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IN THE 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

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' JOINT MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

Date: July 18, 2019
Time: 1:30 p.m.
Courtroom: 3 - 17th Floor

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that, on July 18, 2019, at 1:30 p.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Richard Seeborg, pursuant to Civil L.R. 7-2 and Fed. R. Civ. P. 56(a), Defendants United States Army Corps of Engineers; Lieutenant General Todd T. Semonite, in his official capacity as Chief Engineer and Commanding General of the United States Army Corps of Engineers; Lieutenant Colonel Travis J. Rayfield, in his official capacity as District Engineer of the San Francisco District of the United States Army Corps of Engineers; and Rickey Dale James,[1] in his official capacity as Assistant Secretary of the Army for Civil Works (collectively, the "Corps"), will and do respectfully move this Court to grant summary judgment for the Corps and enter the Corps' proposed order. The motion is based on this notice and the accompanying memorandum of points and authorities; any declarations, exhibits, and request for judicial notice filed in support of the motion; together with such oral and/or documentary evidence as may be presented at the hearing on this motion. Concurrent with this filing, the Corps is filing an opposition to Plaintiffs' Motion to Supplement the Administrative Record.

RELIEF REQUESTED

The relief the Corps seeks is denial of Plaintiff's and Plaintiff-Intervenor's joint motion for summary judgment, granting of the Corps' cross-motion for summary judgment, and entry of the Corps' proposed order. As noted in the Corps' proposed order, if the Court were to deny its cross-motion for summary judgment, the Court should allow briefing and a hearing on the issue of remedy.

[1] Pursuant to Fed. R. Civ. P. 25(d), Defendant Jo Ellen Darcy's successor, Rickey Dale James, Assistant Secretary of the Army for Civil Works, is automatically substituted as a defendant in this case.

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ACRONYMS

Acronym	Description
APA	Administrative Procedure Act
BCDC	Bay Conservation and Development Commission
CWA	Clean Water Act
COA	Course of Action
CZMA	Coastal Zone Management Act
CZMP	Coastal zone management plan
LEDPA	Least environmentally damaging practicable alternative
LOA	Letter of Agreement
NEPA	National Environmental Policy Act
NOAA	National Oceanic and Atmospheric Administration
WQC	Water Quality Certification

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I. INTRODUCTION

Plaintiffs' Joint Motion for Summary Judgment seeks review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and alleges that the actions are contrary to the Coastal Zone Management Act, 16 U.S.C. §§ 1451-1465 ("CZMA"), Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, Corps' dredging regulations, 33 C.F.R. pts. 335-338, and National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. Mot. at 14-16; *see also* Am. Compl. ¶¶ 24-25.[2] The three challenged actions are: (1) a November 10, 2015 letter from the Corps responding to the Bay Conservation and Development Commission's ("BCDC") letter of September 16, 2015 regarding BCDC's Consistency Determination No. C2015.002.00 (June 18, 2015); (2) a November 10, 2015 letter from the Corps to the Regional Water Quality Control Board regarding Provision 10 of the Board's water quality certification; and (3) a January 12, 2017 memorandum from Corps Headquarters concurring in the Corps' San Francisco District's recommendation to implement Course of Action #2 ("COA#2") for its San Francisco Bay maintenance dredging for fiscal year 2017. Plaintiffs request that each alleged agency action be set aside.

As explained below, neither of the November 10, 2015 letters constitutes a *final* agency action subject to APA review, and therefore this Court lacks subject matter jurisdiction over these claims. And the COA#2 concurrence memorandum is rational, supported by the record, within the Corps' statutory authority, and consistent with the CZMA and its implementing regulations, the CWA, and the Corps' dredging regulations. The Corps took a hard look at its 2015 environmental analysis of potential environmental impacts resulting from COA#2 and

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[2] BCDC's Supplemental Complaint also alleges that this Court has jurisdiction under 28 U.S.C. §§ 1331, 1346(a)(2), or 1361, BCDC Suppl. Compl. ¶ 25. However, in the present motion Plaintiffs fail to address how those provisions waive sovereign immunity as to the present claims and Plaintiffs have therefore waived any argument that those statutes provide another basis for jurisdiction. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999); Fed. R. Civ. P. 6(c)(2). Moreover, none of those provisions provide a waiver of sovereign immunity. *See supra* Section V.C. Further, Baykeeper's amended complaint alleges a cause of action for violation of the CWA. Baykeeper Am. Compl. ¶ 154-163 (ECF No. 51). However, Plaintiffs' motion does not appear to present a claim under the CWA, only claims under the APA, so Plaintiffs have waived that claim as well. Even if the Court were to find the claim preserved, Baykeeper failed to provide notice of intent to sue under the CWA and thus, this Court lack jurisdiction over such a claim.

determined that there were no substantial changes requiring supplementation of that analysis, and thus the Corps fully complied with NEPA. Plaintiffs' real dispute here is that the Corps decided to comply with the State's conditions by dredging two channels every other year with a hopper dredge, rather than annually. Plaintiffs' desire for annual dredging with a hopper dredge for one channel and a mechanical dredge for the other channel is not a basis for overturning the Corps' decision. Accordingly, the Court should deny Plaintiffs' motion for summary judgment and grant the Corps' cross-motion for summary judgment.

II. STATUTORY AND REGULATORY BACKGROUND

A. Coastal Zone Management Act

Congress enacted the CZMA in 1972 to foster wise management and use of coastal resources through state-developed and Federally-approved coastal zone management programs ("CZMP"). *See Sec'y of the Interior v. California*, 464 U.S. 312, 316 (1984); 16 U.S.C. §§ 1452, 1455. Through a system of grants and other incentives, the CZMA "encourages each coastal state to develop a coastal management plan," *Sec'y of the Interior*, 464 U.S. at 316, reviewed by the Secretary of Commerce for approval. Once a state's CZMP is approved, certain "Federal actions" affecting the uses or resources of a state's coastal zone must either be "consistent to the maximum extent practicable" or "fully consistent" with the enforceable policies of the approved CZMP. 16 U.S.C. §§ 1456(c)(1)(A), (c)(3) and (d); 15 C.F.R. § 930.32(a)(1). Together, the Bay Plan, the McAteer-Petris Act, Cal. Gov't Code §§ 66600 *et seq.*, and BCDC's regulations make up the approved CZMP for the Bay (hereinafter "Bay Plan"). Ex. 1021 at AR22992. "Enforceable policies" as defined in the CZMA, are "state policies which are legally binding through constitutional provisions, laws, 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).

Subpart C of the CZMA requires any Federal agency carrying out an activity "within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone" to provide the state with a determination that the activity will "be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies" of an approved

plan, such as the Bay Plan. 16 U.S.C. §§ 1456(c)(1)(A), 1456(c)(1)(C); 15 C.F.R. §§ 930.34(d), 930.39(c). This is referred to as a "Consistency Determination." The state must then either concur with or object to the Federal agency's Consistency Determination. 15 C.F.R. § 930.41(a). If the state objects to the agency's Consistency Determination, the project may nevertheless proceed if the Federal agency determines it is "consistent to the maximum extent practicable" with the state's enforceable policies. In such cases, the agency must notify the state of its decision to proceed before the project may commence. 15 C.F.R. § 930.43(e).

B. Clean Water Act

The CWA establishes a comprehensive program designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and establishes as "a national goal . . . wherever attainable . . . water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(1)-(2). To achieve this goal, the CWA prohibits the discharge of pollutants, including dredged or fill material, into navigable waters unless authorized pursuant to CWA section 404. 33 U.S.C. § 1344. The CWA defines "navigable waters" as "waters of the United States," which, in turn, is defined by regulation to include waters used in interstate or foreign commerce and certain wetlands. 33 C.F.R. § 328.3(a).

1. *Discharge of dredged material*

Authorization to discharge dredged and fill material into navigable waters generally requires a permit under section 404. 33 U.S.C. § 1344. Under CWA section 404(a), the Secretary of the Army is directed to regulate the discharge of dredged and fill material into waters of the United States. *Id*. § 1344(a); 33 C.F.R. Part 323. Section 404 also requires the United States Environmental Protection Agency ("EPA") to develop guidelines that the Corps must follow in evaluating and issuing permits for the discharge of dredged or fill material. 33 U.S.C. § 1344(b). These guidelines are known as the "404(b)(1) Guidelines" and are published at 40 C.F.R. Part 230.

Although the Corps does not issue permits for its own activities, it authorizes its own discharges of dredged or fill material by applying all applicable substantive legal requirements,

including public notice, opportunity for public hearing and application of 404(b)(1) Guidelines. 33 C.F.R. § 336.1(a); 33 C.F.R. § 335.2; *see also Cal. Reg'l Water Quality Control Bd., L.A. Region v. U.S. Army Corps of Eng'rs*, No. CV 16-1091, 2016 WL 7042090, at *2 (C.D. Cal. July 15, 2016); 40 C.F.R. § 230.2.a.2; 33 U.S.C. § 1344(r). The Corps' NEPA documentation and its section 404(b)(1) evaluation constitute the functional equivalent of a permit.[3]

The 404(b)(1) Guidelines prohibit permits for which there "is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a). An "aquatic ecosystem" is defined as "waters of the United States, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals." 40 C.F.R. § 230.3(b). "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); *see id.* § 230.3(l).

2. *State water quality certification*

CWA section 303(c) requires states to adopt water quality standards for state waters subject to the CWA. 33 U.S.C. § 1313(c). Water quality standards consist of the designated uses of the navigable waters in the state and the water quality criteria for such waters based upon those uses. *Id.* § 1313(c)(2)(A). Any new or revised water quality standards must be submitted to EPA for review and approval or disapproval. *Id.* §§ 1313(c)(2)(A), (c)(3); 40 C.F.R. §§ 131.5, 131.20-21. California WQS for the San Francisco Bay are contained in the *San Francisco Bay Basin Plan (Region 2), Water Quality Control Plan* (incorporating approved amendments as of May 4, 2017), or "Basin Plan." In reviewing a section 404 permit application, the Corps must consider whether the proposed discharge will violate applicable state water quality standards. 40 C.F.R. § 230.10(b)(1); 33 C.F.R. § 336.1(b)(8).

