at 709, 712. The applicant challenged the WQC, arguing, as the Corps does here, that the state requirement was "unrelated to [the] … discharge" and exceeded the state's authority

under CWA section 401. *Id*. at 711. The Supreme Court held that, while the 401 Certification requirement is triggered by a "discharge" under section 401(a), section 401(d) allows the state to impose any "'limitations . . . necessary to assure that any applicant' will comply with various provisions of the Act." *Id*. at 711 (citing 33 U.S.C. § 1341(d) (emphasis omitted)). The Court reasoned that:

> Section 401(a)(1) identifies the category of activities subject to certification – namely those with discharges. And section 401(d) is most reasonably read as authorizing additional conditions and limitations *on the activity as a whole* once the threshold condition, the existence of a discharge, is satisfied.

Id. at 711-12 (emphasis added); *see also* 40 C.F.R. § 121.2(a)(3) (certification "shall include . . . a statement that there is a reasonable assurance that the *activity* will be conducted in a manner which will not violate applicable [WQS]") (emphasis added).

Here, the activity at issue is the Corps' dredging operations as a whole, which includes both the dredging itself and the disposal of dredged material. AR13044-45. It is undisputed that dredged material disposal results in a discharge. Thus, the State has authority to impose conditions on the entire dredging activity to ensure compliance with WQS. And likewise, here, as in *PUD No. 1*, the Regional Board imposed Provision 10 to protect designated uses of the Bay for fish habitat and migration. AR13576, 13579-80, 13582. As the Supreme Court has found, "the designated use of the river as a fish habitat directly reflects the [CWA's] goal of maintaining the 'chemical, physical, biological, and radiological integrity of the Nation's waters.'" *PUD No. 1*, 511 U.S. at 714 (citation omitted). Thus, Provision 10 is a valid exercise of the State's authority under CWA section 401.[17]

B. The Corps' Federal Standard Alternative Must Comply with the WQC and WQS, Including Provision 10.

Like the CD Decision, the WQC Decision asserts that the Federal Standard prohibits the Corps from implementing Provision 10 because it allegedly will increase dredging costs and is based simply on the "state's own local preference." AR14086. The Corps' interpretation of the Federal Standard is wrong for two reasons. First, the CWA expressly requires the Corps to comply with State requirements to meet WQS. Second, the Corps again ignores and misinterprets the plain language of its own regulations, which

[17] Although CWA section 401 does not require that a WQC condition be "practicable," the Regional Board worked closely with the Corps to ensure that Provision 10 was feasible, including delaying implementation of Provision 10 to 2017 "to allow sufficient time to process a budget augmentation request." AR13586. In fact, the Corps itself suggested or, at very least, helped formulate the Reduced Hydraulic Dredge Alternatives in the EA/EIR. *See* AR23848, 23852.

expressly require it to comply with a WQC issued under CWA section 401 and applicable State WQS.

1. Congress amended the CWA in 1977 to require the Corps to comply with state WQS.

In 1977, Congress amended the CWA to include two waivers of sovereign immunity, which firmly establish that the Corps is subject to conditions imposed by the State in a WQC.[18] *See* 33 U.S.C. §§ 1323(a), 1344(t); *see also Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 929, 934 (9th Cir. 1988) ("Congress waived the federal government's sovereign immunity with respect to state regulation of dredging and water pollution"). CWA section 313(a) provides that federal agencies that are:

> engaged in any activity resulting . . . in the discharge or runoff of pollutants . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity.

33 U.S.C. § 1323(a). In addition, CWA section 404(t), which applies specifically to discharges of dredged or fill material, expressly allows a State:

> to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State . . . requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements.

33 U.S.C. § 1344(t). Thus, "the act has been amended to indicate unequivocally that all Federal facilities and activities are subject to all of the provisions of State and local pollution laws." S. Rep. No. 95-370, at 67 (1977); *see also In re Operation of the Mo. River Sys. Litig.*, 418 F.3d 915, 918 n.4 (8th Cir. 2005) ("Congress' intent in enacting the l977 amendments was to subject the Corps' *channel-dredging* activities to state [WQS] promulgated pursuant to the CWA, while preserving its authority to maintain navigation") (emphasis in original); *Ohio*, 259 F.Supp.3d at 749-50 (in the 1977 CWA amendments, "Congress verified its intent to make" the State "the ultimate authority" on WQS and "did not intend for federal agency decisions to pre-empt state law in this area") (citation omitted).

Moreover, the CWA legislative history indicates that Congress understood that compliance with section 401 would increase costs associated with dredging and supported the Corps seeking additional

[18] The 1977 Amendments also removed a prior provision in section 401 that exempted federal agencies from compliance with that section. *See* AR12578; S. Rep. No 95-370, at 47-48 (1977); *see also* H.R. Rep. No. 95-830, at 25 (Conf. Rep.) (1977).

funds to meet these requirements:

> Pursuant to this amendment, the [C]orps may be required by the States in some instances to expend additional funds to protect water quality. The committee supports funds for this purpose. It is the responsibility of the Secretary of the Army to seek such funds from the Congress, with the support of the [EPA].

S. Rep. No. 95-370, 68 (1977). Similar to the CZMA, the CWA provides only one exception to this requirement:

> The President may exempt any effluent source of any department [or] agency . . . in the executive branch from compliance with any such a [state] requirement if he determines it to be in the paramount interest of the United States to do so. . . *No such exemptions shall be granted due to lack of appropriations unless* the President shall have specifically requested such appropriations as part of the budgetary process and the Congress shall have failed to make available such requested appropriation.