CWA section 401 requires the Corps to seek state water quality certification for

[3] *See* Engineer Regulation ("ER") 1105-2-100, Planning Guidance Notebook (Apr. 22, 2000), https://www.publications.usace.army.mil/USACE-Publications/Engineer-Regulations/u43546q/313130352D322D313030/.

dredged material disposal into waters of the United States unless the discharges would be excluded under CWA section 404(r), 33 U.S.C. § 1344(r) (exempting discharge from certain specifically authorized construction projects). Specifically, section 401 requires that:

> Any applicant for a Federal license or permit to conduct *any activity* including, but not limited to, the construction or operation of facilities, *which may result in any discharge into the navigable waters*, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

33 U.S.C. § 1341(a)(1) (emphasis added); *see also* 33 C.F.R. § 338.2(c). Any conditions or limitations contained in the water quality certification are to be included in project specifications. 33 C.F.R. § 337.10.

CWA section 505(a)(1), 33 U.S.C. § 1365(a)(1), provides for exclusive jurisdiction in the district courts over suits "both to require a facility to obtain certification and to enforce conditions in an existing certificate." *Deschutes River All. v. Portland Gen. Elec. Co.*, 249 F. Supp. 3d 1182, 1194 (D. Or. 2017). Notice is a jurisdictional pre-requisite to a citizens' suit against the United States. *See Hallstrom v. Tillamook Cty*, 493 U.S. 20, 31 (1989). "Particularly when the United States is the defendant, such mandatory provisions must be strictly construed because they waive sovereign immunity." *Basel Action Network v. Maritime Admin.*, 370 F. Supp. 2d 57, 76 (D.D.C. 2005) (citing *Lane v. Pena*, 518 U.S. 187, 192 (1996)).

C. Corps Authorizations and Appropriations

Congress provides the Corps with authorizations to execute its navigation mission. Ex. 686 at AR17755. Through a series of Rivers and Harbors Acts, Congress authorized the maximum dimensions and depths of the Bay channels.[4] Ex. 1 at AR80; Ex. 484 at AR13081-101. Once authorized, the Corps will continue to maintain the channel so long as it receives

[4] Richmond Harbor: RHA of 1917, Pub. L. No. 65-37, 40 Stat. 250 (August 8, 1917), *as amended*; Main Ship Channel: RHA of 1927, Pub. L. No. 69-560, 44 Stat. 1010 (January 21, 1927), *as amended*; Pinole (San Pablo Bay/Mare Island Strait): RHA of 1917, Pub. L. No. 65-37, 40 Stat. 250 (August 8, 1917), *as amended*; Suisun: RHA of 1910, Pub. L. No. 61-264, 36 Stat. 630 (June 25, 1910), *as amended*, Oakland: RHA of 1874, 18 Stat. 237 (June 23, 1874); 1876, 19 Stat. 132 (August 14, 1876), *as amended*.

appropriations to do so. Ex. 686 at AR17755. Congress annually appropriates funds for harbor maintenance. Congress provides appropriations for the Corps' navigation mission as a lump sum to perform a variety of authorized maintenance activities, including dredging, nationwide. *See* e.g. Continuing Appropriations Act, 2017, Pub. L. No. 114-223, 130 Stat. 857, 908 (Sept. 29, 2016) (providing $3,137,000,000 to the Corps for operations and maintenance of all civil works projects). All Corps navigation maintenance projects compete for the same pool of funding.

D. The Administrative Procedure Act

The APA provides that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. "Agency action" subject to review under the APA "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). In order to be reviewable, agency action also must constitute "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. "Under [the APA], federal courts lack jurisdiction over APA challenges whenever Congress has provided another 'adequate remedy.'" *Brem-Air Disposal v. Cohen*, 156 F.3d 1002, 1004 (9th Cir. 1998).

A claim under the APA must be brought within six years of the final agency action that is challenged. 28 U.S.C. § 2401(a). The APA is a specific waiver of the United States' sovereign immunity for actions for non-monetary relief brought under 28 U.S.C. § 1331. *See Cabrera v. Martin*, 973 F.2d 735, 741 (9th Cir.1992). In order to be "final," the action "must mark the 'consummation' of the agency's decision-making process" and not be "merely tentative or interlocutory." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). In addition, the action "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow."' *Id*. at 178 (citations omitted). Section 706 of the APA grants a court the power to "hold unlawful and set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."
5 U.S.C. § 706(2)(A), (C).

III. FACTUAL BACKGROUND

The Corps has a broad array of missions, which include important civil works projects such as flood risk management, ecosystem restoration, and the subject of this litigation, maintaining the nation's waterborne navigation. The Corps is composed of a headquarters in Washington D.C.; division (regional) offices, such as the South Pacific Division, that cover various regions in the country; and district offices, here the San Francisco District, that execute missions in specific watersheds.[5]

For over a century, the Corps has maintained the navigation of the San Francisco Bay. In December of 1975, the Corps prepared comprehensive environmental compliance documentation analyzing twenty federal navigation projects dredging an average of 6.9 million cubic yards ("cy") annually.[6] While nearly fifty years have passed since then, the fundamentals of dredging the Bay remain the same. Ex. 1 at AR80-2. As such, some of the same challenges – balancing navigation, the environment, and cost – continue today. Ex. 1 at AR697-770.

A. Long Term Management Strategy

Beginning in the 1990s, the Corps, EPA, the San Francisco Bay Regional Water Quality Control Board ("Water Board"), BCDC, and the State Water Resources Control Board (jointly "management agencies") voluntarily joined with other public and private interests to establish the Long Term Management Strategy ("management strategy"). Ex. 18 at AR6001. The management agencies work cooperatively to ensure that navigation dredging and disposal occur in an economically and environmentally sound manner by creating a cap on the volume of dredged material disposed within the Bay and encouraging increased ocean disposal and beneficial reuse of dredged material. *Id.*, Ex. 24 at AR8378.

The management agencies published the Long-Term Management Strategy for the Placement of Dredged Material in the San Francisco Bay Region Policy Environmental Impact

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[5] See ER 10-1-2, U.S Army Corps of Engineers Division and District Offices (Oct. 31, 1999), https://www.publications.usace.army.mil/LinkClick.aspx?fileticket=oFyzZIcqXxU%3d&tabid=16441&portalid=76&mid=43546.

[6] *Final Composite Environmental Impact Statement for Maintenance Dredging of Existing Navigation Projects, San Francisco Bay Region* ("1975 EIS"). Exs. 1-17 (AR0001-5979).

Statement/Programmatic Environmental Impact Report ("EIS") in 1998 and its accompanying management plan in 2001. Ex. 18-21 at AR5980-8242; Ex. 24 (AR8279-452). Neither document was promulgated as a new law, regulation, or policy of general applicability, nor did either document supplant existing authorities or jurisdictions of the management agencies. Ex. 18 at AR6001; Ex. 21 at AR7980; and Ex. 24 at AR8292.

After completion of the EIS, the EPA and the Corps also signed a Record of Decision in 1999 memorializing the management plan goal of 20 percent in-Bay disposal of dredged material, 40 percent ocean disposal, and 40 percent beneficial reuse to upland or wetland areas ("20/40/40") to guide disposal of dredged material in the Bay region. Ex. 21 (AR7969-8242). The 20/40/40 goal is a long-term aspiration, applied to all dredging, both Federal and non-Federal, that is not subject to Federal or state legal enforcement mechanisms. Ex. 44 at AR8522.

While the 20/40/40 goal is not binding, the management strategy set up an in-Bay disposal cap that would gradually reduce the amount of overall in-Bay disposal from almost three million cubic yards ("cy") to one million cy per year, with a 250 million cy contingency over twelve years. Ex. 24 at AR8372-74; Ex. 44 at AR8522. The management agencies would first rely on voluntary efforts to meet this cap, but if voluntary efforts failed, the management agencies would take action to consider implementing allotments where specific volumes would be allocated to each dredging project. Ex. 24 at AR8372-73.

The management agencies have never taken action to consider implementing allotments to allocate specific volumes to each dredging project. If the agencies were to implement allotments, they would follow a specific public process laid out by the management plan. *Id*. at AR8373-75. Allotments could be triggered in two ways: the management agencies, based on yearly reviews of disposal volumes, could recommend that BCDC and the Water Board vote to employ allotments or, if the average in-Bay disposal volume over three years surpasses the in-Bay targets plus the 250,000 cubic yard contingency, the management agencies would begin implementing the allotment process. *Id*. at AR8373. Neither of these two circumstances have occurred. Once triggered, the allotment process would involve various reviews by the agencies, workshops, and public hearings. *Id*. at AR8373-79. Ultimately, each major dredger of the Bay,

including the Corps, would be assigned a specific in-Bay volume limit in order to ensure that dredging volumes do not surpass the management strategy in-Bay cap. *Id*. at AR8378.

The Dredged Material Management Office, an interagency group composed of the EPA, BCDC, Water Board, the Corps and the State Lands Commission in charge of dredge permitting, has monitored the dredging community's progress toward attaining these goals since 2000. *Id.* at AR8294. Impressively, the dredging community has met the in-Bay disposal volume targets every year other than 2011. Ex. 209 at AR10898; Ex. 1009 at AR22463. Between 2000-2012, the dredging community diverted more than forty-four percent of its dredged material volume from the Bay to beneficial reuse. Ex. 165 at AR10118. The Corps alone has contributed 6.86 million cy of dredged material to beneficial reuse from 1994 to 2014. Ex. 650 at AR15866. Therefore, the management agencies, including BCDC, have never had cause to implement a system of allotments. Ex. 496 at AR13553.

B. Corps' FY 2017 dredging program and the Federal standard

The Corps is charged with utilizing its appropriations to ensure that the provision of dredging is consistent with navigation needs as well as with available funding. Ex. 719 at AR18076. This responsibility is codified in regulation as the Federal standard. 33 C.F.R. Parts 335-338. The Federal standard requires the Corps to evaluate its dredging program using three metrics: cost, environmental compliance with CWA section 404(b)(1) guidelines, and consistency with sound engineering requirements. 33 C.F.R. §§ 335.7 and 336.1(c)(1). Utilizing the Federal standard, the Corps determines a Base Plan for its dredging program. Ex. 484 at AR13049-51, Ex. 555 at AR14779.