33 U.S.C. § 1323(a) (emphasis added); *see Ohio*, 259 F.Supp.3d at 751 n.26 (the Presidential exemption in CWA § 1323(a) is the only way a federal agency can be exempted from the duty to comply with state conditions imposed under CWA section 401).

As explained in Argument Section II.A *supra*, Provision 10 is a valid exercise of the State's authority under CWA section 401 and, as such, is not merely a "state preference," but is a requirement of federal law. Thus, the Corps wrongly asserts that it "lack[s] the authority to comply with Provision 10" (AR14086); in fact, the CWA expressly states that the Corps lacks the authority *not* to comply with Provision 10. *Ohio*, 259 F.Supp.3d at 749 ("the legislative purpose of [section 401] is to assure that Federal . . . agencies cannot override State water quality requirements") (internal quotations and citation omitted). Further, any Corps' policy not to seek additional funding to comply with conditions in a WQC (*see* AR14086) patently conflicts with Congressional intent in enacting the 1977 amendments to the CWA and must be rejected. *See Ohio*, 259 F.Supp.3d at 748-54 (holding that Corps has no discretion under the CWA to refuse to comply with a State WQC based on cost, "to override a state's interpretation of its own standards" or to shift the costs of compliance to the state); *see also Chevron*, 467 U.S. at 842-43. The State, not the Corps, has final authority to determine whether the Corps' dredging alternative satisfies State WQS. *Ohio*, 259 F.Supp.3d at 749-751, 755.

2. The CDR requires the Corps to comply with a WQC and WQS.

Furthermore, again like the CZMA, the CDR does not prevent the Corps from complying with

Provision 10, but in fact reinforces the Corps' duty to comply. As explained in Argument Section I.B.2 *supra*, the CDR does not simply require the Corps to dredge in the least costly manner, but also expressly requires such dredging to be "environmentally acceptable" and in compliance with the CWA, including section 401 and applicable WQS. *See* 33 C.F.R. §§ 335.2, 335.4, 335.5, 336.1(a)(1), (b)(8), (c)(1)-(2), (10); *Ohio*, 259 F.Supp.3d at 752-54, 760-61. Moreover, the Corps regulations applicable to its section 404 permitting program expressly recognize that a state WQC is "conclusive with respect to water quality considerations." 33 C.F.R. § 320.4(d). Therefore, contrary to the WQC Decision, the CDR, including the Federal Standard, requires the Corps to comply with the Regional Board WQC.

C. The Corps Cannot Object to the Regional Board WQC Because It Did Not Properly Challenge Its Issuance Under State Procedures.

Under CWA sections 313(a) and 404(t), federal agencies must comply with all state procedural and substantive requirements concerning water quality, including state procedures for challenging a WQC. 33 U.S.C. §§ 1323(a), 1344(t)); *Friends of the Earth*, 841 F.2d at 93 (local dredging permit was not final until all State proceedings had concluded); *Ohio*, 259 F.Supp.3d at 742 n.8, 750 n. 23 (Corps required to appeal WQC in accordance with State procedures). Under California law, the Corps was required to object to the Regional Board WQC by petitioning the State Board for review. Cal. Water Code § 13320(a); 23 Cal. Code. Regs. § 3867(a)(1). Following this, the Corps could have sought judicial review in State superior court. *See* Cal. Water Code § 13330(a). Rather than follow these State procedures as required by CWA sections 1344(t) and 1323(a), the Corps unilaterally determined that the Regional Board WQC exceeded the State's authority and the Federal Standard. This determination violated the Corps' substantive obligations to comply with the WQC, but if the Corps wished to challenge the Regional Board WQC, the Corps had to follow applicable State procedures. *See* 33 U.S.C. §§ 1323(a), 1344(t). Because the Corps has admitted it failed to do so, the WQC Decision was invalid. *See* BK Ans. ¶108.

III. THE CORPS' FEDERAL STANDARD ALTERNATIVE IS UNLAWFUL BECAUSE IT VIOLATES THE 404(B)(1) GUIDELINES.

The CD Decision and WQC Decision also was unlawful because the Corps' Federal Standard Alternative does not satisfy the 404(b)(1) Guidelines. *See* 33 U.S.C. § 1344(t); 33 C.F.R. §§ 335.2, 335.5(a), 335.7, 336.1(a), (b)(4), (b)(8)(i), (c)(1)-(2). First, the 404(b)(1) Guidelines prohibit discharges that cause or contribute to violations of state WQS. 40 C.F.R. § 230.10(b)(1). The State, not the Corps,

has final authority to determine whether the Corps' dredging alternative satisfies State WQS. *See* 33 C.F.R. § 320.4(d); *Ohio*, 259 F.Supp.3d at 749-751, 755. Here, the Regional Board determined that Provision 10 was necessary to ensure that dredging complies with State WQS. *See* AR13576, 13579-80, 13582, 14023, 14049. Thus, both the 404(b)(1) Guidelines and the CDR require the Corps' Federal Standard Alternative to include compliance with Provision 10.

Second, the 404(b)(1) Guidelines prohibit discharges "if there is a practicable alternative to the proposed discharge which would have [a] less adverse impact on the aquatic ecosystem." 40 C.F.R. §§ 230.10(a), 230.12(a)(3)(i); *see also* §§ 230.10(d), 230.12(a)(3)(iii) (prohibiting discharges that do not include all "appropriate and practicable steps" to "minimize potential adverse impacts of the discharge on the aquatic ecosystem"). "An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *Id.* § 230.10(a)(2). The analysis of alternatives in a NEPA document (such as the EA/EIR) "will in most cases provide the information for the [required] evaluation of alternatives." *Id.* § 230.10(a)(4). Also, if a CZMP or other planning process (such as the LTMS), has "identified and evaluated" practicable alternatives, "such evaluation shall be considered" by the federal agency "as part of the consideration of alternatives under the Guidelines." *Id.* § 230.10(a)(5).

Here, the Corps' Federal Standard Alternative does not constitute the least environmentally damaging "practicable alternative," because the Contested Conditions and Provision 10 are designed to reduce the adverse environmental effects of the Corps' dredging operations and are practicable to implement. *See* Argument Sections I.A and I.C *supra*. Furthermore, the EA/EIR states that the Reduced Hydraulic Dredge Alternatives, which BCDC and the Regional Board adopted as the Reduced Hydraulic Dredge Condition and Provision 10, are feasible and thus practicable. AR13116, 14037; 40 C.F.R. § 230.10(a)(4).[19] Also, the Corps previously committed to the maximum 20% in-Bay disposal and minimum 40% beneficial reuse goals in the LTMS, which it found to be feasible, and the Beneficial Reuse Condition is designed to meet these LTMS provisions. Ex. 21; AR24207-18; 40 C.F.R. § 230.10(a)(5). Thus, the record indicates that dredging in compliance with the Contested Conditions and Provision 10 is

[19] Under CEQA, the term "feasible" is very similar to the term "practicable" under the 404(b)(1) Guidelines. *Cf.* Cal. Pub. Res. Code § 21061.1 and 40 C.F.R. § 230.10(a)(2).

the least environmentally damaging practicable alternative within the meaning of the 404(b)(1) Guidelines. The Corps' determination that its Federal Standard Alternative meets the 404(b)(1) Guidelines is arbitrary and capricious because it "runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43.

IV. THE CORPS DID NOT COMPLY WITH THE PROCEDURAL REQUIREMENTS OF THE CDR.

Under the CDR, the Corps may only object to state conditions imposed on its maintenance dredging activities if they exceed the Federal Standard. 33 C.F.R. § 337.2(b). As explained in Argument Sections I-III *supra*, the Contested Conditions and Provision 10 do not exceed the Federal Standard because the CZMA, CWA, and CDR all require the Corps to comply with State conditions imposed under the CZMA and CWA.

Assuming *arguendo* that the Corps was authorized to object to the State conditions, the CDR requires the Corps to follow specific procedures, which it did not do. Thus, its objections to the State conditions are invalid or at the very least, premature. First, "[i]f the state agency imposes conditions or requirements which exceed those needed to meet the Federal standard," the Corps must "provide to the state information addressing why the alternative which represents the Federal standard is environmentally acceptable." 33 C.F.R. § 337.2(b); *see also id*. at § 337.6 (requirement for Corps statement of findings). The CD Decision and WQC Decision do not discuss why the Corps' Federal Standard alternative meets the "environmentally acceptable" criterion of the CDR. *See* Exs. 522, 719.

Second, the CDR requires the Corps to prepare a report to Army Headquarters when the Corps believes state conditions "exceed those needed to meet the Federal Standard" and concludes that these requirements "cannot reasonably be accommodated." 33 C.F.R. §§ 337.2(b), 337.8. The CDR contemplates that such a report will be prepared in any situation where, as here, a state has imposed conditions pursuant to the CZMA or CWA that the Corps believes exceed the Federal Standard. *Id.* §§ 337.2(b)(3), 337.8(a)(3)-(4); *Ohio*, 259 F.Supp.3d at 766 n. 50 (Corps must follow its internal reporting procedure "in order to obtain approval to implement…a decision" to proceed with dredging operations despite State objections or conditions). The report must include, *inter alia*: (1) "the economic need for dredging"; (2) the estimated costs of state agency requirements which exceed those necessary to meet the Federal Standard, and (3) other information necessary to assist in a determination "whether to further defer

the dredging and seek Congressional appropriations for the added expense" or override the state's determination under the federal navigation exceptions in CWA sections 404(t) and 511(a). 33 C.F.R. § 337.8(b); *see* 33 U.S.C. §§ 1344(t), 1371(a).

Here, the only evidence in the record of any report to Army Headquarters concerning the State conditions are several internal Corps briefing papers that ultimately led to the Corps' adoption of COA #2. Exs. 583, 584, 587, 593, 595. These documents do not include the information required by 33 C.F.R. § 337.8(b), but rather simply reiterate the Corps' position that it is "without authority" to implement any State conditions that may increase costs. *See* AR12579 (Corps is "unable to request funding that [is] beyond the federal standard"); *accord* AR 13556, 23887 (Corps "does not make accommodations for state requirements"); *see also* Ex. 583; AR14898, 14902, 14924-25, 14940, 14965-67, 21798; BCDC Ans., ¶¶83, 86; BK Ans., ¶¶117, 120. Most notably, the COA #2 documents do not itemize the specific increased costs of complying with the State conditions or consider the need to seek additional funding from Congress. 33 C.F.R. § 337.8(b)(3)-(4).[20]

Therefore, the CD Decision and WQC Decision are invalid because the Corps did not comply with its own mandatory procedures.