The Corps most recently studied the environmental impacts of the Base Plan for the Bay in its Final Environmental Assessment/Environmental Impact Report, Maintenance Dredging of the Federal Navigation Channels in San Francisco Bay, Fiscal Years 2015-2024 ("2015 EA/EIR"). Ex. 484 (AR13026-451). The Corps' program now consists of eleven Congressionally-authorized Federal navigation channels within the San Francisco Bay. *Id*. at AR13081. The total authorized surface area of these Federal channels amounts to 5,699 acres or 2.22 percent of the total surface area of the San Francisco Bay. *Id*. Of these eleven Federal

channels, the Corps has historically aimed to annually maintain the following six deep draft, high use channels, together totaling 4,866 acres: Suisun Bay Channel and New York Slough ("Suisun"), Pinole Shoal ("Pinole"), Richmond Outer Harbor ("Richmond Outer"), Richmond Inner Harbor ("Richmond Inner"), Oakland Inner and Outer Harbor ("Oakland Harbor"), and San Francisco Harbor Main Ship Channel ("Main Ship Channel"). *Id*. at AR13083.

The Corps maintains these channels using hydraulic ("hopper") and mechanical ("clamshell") dredging equipment. *Id*. at AR13118. Hopper dredges used in the Bay are composed of a ship with drag arms that collect sediment from the bottom of the channel and pump it into a storage bin on the ship, similar to a standard household vacuum. *Id*. at AR13119-23. Clamshell dredges scoop sediment with a bucket from a fixed position in the channel and then place the material into a scow, which will then move to a disposal site, comparable to cleaning up a mess with one's fingers. *Id*. at AR13125-6. Therefore, like a vacuum compared to one's hands, hopper dredging is predictably more efficient and cost effective than clamshell dredging. Specifically, the Corps found that clamshell dredging was approximately three times more costly and up to ten times more time consuming than hopper dredging. Ex. 461 at AR12546; Ex. 460 (AR12536-44). However, due to the limited availability of hopper dredge equipment and because they are most efficient with sandy material, the Base Plan only designated Richmond Outer and Pinole for hopper dredging. Ex. 484 at AR13129, 13118; Ex. 621 at AR15440-5, Ex. 460 at AR12538-43, Ex. 463 (AR12556-60).

The Corps has several disposal sites for its San Francisco Bay dredging projects: four in-Bay placement sites, three ocean disposal sites, and two upland beneficial reuse placement sites. Ex. 484 at AR13026-451. Due to limits in site capacity and offloading equipment, often only one beneficial reuse site is available for use. Ex.132 at AR9861; Ex. 563 at AR14827; Ex. 394 (AR12094-6). Disposal costs are highly variable, but it is generally accepted that in-Bay and ocean disposal are less costly than upland beneficial reuse. Ex. 51 at AR8573; Ex. 132 at AR9860, 9861; Ex. 135 at AR9911; Ex. 403 at AR12113-4; Ex. 510 at AR13985.

While the Base Plan does not formally designate upland beneficial reuse for any of the in-Bay channels' disposal sites, in practice the Corps routinely utilizes upland beneficial reuse.

Ex. 628 at AR15696. For instance, where upland beneficial reuse bids are lower than in-Bay, where there is a non-federal cost-share partner, or where the Corps dredges outside designated environmental timeframes,[7] dredging by using upland beneficial reuse may become the Federal standard. *Id.* at AR15697. This has enabled the Corps to use upland beneficial reuse disposal every year from 2006-2015, except 2012. Ex. 244, Ex. 628 at AR15696.

In 2015, the Corps was responsible for the placement of 1,019,000 cy out of 1,251,958 total cy (86.5 percent), of material at beneficial reuse sites, representing 48 percent of its entire Federal program, with only 684,000 cy placed in-Bay. Ex.628 at AR15696; Ex. 209 at AR10898. The dredging community placed a total of 1,171,535 cy in-Bay, well below the target 1,250,000 cy limit. *Id*. Further, in-Bay disposal in 2015 represented 37.3 percent of total dredged disposal, with 40 percent beneficially reused and 23 percent ocean disposal. *Id*.

Considering the above, the Corps determined that its Base Plan, without any limitations to dredging equipment, complied with all Federal laws and regulations. Ex.484 (AR13026-451). The Water Board disagreed and found that reducing the use of hopper dredges was required to meet its responsibility under the California Endangered Species Act to protect the longfin smelt, a species listed as "threatened" under the Act. Mot. at 11. However, the 2015 EA/EIR specifically acknowledged that a requirement to reduce hopper dredging may be "outside the jurisdiction or capability of the lead agency to implement." *Id*. at AR13139. The EA/EIR also noted that if the Water Board chose this alternative, it "could potentially result in deferred dredging at certain channels (i.e., Richmond Outer, Pinole Shoal, and Suisun Bay Channel and New York Slough)." *Id.*

C. State Water Quality Certification, Letter of Agreement, and the November 10, 2015 Letters.

On February 4, 2015, the Corps submitted its Base Plan to the Water Board for a

[7] The National Marine Fisheries Service's July 9, 2015 Biological Opinion states that "a proponent may plan a project that performs work outside the work window (e.g., from December 1 through May 31) if the project mitigates for potential impacts by placing the dredged sediment at a beneficial reuse site that [the Service] agrees will provide aquatic habitat benefits, such as tidal wetlands restoration." Ex. 75 at AR9393.

programmatic water quality certification ("water certification") pursuant to CWA section 401, 33 U.S.C. § 1341, covering planned dredging during fiscal years 2015-2024. Ex. 485 (AR13452-53). The Water Board issued its water certification on May 21, 2015, Order No. R2-2015-0023. Ex. 513 (AR14023-66). The water certification included receiving water limitations and thirty specific provisions including Provision 10 relating to the phased-in reduction of hopper dredging. *Id*. at AR14040-49.

The Corps also analyzed the Base Plan's compliance with the Bay Plan and found it consistent with all of its enforceable policies. Ex. 664 (AR16118-67). On April 10, 2015, the Corps requested BCDC's concurrence with the Corps' Consistency Determination for fiscal years 2015-2017. Ex. 662 (AR16059-60). In response, BCDC issued a Letter of Agreement ("LOA") on June 15, 2015, in which BCDC determined that additional conditions were required to make the Base Plan consistent with the enforceable policies of the Bay Plan. Ex. 698 at AR17852-95.

Like the water certification, the LOA also imposed a condition limiting hopper dredging equipment to one in-Bay channel a year, based on BCDC's findings that the condition would limit take of State-listed longfin smelt. Ex.513 at AR14033, Ex. 698 at AR17887. The LOA contained additional conditions seeking to limit the Corps' in-Bay disposal to 20 percent and required 40 percent beneficial reuse of the Corps' program. Ex. 698 at AR17856. These conditions would come into effect starting in FY 2017. Ex. 513 at AR14044; Ex. 698 at AR17856. If the Corps disagrees with an LOA's conditions, the LOA is treated as an objection. Ex. 698 at 17851, 15 C.F.R. § 930.4(b).

In presentations to the Water Board on May 13, 2015, and BCDC on June 4, 2015, the Corps expressed concern over Provision 10 of the WQC and Special Condition II.J.2.a. of the LOA because they exceeded the Federal standard. Ex. 508 (AR13746-53); Ex. 510 at AR13754-6; Ex. 690 (AR17771-99); Ex. 1108 at AR 24172-90. The Corps explained to the Water Board that the hopper reduction was "a provision that's required based on California State law and not on Federal law" and therefore, it was "unclear if [the Corps] ha[d] the authority really to implement a reduction in the use of the Hopper Dredge as required by the State." Ex. 510 at

AR13950-51. The Corps advised the Water Board that "[i]f we do have to implement the State requirement to reduce the Hopper Dredge, most likely what you'll see is deferred channel maintenance begin in 2017 . . . ." *Id.* at AR13951. BCDC expressly acknowledged that "[t]he Corps ha[d] raised some concerns about whether or not they can make requests for additional funds." Ex. 1108 at AR24175.

The Corps continued to work with both agencies in order to determine if it had the ability to accommodate the State's concerns. Ex. 510 at AR13952; Ex. 1108 at AR24178. The San Francisco District Engineer made this clear by stating that his authority only went as far as what was "permitted by Federal law and regulations." Ex. 698 at AR17850; Ex. 1108 at AR24177.

On November 10, 2015, the Corps sent letters to both the Water Board and BCDC continuing to express concern with regard to the new restrictive conditions. Ex. 522 (14086-114); Ex. 719 (AR18074-102). Attached to these letters, the Corps provided a memorandum from Corps Headquarters – Federal Standard Clarification Regarding Federal Dredging Mission and Interactions with Non-Federal Agencies ("Federal standard memo"). [8] *Id.* at AR14088-114, 18076-102. The Federal standard memo explained that funding for the Corps' navigation program had remained flat during the past forty years and that "Congress typically does not increase the total [Corps] Civil Works appropriations specifically to fund state requirements in excess of the Federal standard." *Id.* at AR12578, 18080. For instance, "[i]n 2012, of 1,067 federally maintained navigation projects nationwide, only 41 received full funding and only 159 projects received partial funding, including 59 high-use projects and 100 moderate-use projects." Ex.484 at AR13080. As a matter of policy, the Corps may only consider requesting additional funding from Congress if such projects involve national security or interstate navigation issues. Ex.522 at AR14805; Ex. 719 at AR18080.

The Corps explained that in light of the Federal standard, it would likely be unable to maintain the same level of navigation and meet the Water Board and BCDC's conditions without

[8] A companion Federal standard memo specific to the San Francisco District, dated September 15, 2015, applies the same principles as the original memo to the specific facts of the San Francisco District. Ex. 562 (AR14801-26).

additional funds from a non-Federal entity. Ex.522 at AR14086-7; Ex. 719 at AR18074-5. Therefore, if the Water Board and BCDC continued to press for the conditions, they would have to provide the Corps with additional funds. *Id*; *see also* Ex. 484 at AR13080 ("[b]eginning in 2009, the San Francisco District has only received 32 to 38 percent of its annual maintenance dredging funding needs.") The Corps specifically informed BCDC that it stood by its initial Consistency Determination, including the finding which determined that the Base Plan, without the additional conditions, was consistent to the maximum extent practicable with the enforceable policies of the Bay Plan. Ex.719 at AR18075.

D. Course of Action #2

On March 10, 2016, the Water Board and BCDC informed the Corps of their refusals to remove the limitations on the Corps' dredging program or to assist by cost-sharing. Ex. 524 (AR14118-27); Ex. 736 at AR18227. In response, the Corps considered four possible courses of action ("COA"):

- COA#1: Status quo dredging and placement
- COA#2: Dredge in accordance with the WQC, including Provision 10 (annual clamshell dredging in the two channels under Option 1)
- COA#3: Dredge in accordance with the WQC and LOA
- COA#4: Defer all maintenance dredging of San Francisco Bay Channels

Ex. 593 at AR 14956-61. On January 12, 2017, after considering recommendations from the District and South Pacific Division, Corps Headquarters concurred with the recommendation to pursue implementation of COA#2. Ex. 595 at AR14971. COA#2 included alternating dredging of the two hopper dredge channels, Richmond Outer and Pinole, in order to comply with both the water certification condition requiring reduced hopper dredging as well as the Federal standard. Ex. 593 at AR14954. The Corps found that alternating dredging might disrupt petroleum-based commodities due to possible draft loss, but that such disruptions could be mitigated by light-loading ships. *Id*. at AR 14957. This situation would potentially lead to minimal change to navigation safety impacts and a potential increase to environmental impacts in the form of possible increased emissions from ships and a potential increase in the risk of oil spills. *Id*. The Corps determined that commercial traffic valued between $560 million to $9 billion could be

disrupted. *Id*. However, navigation would be maintained because the channel that was not dredged one year would be dredged the next, preventing sediment build-up over multiple years. *Id*. In comparison, COAs #3 and #4 would involve greater impacts to navigation due to sedimentation build-up in the deferred channels over multiple years. *Id.* at AR 14958-9. COA#1 would not accommodate the State's concern with regard to longfin smelt.[9] *Id.* at AR 14957.

IV. STANDARD OF REVIEW

A. Subject Matter Jurisdiction

Because federal courts are courts of limited jurisdiction, the first and fundamental question presented by every case is whether the court has jurisdiction to hear it. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("jurisdiction [must] be established as a threshold matter"). Where subject matter jurisdiction does not exist, "the court cannot proceed at all in any cause." *Id.* (internal quotation marks and citation omitted).

The United States and its agencies may be sued only when Congress has consented to suit and waives sovereign immunity by statute. *FAA v. Cooper*, 566 U.S. 284, 290 (2012). A waiver of the United States' sovereign immunity "cannot be implied but must be unequivocally expressed," *United States v. King*, 395 U.S. 1, 4 (1969), and must be construed strictly in favor of the United States. *United States v. Nordic Village, Inc*., 503 U.S. 30, 33-34 (1992); *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983). The plaintiff has the burden to prove subject matter jurisdiction and waiver of sovereign immunity. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Kokkonen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 377 (1994). If the statute can be read in a manner both to allow and to disallow a waiver, it must be interpreted against the waiver. *Nordic Village*, 503 U.S. at 37.

B. Summary Judgment

[9] The Corps does not argue that it has a responsibility to protect longfin smelt, which is only listed as a threatened species under the California Endangered Species Act, but the Corps selected the COA that complies with the Federal standard, accommodates the State's concern to the extent practicable, and complies with the CZMP to the maximum extent practicable.

The Ninth Circuit has endorsed the use of summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure for review of agency actions under the APA. *See*, *e.g.*, *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471-72 (9th Cir. 1994) (discussing the standards of review under both the APA and FED. R. CIV. P. 56). A party is entitled to summary judgment if "the movant 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). Because this case involves review of a final agency determination under the APA, "resolution of this matter does not require fact finding on behalf of this court." *Nw. Motorcycle Ass'n*, 18 F.3d at 1472. There are, therefore, no material facts in dispute and the only issues presented are issues of law. *See id.*; *Lujan*, 497 U.S. at 883-84.

V. ARGUMENT

Plaintiffs allege that three asserted agency actions are arbitrary and capricious, or contrary to the law. The three actions challenged are a Corps letter to BCDC, a Corps letter to the Water Board, and the Corps' memorandum concurring with maintenance dredging in the San Francisco Bay and the associated Federal navigation channels, COA#2. The only cognizable jurisdictional basis mentioned in Plaintiffs' motion is the APA. However, the APA's waiver of sovereign immunity is limited to "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Plaintiffs do not allege that any of the actions are "made reviewable by statute." The two letters to BCDC and the Water Board are not "final agency action." Thus, the Court lacks jurisdiction over Plaintiffs' claims as to the two letters. The third challenged action, the memorandum regarding COA#2, is reasonable, supported by the administrative record, and consistent with relevant statutes and regulations.

A. The Corps' November 10, 2015 letters to BCDC and the Water Board are not final agency actions and therefore are not reviewable.

1. The Corps' November 10, 2015 letter to BCDC

Plaintiffs mischaracterize the Corps' November 10, 2015 letter to BCDC (Ex. 719 at AR18074-75) as a final agency action reviewable under the APA. Mot. at 17, 19. As described

above, on April 10, 2015, the Corps submitted an addendum to its previously-submitted Consistency Determination outlining its dredging plans for the Bay's Federal deep-draft navigation channels for FY 2015-2017. Exs. 662 (AR16059-60) and 663 (AR16061-16117). The Corps proposed to annually dredge the Bay using both hopper and clamshell methods, and expressed that it was "fully committed to beneficially using sediment dredged from the federal navigation channels to the maximum extent practicable" and where the Corps' district engineer had decision-making authority. Ex. 662 at AR16059. On June 4, 2015, the Corps' San Francisco District Commander made a presentation to BCDC in which he explained that the Corps' maintenance of Federal channels must comply with all Federal laws, and discussed the Corps' concerns with its ability to comply with BCDC's additional conditions, specifically the condition requiring a maximum of 20 percent in-Bay placement and a minimum of 40 percent beneficial reuse by the Corps. Ex. 686 at AR17755, 17760-61.

On June 15, 2015, BCDC issued its LOA in which it conditionally concurred with the Corps' Consistency Determination. Ex. 698 (AR17850-910); Ex. 1109 (AR24191-257). BCDC conditioned its concurrence on several conditions, including; limiting in-Bay disposal to 20 percent and requiring a minimum 40 percent beneficial reuse (Special Condition II.B); restricting hopper dredge use in Richmond Outer and Pinole to one hopper dredge per year (Special Condition II.J.2.a.); and requiring the Corps to request sufficient funds to support increased beneficial reuse, decreased in-Bay disposal, and limited use of hopper dredging. Ex. 698 at AR17856, 17860, 17865. Three days later, the Corps responded with a signed copy of the LOA. However, Lt. Col. Morrow attached a cover letter emphasizing

> [A]s has been noted in numerous staff conversations occurring prior to the BCDC conditional concurrence, I am only able to acknowledge this letter to the extent permitted by Federal law and regulation. As we have previously indicated certain of the Commissions [sic] conditions and fiscal obligations, which become effective in 2017[,] require coordination within my agency.

Ex. 698 at AR17850.

Following additional analysis, the Corps sent what Plaintiffs characterize as its "final action": the November 10, 2015 letter. Ex. 719 (18074-102). In it, the Corps explained "[w]ith regard to Special Conditions II-B and J.2.a, your requirements for beneficial reuse of sediment

and the reduction of hopper dredge use exceed the constraints established by the federal standard . . . [.]" *Id.* at AR18074. The Corps further explained that the Federal standard also precluded compliance with Special Condition II-K, and that despite these limitations, the Corps planned to dredge the Bay with the understanding that BCDC's "conditional concurrence continues to be valid," and agreed to implement BCDC's conditions into its dredging project if BCDC or another State entity could contribute the necessary funds. *Id.* at AR18075. Over the next year, BCDC and the Corps consulted about the Corps' ongoing dredging projects and the Corps continued to analyze whether it could comply with BCDC's conditions. It wasn't until January 12, 2017 that the Corps Headquarters concurred with the South Pacific Division's and San Francisco Division's recommendation to pursue COA#2. Ex. 595 (AR14971-73).

Plaintiffs mischaracterize the Corps' November 10, 2015 letter as the Consistency Determination "decision," Mot. at 14, and argue that the Corps' conclusion that Federal regulations prohibited it from accepting all conditions sought by BCDC violated the Bay Plan and hence the CZMA. *Id*. at 18-19. However, to be reviewable under the APA, the Corps' action must be final. 5 U.S.C. § 704; *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004). "[F]inality is a . . . a jurisdictional requirement." *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 n. 1 (9th Cir. 1990); *City of San Diego v. Whitman*, 242 F.3d 1097, 1101-2 (9th Cir. 2001). As evidenced by the Corps' ongoing deliberations between its November 10, 2015 letter to BCDC and the COA#2 decision, the November 10, 2015 letter is not a final agency action, and therefore this Court lacks jurisdiction over Plaintiffs' claims to this letter.

Two conditions must be satisfied for agency action to be "final." *Bennett*, 520 U.S. at 177-78. "First, the action must mark the 'consummation' of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow."' *Id*. (internal citations omitted). The letter to BCDC meets neither *Bennett* finality test requirement. First, it does not mark the "consummation" of the Corps' "decision-making process." *Id*. The letter represents a step in the Corps' decision-making process about its Base Plan, not the culmination of its decision about how, when, and where it would

dredge within FY16 or 17. Moreover, several months after receiving the letter, on March 10, 2016, BCDC responded stating that it disagreed implementation of the four contested conditions exceeded the Federal standard and requested that NOAA mediate. Ex. 736 at AR18222-24. BCDC noted that the conditions only applied to the Corps' FY 2017 dredging, and that it hoped the mediation process would avoid "delay in implementation of the USACE's 2017 dredging program." *Id*. at AR18234. That letter makes clear that BCDC did not believe the Corps' decision regarding FY17 dredging was final, and the Corps' response expressing a desire to "communicat[e] with the respective staff counterparts in the very near future to try to resolve this impasse," Ex. 735 at AR18220, demonstrates that the Corps was engaged in ongoing negotiations with BCDC and internal review at all levels, accordingly, there could be no final decision made as a result of the letter.