V. THE CORPS' REFUSAL TO IMPLEMENT CERTAIN STATE CONDITIONS BY REFUSING TO ANNUALLY DREDGE SOME BAY CHANNELS UNDER COA #2 IS UNLAWFUL.

In January 2017, the Corps adopted COA #2 as a purported means of "complying" with the Regional Board WQC (and, by implication, the Reduced Hydraulic Dredge Condition). AR14971-72.[21] Under COA #2, the Corps determined that, instead of dredging the Richmond Outer Harbor and Pinole Shoal Channel annually using a mechanical dredge in one of these channels and a hydraulic dredge in the other channel, instead, in each year, it would only dredge one of these channels using a hydraulic dredge and would not dredge the other channel at all. AR14972. The Corps' adoption of COA #2 was based solely on its mistaken view that the Federal Standard allows it to refuse to implement any potentially more-costly state CZMA and CWA conditions, which violates its legal duties under the CZMA, CWA,

[20] In fact, the South Pacific Division of the Corps refused to consider a proposal from the Corps' San Francisco District to request additional funds to comply with the Contested Conditions and Provision 10, stating that doing so "would add validity to the State imposing these conditions." *See* AR14798-99, 14902-03.

[21] COA #2 does not address the Corps' compliance with the other Contested Conditions. The Corps admits that it is not complying with those provisions. AR14966-67; BK Ans. ¶132.

and CDR for the same reasons discussed in Argument Sections I-IV *supra*.

COA #2 also must be set aside for three further reasons. First, the Corps abused its discretion in adopting COA #2 because the Corps does not have discretion to refuse to dredge a channel that it previously has prioritized and obtained Congressional funding to dredge, solely to avoid implementing state CZMA and CWA conditions. Second, COA #2 is arbitrary and capricious because it is not supported by any reasonable justification and contradicts the Corps' previous findings and the evidence in the record. Third, the Corps abused its discretion by failing to prepare further environmental review prior to approving COA #2 as required by NEPA.

A. The Corps Abused Its Discretion by Refusing to Dredge Prioritized Federal Navigation Channels in Order to Avoid Its Obligation to Implement the CZMA and CWA Conditions.

The Corps admits that its "primary mission [is] to maintain safe navigation of its channels" and that failing to dredge any federal navigation channel in the Bay, particularly deep draft channels such as Richmond Outer Harbor and Pinole Shoal Channel, "would be inconsistent with its Congressional mandate." AR16084, 23893; *see also* AR13552-53, AR13073-74, 24177; *Ohio*, 259 F.Supp.3d at 766 (CWA section 404(t) establishes "that Congress intended the Corps' obligation to maintain navigation to be its highest priority"). Congress has delegated to the Corps the authority to determine which federal navigation channels to maintain, and "[t]he need and justification for operations and maintenance work are made during the Army Civil Works annual Congressional budget review process." *Ohio*, 259 F.Supp.3d at 762 (*quoting* 52 Fed. Reg. 14902-01 (Apr. 26, 1988)). Here, the Corps prioritized and obtained Congressional funding for dredging both Richmond Outer Harbor and Pinole Shoal Channel in FY 2017. *See* Plaintiffs' Joint Mtn. to Supplement the Administrative Record at 5-7, Exs. 1-2; *see also* AR14962, 19490. The Corps has maintained the Richmond Outer Harbor and Pinole Shoal Channel annually for years, and prior to its adoption of COA #2, the Corps intended to dredge both channels annually between at least 2015 and 2024 (*see* AR13026, 13080, 13086-87, 13452, 14736, 14748, 15785, 15872, 15877, 16059; BK Ans. ¶74), including both channels in 2017 (*see* AR16067-71, 19495, 19506, 24050-51).

Once the Corps has prioritized and obtained funding to dredge a federal navigation channel, as it has done here with regard to Richmond Outer Harbor and Pinole Shoal Channel, it has no discretion to refuse to dredge that channel, but rather is required to dredge in compliance with all applicable federal

laws, including the CZMA and CWA. *Ohio*, 259 F.Supp.3d at 747-57, 761-66. "Congress clearly intends for the Corps to act when it has determined that dredging is necessary to maintain navigation." *Id.* at 765. Thus here, as in the *Ohio* case, the Corps has abused its discretion in adopting COA #2 because, having already prioritized and obtained funding for annual dredging of Richmond Outer Harbor and Pinole Shoal Channel, it did not have discretion to refuse to dredge either of these channels to avoid complying with the State's CZMA and CWA conditions. *See id*. at 762-66; 33 U.S.C. § 1344(t). "[W]hen an irreconcilable conflict arises…the proper course is NOT to allow navigation to be impaired," but rather to invoke its own procedures for resolving the conflict. *Id.* at 766 (*citing* 33 C.F.R. § 337.8) (emphasis in original). [22]

B. The Corps' Adoption of COA #2 Is Unsupported by Any Reasonable Justification or the Evidence in the Record.

COA #2 also is arbitrary and capricious because it is not supported by any reasonable justification and contradicts the Corps' prior findings and the evidence in the record. A court must set aside agency action where the agency fails to "examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made" or if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43 (citation omitted). In addition, where, as here, an agency is changing it prior approach, it "must show that there are good reasons for the new policy," and offer a more detailed explanation when "its new policy rests upon factual findings that contradict those which underlay its prior policy." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