The letter to BCDC also fails to satisfy the second requirement of the *Bennett* finality test – "that the agency action impose an obligation, deny a right or fix some legal relationship." *Whitman*, 242 F.3d at 1102 (citing *Bennett*, 520 U.S. at 178); *see also Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 987 (9th Cir. 2006) (examining "whether [challenged action] has any legal effect that would qualify it as a final agency action under *Bennett's* second finality requirement"). At most, the letter "'expresse[s] [the agency's] view of what the law requires." *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 594 (9th Cir. 2008) (quoting *AT&T Co. v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001)). The letter does not impose an obligation on any party nor does it deny a right or fix a legal relationship, *Whitman*, 242 F.3d at 1102, in that it was an explanation by the Corps of its plans moving forward that represented the Corps' intent moving forward, but not its final decision.

2. The Corps' November 10, 2015 letter to the Water Board.

Plaintiffs allege that the Corps' November 10, 2015 letter to the Water Board (Ex. 522 (AR14086-114)) is a final agency action reviewable under the APA. Mot. at 17, 40. As noted above, the Water Board issued Order No. R2-2015-0023 on May 5, 2015, the WQC at issue here. Ex. 513 (AR14023-66). As described above, the Board conditioned its certification on several provisions including Provision 10 that provides that starting in FY17, the Corps must reduce

hopper dredging by implementing one of two options: either **l**imiting the use to one in-Bay federal channel, *either* the Richmond Outer Harbor or Pinole Shoal Channel, but not the Suisun Bay Channel, or limiting the use to the MSC. *Id.* at AR14044 (emphasis added).

On November 10, 2015, the Corps responded to the Board's issuance of Order No. R2-2015-0023 advising the Board that the Corps believed that the reduction of hopper dredge use required by Provision 10 of the water certification exceeded "the constraints established by the federal standard." Ex. 522 at AR14086. Plaintiffs inappropriately refer to this letter as the "WQC *Decision*," Mot. at 15 (emphasis added), and generally (albeit vaguely) allege that this letter is "unlawful" and violates the APA. *Id*. at xi, 2, 40. However, because the November 15, 2015 letter to the Water Board is not a final agency action, this Court lacks jurisdiction over Plaintiffs' claim as to this letter. 5 U.S.C. § 704; see *FTC*, 911 F.2d at 264 n.1; *Whitman*, 242 F.3d at 1102.

As discussed *supra*, two conditions must be satisfied for agency action to be "final," and the Corps' letter to the Water Board does not satisfy either requirement. The letter to the Water Board does not satisfy the first requirement of the *Bennett v. Spear* test for final agency action because the letter does not mark the "consummation" of the agency's "decisionmaking process." *Id*. The letter from the District Engineer to the Water Board is merely a step in the Corps' process of determining whether it could accommodate the State's Provision 10 – that placed requirements on the type and timing of the Corps' dredging projects. As the text of the letter and its context in the record make clear, there is no indication that the letter constitutes the consummation of the decision-making process.

First, the letter states the Corps' understanding that Provision 10's limitation on the proposed annual use of the hopper dredge in the two channels and the implied requirement that if the Corps dredged the two channels annually that one of the two channels each year must be dredged with the more costly hopper dredge, exceeds the Federal standard. Ex. 522 at AR14086-7. The letter further indicates that if Provision 10 remains in place, the Corps might be required to defer annual dredging in favor of dredging each channel every other year. *Id*. However, the Corps offered the Water Board an alternative –local funding for the use of a clamshell dredge every other year beginning in 2017 for the two channels. *Id*. at 14087.

Second, subsequent to the November 15, 2015 letter, the Water Board responded to the Corps' on March 10, 2016 advising the Corps that it disagreed that Provision 10 exceeds the Federal standard and requesting confirmation that the Corps will comply with Provision 10. Ex. 524 (AR14120-27). It is clear at that point that the Board did not believe the Corps had made any final decision regarding FY17 dredging. Several months later, on November 18, 2016, the Board sent another letter "seek[ing] clarification concerning whether [Corps] intends to dredge San Francisco's federal navigation channels in 2017 and, if so, whether it will comply with Provision 10." Ex. 530 at AR14145. The Water Board's letter is based on the incorrect "understanding that the [Corps] must maintain all federal navigational channels to authorized regulatory depths . . . [.]" *Id.* [10] The Board is incorrect to the extent it believes there is a statutory requirement to dredge each authorized channel annually to specific dimensions or depths. On January 12, 2017, the COA#2 memorandum explained, *inter alia*, that the course of action's frequency of use of a hopper dredge in two channels decreases the scope and cost of dredging and is therefore compliant with both the water certification and Federal standard. *See* Ex. 595 at AR14971.

Further, like the letter to BCDC, the Corps' November 15, 2015 letter fails to "impose an obligation, deny a right or fix some legal relationship." *Whitman*, 242 F.3d at 1102. The letter, at most, expresses *the Corps'* view of what the law requires. *Fairbanks N. Star Borough*, 543 F.3d at 594.

B. COA#2 is reasonable, supported by the Record, and consistent with the CZMA, NEPA, and CWA.

COA#2 was a reasonable decision, complies with the enforceable policies of the Bay Plan to the maximum extent practicable, and with the Federal standard by accommodating the State's concern to the extent practicable through limiting hopper dredging to either the Richmond Outer or Pinole Shoal each year. As illustrated *infra*, the Corps' COA#2 decision is reasonable, supported by the Record, and consistent with the CZMA, NEPA, and CWA.

[10] The November 18, 2016 letter alleges that "USACE staff informed the Regional Water Board staff that, by Congressional mandate, the USACE must maintain the federal channels to navigation depths." Ex. 530 (AR14145-46).

1. COA#2 is consistent with the CZMA.

Plaintiffs argue that the CZMA requires the Corps to dredge under the contested conditions related to the types of dredging equipment used by the Corps imposed by the State regardless of conflict with other laws or regulations. Mot. at 18-24. However, the CZMA is a limited waiver of sovereign immunity. 16 U.S.C. § 1456(e)(1). Nothing in it "shall be construed as superseding, modifying, or repealing existing laws applicable to the various Federal agencies." 16 U.S.C. § 1456(e)(2). It does not give a state the authority to regulate the Federal government in order to achieve the state's goals. Rather, the CZMA requires a Federal agency to render a determination that its proposed activity will be conducted in a manner that is consistent to *the maximum extent practicable* with the State CZMP's enforceable policies. 16 U.S.C. §§ 1456(c)(1)(A), 1456(c)(1)(C); 15 C.F.R. §§ 930.34(a)(1), 930.39(c). The Corps made that determination here. Ex. 664 (16118-67), Ex. 719 at AR18075. BCDC disagreed with the Corps' determination and additional conditions in its LOA. Ex. 698 at AR17856, 17860, 17865.

When such a dispute arises, the CZMA suggests that the Corps should attempt to resolve its differences with BCDC, which the Corps did through presentations, letters, and other less formal forms of communication. [11] But the Corps may proceed over BCDC's objection where:

> (1) the Federal agency has concluded that under the "consistent to the maximum extent practicable" standard, consistency with the enforceable policies of the management program is prohibited by existing law applicable to the Federal agency and the Federal agency has clearly described, in writing, to the State agency of its decision to proceed before the project commences; or
>
> (2) the Federal agency has concluded that its proposed action is fully consistent with the enforceable policies of the management program, though the State agency objects.

15 C.F.R. § 930.43(d)(1)-(2).

On January 12, 2017, after giving full consideration to the State's concerns as expressed in the LOA and water certification, the Corps' Director of Civil Works concurred with South Pacific Division's recommendation to pursue COA#2 for implementation of FY17 operations

[11] Ex. 688 (AR17768); Ex. 690 (AR17771-99); Ex. 698 at AR17850; Ex. 719 (AR18074-102); Ex. 735 (AR18220-1); Ex. 736 at AR18222-34; Ex. 737 (AR 18235); Ex. 1108 (AR24153-90).

and maintenance ("O&M") dredging of the Bay's navigational channels. Ex. 595 at AR14971. COA#2 determined:

> a. The federal standard dredging method for Suisun Bay Channel is hopper dredge. However due to Endangered Species Act (ESA) concerns associated with delta smelt, Suisun Bay Channel will be dredged by clamshell in 2017. The Suisun Bay Channel dredging method will be reassessed annually based on research [San Francisco District and the U.S. Army Engineer Research and Development Center] are pursuing to address questions related to the potential for fish entrainment by hopper dredging.
>
> b. To comply with the federal standard and meet applicable Clean Water Act Section 401 Water Quality Certification conditions dredging will be deferred at one hopper dredging project each year within SF Bay. Channel dredging at Richmond Outer and Pinole Shoal will be deferred in alternating years. Richmond Outer will be deferred in 2017. All other projects in SF Bay will be dredged per historic norms in compliance with the federal standard.
>
> c. With implementation of a. and b. above, the FY17 SF Bay O&M Dredging Program is defensible as compliant with the Coastal Zone Management Act.

Id. at AR14972. This decision was based on the District's recommendation to pursue COA#2 and South Pacific Division and Headquarters' concurrence therewith. *Id*.

In choosing COA#2, the Corps correctly determined that it was in full compliance with the enforceable polices of the Bay Plan. Ex. 593 at AR14966-7. The Corps also correctly decided that its regulations prohibited the agency from agreeing with conditions that exceeded the cost, engineering, and environmental requirements set by the Federal standard. 33 C.F.R. §§ 335.7, 336.1(c)(1). Ex. 562 (AR14801-26); Ex. 522 (AR14088-114); Ex. 719 at AR18076-102. Therefore, the Corps' decision to implement COA#2 was reasonable and consistent with the CZMA.

In its Consistency Determination, the Corps appropriately concluded that its Base Plan complied with all the enforceable policies of the Bay Plan. Ex. 664 (16118-67); Ex. 719 at AR18075. Its proposed average in-Bay disposal volume of 700,000 cy was well below the Bay Plan's one million cy per year goal, and the Corps renewed its commitment to continuing to beneficially use dredged material to the extent allowed by its authorities. Ex. 698 at AR17871; Ex. 664 at AR16154-55. Plaintiffs argue the Corps' Base Plan violates the CZMA because the Corps determined it could not comply with the additional conditions listed in BCDC's LOA, but

even Plaintiffs note that the LTMS actions were "goals," Mot. at 19, not enforceable policies.

Plaintiffs mischaracterize the enforceable policies under the Bay Plan as authority to require beneficial reuse of sediment. Mot. at 18-19. Contrary to Plaintiffs' characterization, the Bay Plan's Dredging Policy 1 does not authorize BCDC to independently impose an in-Bay disposal limitation or implement a system of disposal allotments on the Corps without following the allocation process outlined in the management plan. Specifically, Dredging Policy 1 states that:

> 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. (emphasis added)

Ex. 1021 at AR23039. Dredging Policy 1 does not establish the 20/40/40 goal or an independent authority to implement disposable allotments as enforceable policies.[12] Nor is the management plan itself an enforceable policy of the Bay Plan. Ex. 24 at AR8292; Ex. 18 at AR6002.[13]

The conditions listed by BCDC did not become enforceable policies, as defined under the CZMA, simply because BCDC put them in their LOA.[14] The LOA is treated as an objection by BCDC. Ex. 698 at 17851; 15 C.F.R. § 930.4(b). Despite that objection, the Corps stood by its determination that its plan was consistent with the State's enforceable policies, as the Corps is permitted to do under the CZMA. 15 C.F.R. § 930.43(d)(2); *Del. Dept. of Natural Resources and*

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[12] The unenforceability of these policies is reinforced by BCDC in its LOA. Ex. 698 at AR 17872 ("If the three-year average of in-Bay volumes is exceeded beyond the contingency volume, the [management agencies] must consider in-Bay disposal allocations to each dredger…[t]he Commission would need to vote affirmatively for the allocations in order to implement this portion of the [management plan]. In order to address this issue, the USACE should reduce its in-Bay disposal volume significant (sic) to become consistent with the [management plan] and Bay Plan policies.")

[13] Further, the management plan is meant to guide dredged material disposal efforts *for the entire Bay dredge disposal program*, not just dredging done by the Corps. Ex. 21 at AR7975 (LTMS percentage goals apply to "all navigational dredging and dredged material disposal projects").

[14] As defined *supra*, "enforceable policies" refers to State policies that become legally binding through mechanisms such as constitutional provisions, laws, or regulations. 16 U.S.C. § 1453(6a). BCDC's additional conditions in the LOA does not convert those conditions into enforceable policies.

Envt'l Control v. U.S. Army Corps of Engrs., 685 F.3d 259, 286-7 (3d Cir. 2012) ("[E]ven if a state objects, the federal agency can proceed over the state's objection if it 'conclude[s] that its proposed action is fully consistent with the enforceable policies of the management program.").

The Corps determined that its Base Plan was consistent, to the maximum extent practicable, with BCDC's added conditions. Ex. 595 at AR14972. Under COA#2, the Corps keeps its in-Bay disposal to under one million cy within each dredging year, and also reduces impacts on smelt species by alternating dredging. Plaintiffs challenge the Corps' decision by incorrectly arguing the Bay Plan allows BCDC to impose the management plan goal of 20/40/40 on solely the Corps' dredging program, Mot. at 24-25, but as discussed above, it does not.

Despite the foregoing, the Corps has made substantive efforts to further the management plan goal of increased beneficial reuse since it voluntarily joined the effort in the 1990s. In fact, it was the Corps' Hamilton Wetland Restoration Project that led to the beneficial reuse of approximately 10.6 million cy in the former Hamilton Army Airfield. Ex.18 at AR6257, 6439-40; Ex. 613 at AR15235-6; Ex. 168 at AR10334. The Corps' commitment to use beneficial reuse within the limits of its regulations continued after Hamilton. In 2015, over a year before BCDC's beneficial reuse condition would have gone into effect, the Corps' total amount of beneficially reused material equaled nearly half of its overall dredged material. Ex. 628 at AR15696.

Throughout its process of evaluating its Base Plan following receipt of BCDC's LOA and the COA#2 decision, the Corps followed both the CZMA's procedures and its own regulations by: (1) notifying BCDC that its proposed conditions exceeded the dredging allowed by the Federal standard; and (2) determining that COA#2 accommodates BCDC's concerns and complies with BCDC's conditions to the maximum extent practicable. The CZMA requires nothing more. *Matter of Defend H2O v. Town Bd. of the Town of East Hampton*, 2015 WL 12564207, *12 (E.D.N.Y. Oct. 15, 2015) ("Ultimately, there is more than sufficient evidence to conclude that [the] Corps reasonably decided to go forward with the project in an effort to accommodate both the local and State plans 'to the maximum extent practicable.' No more is required.") The COA#2 decision was not arbitrary or an abuse of its discretion, and is fully compliant with the CZMA.

2. COA#2 complies with the Endangered Species Act.

Though Plaintiffs cite the Endangered Species Act ("ESA") in their Motion for Summary Judgment, Mot. at 11-13, 24. 26, they do not allege any violation of the ESA in their Complaints or Amended Complaints. ECF Nos. 1, 27, 50, 51. Thus, any claims Plaintiffs purport to make under the ESA should not be considered by the Court. Moreover, Plaintiffs have not presented an argument as to how COA#2 fails to accommodate the State's concern for avoiding harm to the Federally-listed delta smelt or State-listed longfin smelt. Instead, Plaintiffs attempt to use the Corps' decision for the Suisun Channel, in consultation with the U.S. Fish & Wildlife Service ("FWS"), that the Federal standard called for a change in use from hopper dredging to clamshell, and argue that the Corps' decision to alternate hopper dredging per year between Richmond Outer and Pinole is arbitrary because "the same rationale [to protect fish] necessarily applies" to those two channels. *See* Mot. at 12, 24.

Plaintiffs' reliance on Suisun is misplaced. In Suisun, the Corps used the three Federal standard metrics – cost, environmental compliance, and sound engineering principles – to guide its dredging activity and concluded that the Federal standard called for the use of clamshell dredging to reduce impacts on delta smelt in Suisun. Ex. 587 at AR14938; Ex. 923 at AR19991; Ex. 924 at AR19992. Today, the only channels in the Bay eligible for hopper dredging are Richmond Outer and Pinole. Delta smelt are not expected to be found in Richmond Outer or Pinole. Longfin smelt are potentially impacted by the Corps' dredging in Richmond Outer and Pinole. Ex. 988 at 21868-9; Ex. 698 at AR17887. There is no waiver of sovereign immunity for violations of California's ESA, however, and consequently there is no Federal law requiring compliance with take limits on longfin smelt. Notably, neither FWS nor the National Marine Fisheries Service has determined that the Corps needed to reduce hopper dredge use elsewhere in the Bay. Ex. 587 at AR14939. Therefore, Plaintiffs are wrong to compare the Corps' position on dredging in Suisun with Richmond Outer and Pinole. The treatment distinction between these channels is based on differences in law and fact – the Corps is required to comply with the Federal ESA, but not California's ESA – and, thus, cannot be considered arbitrary and capricious.

BCDC is also wrong in assuming that hopper dredges imperil the existence of either smelt species. *See* Mot. at 12. Both BCDC and the Water Board recognize that the studies of smelt take are flawed and that no data on clamshell dredging impacts on fish exists. Ex. 513 at AR14034; Ex. 698 at AR17887. Further, "there is considerable evidence that the principal impact to smelt involves the large intake pumps to the California Aqueduct upriver from the Bay." Ex.587 at AR14938. In addition, clamshell dredging has its own environmental impacts, as it is a longer process, resulting in the presence of the dredging ship in the area for a longer period of time. Ex. 484 at AR13125; Ex. 698 at AR17880.

Under COA#2, the Corps decided to dredge at Richmond Outer and Pinole Shoal in alternating years. By doing so, the Corps accommodated the State's concern exactly as the State requested: to dredge only one in-Bay channel with a hopper dredge per year. In fact, by only dredging in one of the two channels every year, the risk to longfin smelt is likely even further diminished than if the Corps dredged both channels every year using a clamshell dredge. Ex. 484 at AR13322-7; *see also Id*. at AR13229-93. Accordingly, COA#2 is in full compliance with BCDC's enforceable policies.

3. The Corps has discretion to allocate lump sum appropriations for maintenance dredging.

Plaintiffs argue that the Corps' compliance with Provision 10 is improper because the Corps does not have discretion to maintain the channels in accordance with COA#2. Mot. at 26-30. Plaintiffs' argument is wholly unsupported. There is no legal requirement for the Corps to dredge Richmond Outer and Pinole Shoal in accordance with Plaintiffs' preferred manner.

Lacking any statutory support, Plaintiffs point to the holding in *Ohio v. U.S. Army Corps of Engineers*, 259 F. Supp. 3d 732, 763 (N.D. Ohio 2017), *appeal dismissed sub nom. State ex rel. DeWine v. United States Army Corps of Engineers*, No. 17-4255, 2017 WL 8185847 (6th Cir. Dec. 8, 2017) to argue that the Corps must dredge each Federal navigation channel annually by the particular means required by a state if the state demands such in its water quality certification. Mot. at 29-33. Plaintiffs' reliance on this case is entirely misplaced, as the case

related to maintenance dredging of the Great Lakes, and the court's decision[15] was based on its finding that 33 U.S.C. § 426o-2 mandates Corps dredging of the Great Lakes and requires that the Corps, "[u]sing available funds . . . expedite the operation and maintenance including dredging of the navigation features of the Great Lakes and Connection Channels for purposes of supporting commercial navigation to authorized project depths." *Id.*; *see also* 33 U.S.C. § 426o-1 (providing that "the Secretary [of the Army] shall conduct such dredging as is necessary to ensure minimal operation depths consistent with the original authorized depths of the channels and harbors when water levels in the Great Lakes are, or are forecast to be, below the International Great Lakes Datum of 1985.") No similar statutory requirement applies to the Bay navigation channels or indeed, to most navigation channels across the country. Plaintiffs have cited no authority mandating dredging. Nor could they, as none exists.

Congress authorizes construction of specific projects, but funds the entire O&M program as a lump sum appropriation. Corps decisions as to how to allocate its lump sum operations and maintenance (i.e., dredging) appropriations among authorized projects require "a complicated balancing of a number of factors which are peculiarly within its expertise." *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)). Whether the "resources are best spent" on one dredging project or another, and whether the Corps "has enough resources" to fund a specific dredging project is within the discretion of the Corps. *Id.*

Factors that the Corps must consider in allocating its dredging appropriations include changes in priorities because of storms, construction schedules, the inability to obtain required real estate, permits, or changes in demand. The Corps continues to weigh those factors over the years-long process of budget development and until the funds are spent. Here, the Corps considered the State's concerns with State-listed species and accommodated them to the extent practicable by choosing a course of action that involves alternate annual dredging of the two channels with a hopper dredge.