As discussed above, the Corps has annually dredged both Richmond Outer Harbor and Pinole Shoal Channel for many years and, prior to COA #2, had planned to dredge both channels in 2017. AR13452, 16068-69, 19495, 19506, 24050-51. The Corps also determined in the EA/EIR that even temporarily deferring dredging was infeasible, due to significant impacts on the entire West Coast

[22] These procedures include the CDR internal reporting requirement discussed in Argument Section IV *supra*, which is required whenever there is a dispute between the Corps and the State concerning CZMA and CWA conditions. *Ohio*, 259 F.Supp.3d at 766 n.50. However, the CDR only permits the Corps to *refuse to dredge* a prioritized federal navigation channel where the State has *denied* a WQC, and even then, the Corps may only cease dredging *temporarily* pending preparation of the internal report and a determination by Army Headquarters regarding a CWA navigational override. *See id.* at 761; 33 C.F.R. § 337.2(b)(3). Thus, the Corps did not have any discretion to refuse to dredge in this case, even under its own regulations.

economy, navigational safety, and the environment. AR13141-42, 13555, 24061-62. The Corps concedes that failing to dredge both Richmond Outer Harbor and Pinole Shoal Channel every year will result in significant adverse economic, public safety, and environmental impacts. AR13142, 13151, 13301, 15910-12, 16084-86. The Corps also admits that maintaining federal channels to less than their authorized depths "is critical to the . . . regional and national economies," and that not doing so would "have a drastically negative effect on safety and the environmental health of the Bay." AR12556; *see also* AR12558 (describing economic and environmental impacts of failing to maintain channels at authorized depths).

Bay Area ports and harbors "play a major role" in the local, state, and the entire West Coast economy. AR16085-86 (goods-movement industry accounts for 51% of the total regional economic output and 32% of the regional employment); *see also* AR13556, 15910-12, 24061-62. The Corps estimates that approximately 8,000-10,000 vessel trips are made on the Bay's federal deep-draft navigation channels each year, including 1,150 to 1,340 oil tankers on Pinole Shoal Channel and 1,350 to 1,550 oil tankers in the Richmond Harbor channels. AR16084. In addition to ensuring the efficient and effective flow of goods, "maintaining the [Bay's] deep-draft channels is vital to reducing the risk of vessel collisions, groundings, allisions, and oil spills." AR13553; *see also* 16086. Failing to conduct regular deep-draft channel maintenance also increases the navigational safety and environmental risks of moving petroleum products to and from the five Bay refineries. AR12558, 13436, 14957. This requires ships to carry lighter and more frequent loads due to reduced draft depths, resulting in increased vessel traffic and congestion and associated increased air emissions and navigational safety and environmental risks. AR13436. In addition, the procedure for "light loading" an oil tanker involves transferring the petroleum product from one ship to another, which also increases oil spill risks. AR12558.

With regard to Richmond Outer Harbor and Pinole Shoal Channel in particular, the Corps admits that "[i]mpacts associated with [COA #2] specifically to Richmond Harbor in 2017, may be significant based on historic shoaling rates." AR14972. Richmond Outer Harbor "provides deep draft navigation access to the Richmond Long Wharf and Port of Richmond marine terminals," including loading and offloading petroleum products as the Chevron Long Wharf Facility. AR13085. Pinole Shoal Channel "serves as a vital link for commercial vessels en route to ports at Concord, Pittsburg, Antioch, Stockton and Sacramento," providing access to inland ports and several oil refineries. AR18782, 13096. The Corps

found that COA #2 will result in the loss of one to three feet of depth in the deferred channel, which would result in significant economic impacts to petroleum-based and other commodities, increased emissions and increased risk of oil spills at Richmond Outer Harbor and Pinole Shoal Channel. AR14957.[23] These economic, navigational safety, and environmental concerns were the reasons the Corps prioritized the Bay's deep draft navigational channels, including Richmond Outer Harbor and Pinole Shoal Channel, in the first place. Yet the Corps does not provide "a reasoned explanation . . . for disregarding facts" that provided the basis for its earlier determination. *See Fox*, 556 U.S. at 515-16.

In addition, in adopting COA #2, the Corps relied on factors Congress did not intend for it to consider. *State Farm*, 463 U.S. at 43. Under COA #2, the Corps determined that it will no longer annually dredge the Richmond Outer Harbor and Pinole Shoal Channel not because those channels are no longer a priority for dredging in order to maintain necessary navigational safety and commerce, but to avoid implementing the State CZMA and CWA conditions. This refusal to dredge based solely on avoiding federally-mandated environmental requirements exceeded its authority and was based on factors unrelated to the Corps' primary mission to maintain navigation. *See Ohio*, 259 F.Supp.3d at 747-57, 761-66. Moreover, the Corps wholly failed to consider that COA #2 does not comply with Bay Plan Navigational Safety and Oil Spill Prevention Policy 1, which requires removal of physical obstructions to safe navigation to the maximum extent feasible. *See* AR23073. Under COA #2, the deferred channels will continue to shoal, leading to increased adverse impacts on the economy, public safety, and the environment. *See* AR13151, 14972, 14957.

For all these reasons, the Corps failed to provide a valid justification for adopting COA #2, and its decision ignores the relevant factors and contradicts its own prior findings and the evidence before it. Accordingly, COA #2 is arbitrary and capricious and must be set aside. *State Farm*, 463 U.S. at 43.

C. The Corps Violated NEPA By Failing to Prepare Further Environmental Review Before Adopting COA #2.

The Corps and Regional Board determined not to discuss the significant environmental impacts of

[23] The Corps estimates that a two-foot draft loss could disrupt 16 million tons of traffic valued at approximately $9 billion at Richmond Harbor, and 9 million tons of traffic valued at approximately $560 million at Pinole Shoal. AR14957. In addition, every foot in draft loss results in the need for an additional one to ten oil tankers per year per berthing area to handle the product transferred during light-loading. AR13436.

deferring dredging in the EA/EIR, because the possibility was speculative at the time. AR13151, 23893. But with adoption of COA #2, the Corps has deferred and will continue to defer dredging in two deep draft navigation channels in alternating years, which it concedes will cause significant environmental impacts. *See* AR14972. Yet, the Corps failed to conduct additional environmental review of this decision as required by NEPA. BK Ans. ¶136. Additional NEPA review is required for two reasons: (1) COA #2 is an alternative that the Corps previously expressly rejected during the NEPA process; and (2) substantial evidence indicates that COA #2 will result in significant environmental and economic impacts that the Corps did not previously analyze in its prior EA/EIR.

First, a federal agency must supplement a previous EIS or EA when the "agency makes substantial changes in the proposed action that are relevant to environmental concerns." 40 C.F.R. § 1502.9(c)(1)(i). Supplementation specifically is required when an agency implements a previously rejected alternative, as this constitutes a "substantial change[]" in the proposed action. *See Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 559-60 (9th Cir. 2006) (*KS Wild*) (*citing* 40 C.F.R. § 1502.9(c)(1)(i)) (holding that federal agency was required to prepare a supplemental NEPA document prior to approving previously rejected alternative)). Here, as in *KS Wild*, COA #2 is similar to an alternative that the Corps previously rejected in the EA/EIR: Maintenance Dredging of Select Federal Channels, under which the Corps would only dredge some of the Bay's federal navigation channels. AR13141-42. The EA/EIR eliminated the reduced dredging alternative "because it would not meet the purpose and need of the project to maintain safe navigation of all the federal navigation channels, and would be expected to have significant economic and safety impacts." AR13142. Thus, the Corps' adoption of COA #2, which is similar to a previously rejected alternative, constitutes a substantial change to the action, triggering the Corps' duty to supplement the EA/EIR under NEPA. 40 C.F.R. § 1502.9(c)(1)(i); *KS Wild*, 468 F.3d at 559-60.

Second, NEPA required the Corps to prepare a supplemental EA or EIS prior to adopting COA #2 because the change in the action is a new circumstance that will result in environmental and economic impacts that were not previously considered in the EA/EIR. *See* 40 C.F.R. § 1502.9(c)(1)(ii) (requiring further environmental review where "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts"). As discussed above, the Corps repeatedly has concluded that regular maintenance of the Bay's deep-draft navigation channels "is

vital to reducing the risk of vessel collisions, groundings, allisions, and oil spills." AR13553, 16086. The Corps admits that failing to annually dredge deep draft navigation channels, as under COA #2, will increase the safety and environmental risks of moving petroleum to and from the five Bay refineries. AR12547, 12561, 13151, 13301, 13436, 13750, 13951, 14957. The Ninth Circuit has found that an agency action that increases oil tanker traffic and the risk of oil spills, as COA #2 does here, warrants supplemental review. *See Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864-66 (9th Cir. 2004). NEPA also requires consideration of the economic impacts of a federal agency action. 40 C.F.R. § 1508.8. As discussed in Argument Section V.B *supra*, failure to annually dredge under COA #2 will adversely affect the shipping industry, and those impacts were not considered in the EA/EIR at all. AR16085.

In sum, the Corps' failure to prepare a supplemental EA or EIS analyzing the impacts of "deferred" dredging in the Richmond Outer Harbor and Pinole Shoal Channel under COA #2 violates NEPA. Thus, COA #2 must be set aside. *See* 5 U.S.C. § 706(2).

CONCLUSION

For all the foregoing reasons, Plaintiffs request that the CD Decision, WQC Decision, and COA #2 be held in violation of APA section 706(2) as contrary to the CZMA, CWA, CDR and NEPA and be set aside.

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Appendix A:

Applicable Enforceable Policies of San Francisco Bay Plan

Fish, Other Aquatic Organisms and Wildlife Policies (AR22999)

1. To assure the benefits of fish, other aquatic organisms and wildlife for future generations, to the greatest extent feasible, the Bay's tidal marshes, tidal flats, and subtidal habitat should be conserved, restored and increased.

2. Specific habitats that are needed to conserve, increase or prevent the extinction of any native species, species threatened or endangered, species that the California Department of Fish and Game has determined are candidates for listing as endangered or threatened under the California Endangered Species Act, or any species that provides substantial public benefits, should be protected, whether in the Bay or behind dikes.

4. The Commission should:

   (a) Consult with the California Department of Fish and Game and the U.S. Fish and Wildlife Service or the National Marine Fisheries Service whenever a proposed project may adversely affect an endangered or threatened plant, fish, other aquatic organism or wildlife species;

   (b) Not authorize projects that would result in the "taking" of any plant, fish, other aquatic organism or wildlife species listed as endangered or threatened pursuant to the state or federal endangered species acts, or the federal Marine Mammal Protection Act, or species that are candidates for listing under the California Endangered Species Act, unless the project applicant has obtained the appropriate "take" authorization from the U.S. Fish and Wildlife Service, National Marine Fisheries Service or the California Department of Fish and Game; and

   (c) Give appropriate consideration to the recommendations of the California Department of Fish and Game, the National Marine Fisheries Service or the United States Fish and Wildlife Service in order to avoid possible adverse effects of a proposed project on fish, other aquatic organisms and wildlife habitat.