[15] The Corps does not concede that 33 U.S.C. § 426o-2 is a statutory requirement to conduct annual dredging in the Great Lakes no matter the cost of state conditions.

4. COA#2 is consistent with the Federal standard regulations.

When BCDC placed a condition limiting hopper equipment in the LOA, the Corps, in an effort to accommodate the State's concerns and comply with California's policies to the maximum extent practicable, had to re-evaluate what dredging actions they could take that would be consistent with the Federal standard. Plaintiffs mischaracterize the Corps' efforts in asserting that the Corps "refuse[d] to implement any potentially more costly state CZMA" conditions because of a myopic view of the Federal standard, and accuse the Corps of refusing to spend money it otherwise had. Mot. at 23, 34. But the Corps' guidelines mandate that it undertake:

> [O]perations and maintenance activities where appropriate and environmentally acceptable. All practicable and reasonable alternatives are fully considered on an equal basis. This includes the discharge of dredged or fill material into waters of the U.S. or ocean waters in the *least costly manner*, at the *least costly and most practicable location*, and *consistent with engineering and environmental requirements*.

33 C.F.R. § 335.4 (emphasis added).

Plaintiffs contend that the Corps ignored the "environmentally acceptable" prong of the Federal standard. Mot. at 23. But the Consistency Determination, the 2015 EA/EIR, and the COA#2 documentation demonstrates that the Corps reasonably determined that COA#2 is environmentally acceptable. Ex. 484 at AR13358-65 (finding that the Base Plan for Richmond Outer and Pinole would not significantly impact Federally-listed threatened or endangered species); Ex. 664 at AR16145-7; Ex. 593 at AR 14965, 14968.

Additionally, the Corps evaluated the reduction of hopper dredging considering cost, engineering requirements, available resources, and environmental requirements. Ex. 593 at AR14965, 14968. The Corps determined it could not annually maintain both Richmond Outer and Pinole and still comply with BCDC's condition. *Id.* This is because annual maintenance of both projects would require a switch to clamshell dredging for one project in order to continue maintaining both channels. *Id.* Clamshell dredging is less efficient and more costly than hopper dredging. *Id.* The Corps reasonably concluded it could reduce hopper dredging by alternating dredging of Richmond Outer and Pinole, thereby accommodating the State's desire to limit state-listed species' exposure to hopper dredging. *Id.* Finally, Plaintiffs argue the Corps is not entitled

to deference because NOAA, and not the Corps, is the Federal entity with the responsibility to interpret the CZMA. Mot. at 22. But the Corps' interpretation of the CZMA is not at issue here. Instead, it is the Corps' interpretation of the Federal standard, which the Corps used in its COA#2 decision. The Federal standard clearly lays out the three factors the Corps must consider.

5. COA#2 is based on the Federal standard, not a lack of funding.

Simply put, discretion to allocate the Corps' lump sum appropriation for O&M activities rests with the Corps, not Plaintiffs. The Corps' activities in the Bay are one part of a national network of dredging activities. It is this scenario that substantiates the purpose of the Federal standard. Congress did not authorize the Corps to dredge regardless of costs or conditions imposed by a State. Nor did Congress mandate that the Corps dredge regardless of channel conditions. The Federal standard regulations allow the Corps to prudently operate and maintain its national civil works dredging program. *See* 33 C.F.R. §§ 335.1 and 337.0. Here, when BCDC attempted to impose new conditions on the Corps' Base Plan, the Corps directed its dredging plans to comply with the CZMA and the Bay Plan's enforceable policies to the maximum extent practicable.[16] The Corps is not required to comply with BCDC's 20/40/40 beneficial reuse condition because it is not an enforceable policy of the Bay Plan, but rather a goal created by the management agencies. As such, the Corps is not required to comply with it, but nevertheless accommodated the State's concerns to the extent practicable under 33 C.F.R. § 337.2(b) by beneficially reusing material when it costs less than in-Bay or ocean disposal. Similarly, BCDC's condition requiring the Corps to seek additional funding to implement the dredging methodology desired by the State is not an enforceable policy of the Bay Plan, and the Corps is thereby not required to comply with it under the CZMA. As discussed *supra*, by selecting COA#2, the Corps is compliant with BCDC's condition to limit hopper dredging in Richmond Outer and Pinole to one hopper dredge per year. BCDC's condition requiring hopper dredge reduction imposed costs

[16] The Corps' regulations define "practicable" as "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 33 C.F.R. § 335.7.

and engineering requirements that exceeded the Federal standard to maintain both channels annually. *See* Ex. 593 at AR14965. The Corps does not contend that it lacked funds to comply with BCDC's reduced hopper dredge condition. Indeed, the Corps complied with the reduced hopper condition, but BCDC simply objects to the manner in which the Corps complied with it.

In considering challenges to CZMA consistency determinations, the Ninth Circuit has held that courts "should be reluctant to set aside determinations made pursuant to [the CZMA's] procedures absent a compelling reason to do so." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1222 (9th Cir. 2004) (citation omitted). Courts "will not generally overturn a consistency determination just because [the Court] might have come to a different conclusion were the determination of 'consistency' before us in the first instance." *Id*. In *City of Sausalito*, the Ninth Circuit set aside the National Park Service's consistency determination because the agency relied on a lack of funds in finding it could not comply with the city's conditions. *Id.* at 1223. Unlike the Park Service, COA#2 is not based on a lack of funds needed to comply with BCDC's conditions. To the contrary, the Corps complied with the Bay Plan's enforceable policies to the maximum extent practicable and accommodated the State's concerns to the extent practicable.

6. The Corps complied with its dredging regulations.

Plaintiffs allege first that COA#2 is inconsistent with 33 C.F.R. § 337.2(b) and contend that regulatory provision only allows the Corps to object to conditions if they exceed the Federal Standard. Mot. at 33. Plaintiffs seem to suggest that because they dispute the applicability of the Federal standard, the Corps was not permitted to follow its established procedures for resolving disputes regarding state-imposed conditions. That misunderstands the CZMA and misrepresents the Corps' actions. Indeed, here, the Corps made every effort to "cooperate to the maximum extent practicable with state agencies" in addressing conflict between state conditions and the Federal standard. 33 C.F.R. § 337.2(a).

Additionally, Plaintiffs allege in the alternative that even if the Corps is allowed to follow its regulations in cases of a conflict between state conditions and the Federal standard, "it did not do so." Mot. at 33. The Corps' dredging regulations are codified at 33 C.F.R. parts 336-338. Section 337.2, entitled "State requirements," provide that "[t]he procedures of this section *should*

be followed in implementing state requirements." 33 C.F.R. § 337.2 (emphasis added). Contrary to Plaintiffs' suggestion, Mot. at 33-34, the Corps has complied with the relevant provisions of these regulations addressing concerns related to Provision 10 of the WQC as well as BCDC's similar condition limiting hopper dredging and the enforceable aspects of BCDC's beneficial reuse conditions culminating in the COA#2 decision.

First, "District engineers *should cooperate to the maximum extent practicable* with state agencies to prevent violation of Federally approved state water quality standards and to achieve consistency to the maximum degree practicable with an approved coastal zone management program." *Id*. § 337.2(a) (emphasis added). Here, the District Engineer made every effort to explain his understanding of how the conditions imposed in the WQC are inconsistent with the Federal standard. Ex. 508 (AR13746-53); Ex. 510 at AR13754-6. Indeed, the Corps reiterated to BCDC on several occasions that use of clamshell dredging where the Corps otherwise could, under all applicable Federal laws, otherwise use hopper dredging, would cost an estimated approximately $10 million a year for a district with a budget ranging between $35-60 million. Ex. 1108 at AR24178-79. Because the Federal standard did not justify such costs, the Corps informed BCDC that dredging annually in Richmond Outer and Pinole Shoal may become economically unjustified. *See* 33 C.F.R. § 337.2(b)(2) (requirement to notify State agency); Ex. 719 at AR18074-5. Further, the Corps informed BCDC that it could comply with the conditions if BCDC or another entity covered the costs exceeding the Federal standard. *See* 33 C.F.R. § 337.2(b)(2). On multiple occasions leading up to the COA#2 decision, the Corps informed BCDC that its conditions exceeded what the Corps was authorized to conduct under the Federal standard. *See* 33 C.F.R. § 336.1; *see also* 15 C.F.R. § 930.43(d).

Second, section 337.2(b) requires that "[i]f the state agency imposes conditions or requirements which exceed those needed to meet the Federal standard, the district engineer should determine and consider the state's rationale and provide to the state information addressing why the alternative which represents the Federal standard is environmentally acceptable." 33 C.F.R. § 337.2(b). As described in detail above, the District Engineer sent a letter to the Water Board on November 10, 2015, explaining why the Corps believes that Provision 10

exceeds the Federal standard. Ex. 522 (AR14086-114). Consistent with section 337.2(b), the District Engineer explained that the only practicable way that Provision 10 could be accommodated consistent with the Federal standard would be to perform alternate hopper dredging of Richmond Outer and Pinole Shoal. *Id*. at AR14086; *see* 33 C.F.R. § 337.2(b) ("The district engineer will accommodate the state's concerns to the extent practicable.").

Lastly, Plaintiffs mistakenly allege that the District Engineer was required to prepare a "report pursuant to section § 337.8." 33 C.F.R. § 337.2(b)(3). Section 337.2(b)(3) does not require such a report here. Indeed, section 337.2(b)(3) provides that "[i]f the state denies or notifies the district engineer of its intent to *deny* water quality certification or *does not concur* regarding coastal zone consistency, the project dredging may be deferred." *Id*. § 337.2(b)(3) (emphasis added). Here, the state did not deny the certification, instead it imposed an additional condition (Provision 10). Likewise, the State did not refuse to concur, it instead provided a concurrence with unenforceable conditions. Thus, no "report pursuant to § 337.8" was required.