Water Quality Policies (AR23002)

1. Bay water pollution should be prevented to the greatest extent feasible. The Bay's tidal marshes, tidal flats, and water surface area and volume should be conserved and, whenever possible, restored and increased to protect and improve water quality. Fresh water inflow into the Bay should be maintained at a level adequate to protect Bay resources and beneficial uses.

2. Water quality in all parts of the Bay should be maintained at a level that will support and promote the beneficial uses of the Bay as identified in the San Francisco Bay Regional Water Quality Control Board's Water Quality Control Plan, San Francisco Bay Basin and should be protected from all harmful or potentially harmful pollutants. The policies, recommendations,

decisions, advice and authority of the State Water Resources Control Board and the Regional Board should be the basis for carrying out the Commission's water quality responsibilities.

Subtidal Areas Policies (AR23011)

1. Any proposed filling or dredging project in a subtidal area should be thoroughly evaluated to determine the local and Bay-wide effects of the project on: (a) the possible introduction or spread of invasive species; (b) tidal hydrology and sediment movement; (c) fish, other aquatic organisms and wildlife; (d) aquatic plants; and (e) the Bay's bathymetry. Projects in subtidal areas should be designed to minimize and, if feasible, avoid any harmful effects.

2. Subtidal areas that are scarce in the Bay or have an abundance and diversity of fish, other aquatic organisms and wildlife (e.g., eelgrass beds, sandy deep water or underwater pinnacles) should be conserved. Filling, changes in use; and dredging projects in these areas should therefore be allowed only if: (a) there is no feasible alternative; and (b) the project provides substantial public benefits.

Dredging Policies (AR23029, 23030, 23032)

1. Dredging and dredged material disposal should be conducted in an environmentally and economically sound manner. Dredgers should reduce disposal in the Bay and certain waterways over time to achieve the LTMS goal of limiting in-Bay disposal volumes to a maximum of one million cubic yards per year. The LTMS agencies should implement a system of disposal allotments to individual dredgers to achieve this goal only if voluntary efforts are not effective in reaching the LTMS goal. In making its decision regarding disposal allocations, the Commission should confer with the LTMS agencies and consider the need for the dredging and the dredging projects, environmental impacts, regional economic impacts, efforts by the dredging community to implement and fund alternatives to in-Bay disposal, and other relevant factors. Small dredgers should be exempted from allotments, but all dredgers should comply with policies 2 through 12.

2. Dredging should be authorized when the Commission can find: (a) the applicant has demonstrated that the dredging is needed to serve a water-oriented use or other important public purpose, such as navigational safety; (b) the materials to be dredged meet the water quality requirements of the San Francisco Bay Regional Water Quality Control Board; (c) important fisheries and Bay natural resources would be protected through seasonal restrictions established by the California Department of Fish and Game, the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service, or through other appropriate measures; (d) the siting and design of the project will result in the minimum dredging volume necessary for the project; and (e) the materials would be disposed of in accordance with Policy 3.

3. Dredged materials should, if feasible, be reused or disposed outside the Bay and certain waterways. Except when reused in an approved fill project, dredged material should not be disposed in the Bay and certain waterways unless disposal outside these areas is infeasible and the Commission finds: (a) the volume to be disposed is consistent with applicable dredger disposal allocations and disposal site limits adopted by the Commission by regulation; (b) disposal would be at a site designated by the Commission; (c) the quality of the material disposed of is consistent with the advice of the San Francisco Bay Regional Water Quality

Control Board and the inter-agency Dredged Material Management Office (DMMO); and (d) the period of disposal is consistent with the advice of the California Department of Fish and Game, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service.

4. If an applicant proposes to dispose dredged material in tidal areas of the Bay and certain waterways that exceeds either disposal site limits or any disposal allocation that the Commission has adopted by regulation, the applicant must demonstrate that the potential for adverse environmental impact is insignificant and that non-tidal and ocean disposal is infeasible because there are no alternative sites available or likely to be available in a reasonable period, or because the cost of disposal at alternate sites is prohibitive. In making its decision whether to authorize such in-Bay disposal, the Commission should confer with the LTMS agencies and consider the factors listed in Policy 1.

5. To ensure adequate capacity for necessary Bay dredging projects and to protect Bay natural resources, acceptable non-tidal disposal sites should be secured and the Deep Ocean Disposal Site should be maintained. Further, dredging projects should maximize use of dredged material as a resource consistent with protecting and enhancing Bay natural resources, such as creating, enhancing, or restoring tidal and managed wetlands, creating and maintaining levees and dikes, providing cover and sealing material for sanitary landfills, and filling at approved construction sites.

6. Dredged materials disposed in the Bay and certain waterways should be carefully managed to ensure that the specific location, volumes, physical nature of the material, and timing of disposal do not create navigational hazards, adversely affect Bay sedimentation, currents or natural resources, or foreclose the use of the site for projects critical to the economy of the Bay Area.

12. The Commission should continue to participate in the LTMS, the Dredged Material Management Office, and other initiatives conducting research on Bay sediment movement, the effects of dredging and disposal on Bay natural resources, alternatives to Bay aquatic disposal, and funding additional costs of transporting dredged materials to non-tidal and ocean disposal sites.

Mitigation Policies (AR23069)

1. Projects should be designed to avoid adverse environmental impacts to Bay natural resources such as to water surface area, volume, or circulation and to plants, fish, other aquatic organisms and wildlife habitat, subtidal areas, or tidal marshes or tidal flats. Whenever adverse impacts cannot be avoided, they should be minimized to the greatest extent practicable. Finally, measures to compensate for unavoidable adverse impacts to the natural resources of the Bay should be required. Mitigation is not a substitute for meeting the other requirements of the McAteer-Petris Act.

Navigation Safety and Oil Spill Prevention Policies (AR23073)

1. Physical obstructions to safe navigation, as identified by the U.S. Coast Guard and the Harbor Safety Committee of the San Francisco Bay Region, should be removed to the maximum extent feasible when their removal would contribute to navigational safety and would not create significant adverse environmental impacts. Removal of obstructions should ensure that any detriments arising from a significant alteration of Bay habitats are clearly outweighed by the

public and environmental benefits of reducing the risk to human safety or the risk of spills of hazardous materials, such as oil.

Public Trust Policies (AR23071)

1. When the Commission takes any action affecting lands subject to the public trust, it should assure that the action is consistent with the public trust needs for the area and, in case of lands subject to legislative grants, should also assure that the terms of the grant are satisfied and the project is in furtherance of statewide purposes.

Applicable Enforceable Policies of the McAteer Petris Act
(Cal. Gov Code §§ 66600 *et seq*.)

Gov. Code § 66600. Public Interest in the Bay.

The Legislature hereby finds and declares that the public interest in the San Francisco Bay is in its beneficial use for a variety of purposes; that the public has an interest in the bay as the most valuable single natural resource of an entire region, a resource that gives special character to the bay area; that the bay is a single body of water that can be used for many purposes, from conservation to planned development; and that the bay operates as a delicate physical mechanism in which changes that affect one part of the bay may also affect all other parts….

Gov. Code § 66603. San Francisco Bay Plan.

The Legislature further finds and declares that the San Francisco Bay Conservation and Development Commission, treating the entire bay as a unit, has made a detailed study of all the characteristics of the bay, including: the quality, quantity, and movement of bay waters, the ecological balance of the bay, the economic interests in the bay…; that the study has examined all present and proposed uses of the bay and its shoreline, and the master plans of cities and counties around the bay; and that on the basis of the study the commission has prepared a comprehensive and enforceable plan for the conservation of the water of the bay and the development of its shoreline, entitled the San Francisco Bay Plan.

Gov. Code § 66605. Limitations on Filling Bay and Certain Waterways.

The Legislature further finds and declares:…

(b) That fill in the bay and certain waterways specified in subdivision (e) of Section 66610 for any purpose should be authorized only when no alternative upland location is available for such purpose;

(c) That the water area authorized to be filled should be the minimum necessary to achieve the purpose of the fill;

(d) That the nature, location, and extent of any fill should be such that it will minimize harmful effects to the bay area, such as, the reduction or impairment of the volume surface area or circulation of water, water quality, fertility of marshes or fish or wildlife resources, or other conditions impacting the environment, as defined in Section 21060.5 of the Public Resources Code….

Gov. Code § 66663.1. Interests of State.

The Legislature further finds and declares that it is in the interest of the state to accomplish the following:

(a) Establish the relative importance of dredging needs so that the most important projects can be prioritized and accomplished quickly and unnecessary dredging activities are eliminated.

(b) Examine the potential for and promote using dredged materials as a resource, such as creating new wetlands and maintaining existing levees.

(c) Establish a broad range of environmentally sound and economically feasible disposal options in order to protect fish and wildlife resources and other beneficial uses of the bay and the ocean.

(d) Identify how disposal sites can best be managed and assure adequate monitoring of dredging and disposal activities.'

Gov. Code § 66663.2. Long-Term Management Strategy; Commission's Role.

The Legislature further finds and declares that the United States Army Corps of Engineers, the Environmental Protection Agency, the State Water Resources Control Board and relevant California regional water quality control boards, and the San Francisco Bay Conservation and Development Commission have agreed to participate in a joint effort known as the Long Term Management Strategy (LTMS) to formulate a federal/state management strategy for bay dredging that concentrates federal efforts toward studying and possibly designating ocean disposal sites, and state efforts towards inbay and upland disposal options. This chapter is intended to reflect the commission's role in the Long-Term Management Strategy, including all of the following:

(a) Evaluation of the use of upland, diked bayland, and delta areas for reuse of material dredged from the bay, regulatory constraints and opportunities involving upland disposal, and potential project sponsors and methods to implement those uses….

(c) Participation in the studies of the economic and environmental impacts of the array of disposal options, and assistance in the identification of feasible and environmentally acceptable disposal sites for material dredged from the bay in the ocean, bay, upland, and delta areas, with particular attention given to identifying sites suitable for the reuse of dredged materials.

(d) Participation in the development of a joint agency comprehensive dredging management plan to implement the Long-Term Management Strategy, which shall include all of the following:

(1) Prioritization of dredging needs, taking into account technical requirements, geographic factors, costs, and economic investments affecting, and environmental impacts resulting from, maritime, recreational boating, and other dredging projects, and the monitoring and evaluation of regulatory compliance, the environmental effects of dredging and disposal, and the effectiveness of designated disposal sites….

(4) The development of alternatives to open water disposal of dredged sediments.