7. COA#2 is reasonable and complies with the Corps' NEPA duties.

Plaintiffs argue that COA#2 violates NEPA because they allege the 2015 EA/EIR did not address the scenario of decreased frequency of dredging from annually to every other year in two deep draft channels. Mot. at 38-39. They are wrong. The EA/EIR evaluated the impact of the Base Plan and, *inter alia*, a deferred dredge alternative. Ex. 484 at AR13053. Prior to the COA#2 decision, the Corps engaged in a thorough review of the EA/EIR and determined that its decision to alternate dredging did not constitute a substantial change to the dredging activities already analyzed with regard to environmental concerns. Ex. 484 (AR13026-451).

In reviewing an agency's NEPA analysis, a court's review is limited to whether the agency's environmental review "contains 'a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs.*, 887 F.3d 906, 913 (9th Cir. 2018) (citing *Nat. Res. Def. Council v. U.S. Dep't of Transp.*, 770 F.3d 1260, 1271 (9th Cir. 2014)). The court must "insure that the agency has taken a hard look" at potential environmental consequences of its actions, but cannot "interject itself within the area of discretion of the executive as to the choice of action to be taken. *Id.*

(citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)). A decision to alternate dredging does not require a supplemental NEPA document. 40 C.F.R. § 1502.9(c)(1).

Plaintiffs do not challenge the process undertaken to conduct the 2015 EA/EIR, but rather argue that the Corps should have conducted "additional environmental review" by supplementing the EA/EIR. Mot. at 39. Plaintiffs' attempt to argue that the Corps ignores the findings in the EA/EIR that deferred dredging could cause significant environmental impacts, *id.* at 36-37, is misplaced. Those findings contemplated long-terms periods of deferred dredging, not a one-year period of deferment. The Corps considered environmental impacts resulting from deferred dredging of Richmond Outer and Pinole by considering minor additional impacts to air quality due to increased ship traffic caused by draft restrictions, and a minor increase in the possibility of oil spills from ships if they did not follow draft restrictions. Ex. 593 at AR14597. The Corps reasonably determined the alternate dredging under COA#2 was not a substantial change and there was no significant new circumstances or information relevant to environmental concerns to require supplemental analysis. Ex. 593 at AR14597; 40 C.F.R. 1502.9(c); *see N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147 (9th Cir. 2008) (holding that agency did not violate NEPA in deciding a supplemental environmental impact statement was not necessary after re-evaluating its initial EA and finding impacts from changes were not significant or adverse enough to warrant one); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017 (9th Cir. 1980) (holding that Corps did not violate NEPA by concluding additional information received after publication of its EIS because Corps studied it and determined it was not significant and no supplementation was required).

The Corps' reliance on its analysis in the 2015 EA/EIR and renewed examination of whether its actions under COA#2 constituted substantial changes or any significant new circumstances enabled the Corps to take a hard look at the potential impacts of COA#2. The Corps completed the appropriate NEPA analysis prior to the COA#2 decision.

8. COA#2 is reasonable and consistent with the Clean Water Act.

Similarly, the Corps complied with the CWA by applying the Section 404(b)(1) Guidelines, selecting the least environmentally damaging practicable alternative, COA#2, and

complying with the WQC, including Provision 10, thereby ensuring that maintenance dredging of the Bay's navigational channels would not cause a violation of water quality standards.

a. *The Corps properly applied the 404(b)(1) Guidelines.*

"Although the Corps does not process and issue permits for its own activities, the Corps authorizes its own discharges of dredged or fill material by applying all applicable substantive legal requirements, including . . . application of the section 404(b)(1) guidelines." 33 C.F.R. § 336.1(a). The 404(b)(1) Guidelines require that the Corps ensure that the proposed discharges will not cause significant adverse effects on human health or welfare, aquatic life, or aquatic ecosystems. 40 C.F.R. § 230.10(c)(1)-(3) (emphasis added). Accordingly, the Corps considers the impacts of the permitted project on the "aquatic ecosystem," which means "waters of the United States, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals." 40 C.F.R. § 230.3(b). After considering these impacts, the Corps must make a written determination of the effects of a proposed activity "on the physical, chemical, and biological components of the aquatic environment." *Id.* § 230.11. "Except as provided under [CWA] section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." *Id.* § 230.11(a). This alternative is often referred to as the least environmentally damaging practical alternative, or "LEDPA."

The Corps is required to analyze the proposed discharge alternatives to ensure the select discharges meet the Guidelines. Though Plaintiffs' argument with regard to the 404(b)(1) Guidelines is disjointed, Plaintiffs seem to be arguing that the Federal standard alternative cannot constitute the LEDPA simply because they believe BCDC's conditions and Provision 10 of the WQC are intended to reduce environmental effects and thus must equate to the LEDPA. Mot. at 32. First, Plaintiffs' focus on the Federal standard alternative is misplaced. The only challenged final agency action here is COA#2, not the Federal standard alternative, making Plaintiffs' argument about whether the Federal standard alternative is the LEDPA a hypothetical question. The Corps ultimately chooses COA#2, a project scope that includes the Federal standard

dredging alternative, but modified to comply with the WQC's Provision 10, deferring at Richmond Outer and Pinole Shoal in alternating years. Ex. 595 at AR14972. COA#2 is then essentially what Plaintiffs claim is the LEDPA. Mot. at 32.

Second, Plaintiffs also claim that the LTMS goal of 20 percent in-Bay disposal and 40 percent beneficial reuse was found to be feasible, therefore the LEDPA must also include that additional condition. However, Plaintiffs take no issue with the Corps reasonable and well-documented 404(b)(1) Guidelines alternatives analysis and thus it must stand uncontroverted. Ex. 484, App. A (AR13356-365); *see also* Ex. 621 at AR15451. Plaintiffs do no more than make a conclusory statement that the condition is "feasible," without demonstrating that it otherwise meets the 404(b)(1) Guidelines. Thus, Plaintiffs fall woefully short of demonstrating that the record does not demonstrate that the Corps' action – COA#2 – is not the LEDPA.

b. *The Corps complied with Provision 10 of the WQC.*

The Water Board imposed conditions, including Provision 10 providing that beginning in FY17, the Corps' use of the government-owned hopper dredge *Essayons* or similarly sized hopper dredge is limited to "one of the following two options on an annual basis."

> Option 1: "Limit hopper dredge use to a maximum of one in-Bay federal channel, either the Richmond Outer Harbor or the Pinole Shoal Channel, but not the Suisun Channel."
> Option 2: "Limit hopper dredge use to the [Main Ship Channel] and urgent action removal of any hazardous shoal at Bulls Head Reach in the eastern approach to Benicia-Martinez Bridge in Suisun Bay Channel if a mechanical dredge is not available."

Ex. 513 at AR14044.

Although the Corps' proposed project included annual dredging of each of the six channels at issue here, Ex. 484 at AR13050-1, COA#2 accommodates the State's concerns by complying with conditions imposed in the certification as Option 1. The Corps decided to dredge only one of the two in-Bay Federal channels using a hopper dredge each year. This option plainly limits the use of a hopper dredge in either of the designated channels to every other year.

Plaintiffs here do not allege that the Corps has violated Provision 10. Instead they argue that the Provision *requires* the Corps to dredge each of the two channels annually and therefore,

Provision 10 requires the Corps to use a hopper dredge to dredge at least one of the channels with the state's preferred clamshell dredge. Mot. at 29-34. The provision is plainly a limit on the use of hopper dredges and not a mandate or requirement to conduct annual dredging. There can be no dispute that the plain language of Provision 10 allows the Corps the option of decreasing the frequency of dredging the two channels to comply. *See, e.g.*, *Deschutes River All. v. Portland Gen. Elec. Co.*, 331 F. Supp.3d 1187, 1198 (D. Or. 2018) ("The Court interprets the Certification 'like any other contract.'" (citing *Natural Res. Def. Council, Inc. v. Cty. of Los Angeles*, 725 F.3d 1194, 1204 (9th Cir. 2013)) (interpreting a CWA permit).[17]

Plaintiffs instead argue that the Corps' "refus[al] to annually dredge some Bay channels" as set forth under COA#2 is unlawful. Mot. at 34. Plaintiffs claim that this refusing to dredge annually (presumably one channel by hopper dredge and one by clamshell) violates the CZMA, CWA, and the Corps' dredging regulations "for the same reasons discussed in . . . Sections I-IV" of their brief. *Id*. at 35. As explained *supra*, there is not a statutory requirement to conduct annual maintenance dredging of the San Francisco Bay navigation channels and the holding in *Ohio v. U.S. Army Corps of Engineers* is irrelevant to the questions at issue here, where the Corps conducts its dredging activities in accordance with, *inter alia*, the CZMA, CWA, and its own regulations. Plaintiffs do not cite any authority mandating dredging in the Bay, for none exists.

Further, Plaintiffs assert that the Corps' refusal to dredge annually, or more appropriately, the Corps' decision that it could comply with Provision 10 of the WQC by limiting the frequency of dredging in two channels consistent with Option 1, is an abuse of discretion because "[o]nce 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, 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." Mot. at 35-36. Tellingly, instead of citing any provision

[17] Plaintiffs also allege, in Section II.C of their brief, that because the Corps did not challenge the WQC under state law, that the November 11, 2015 letter is "invalid." Mot. at 31. Though it is not entirely clear what that allegation means, as explained in this section, there is no need for the Corps to object to the WQC as the Corps is in full compliance with the WQC.

that creates this alleged duty, Plaintiffs cite *Ohio v. U.S. Army Corps of Engineers*. As explained above, that case involved a statutory provision specific to the Great Lakes and has no applicability or relevance here. There is simply no requirement that the Corps conduct dredging on a specific timeframe – annually or otherwise – in each of the Federally authorized navigation channels in the San Francisco Bay.

C. Neither 28 U.S.C. §§ 1331, 1346(a)(2), nor 1361 Provide a Basis for Jurisdiction Over Plaintiffs' Claims

Plaintiffs allege (but do not argue in their motion) that jurisdiction is available under 28 U.S.C. §§ 1331 (federal question), 1346(a)(2) (the "Little Tucker Act"), or 1361 (mandamus jurisdiction). BCDC Am. Compl. ¶ 25. Baykeeper Am. Compl. ¶ 2.

Section 1331 of Title 28 is not a basis for jurisdiction over Plaintiffs' claims. Section 1331 of Title 28 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." To invoke the Court's jurisdiction under § 1331, a plaintiff must identify a federal right to be adjudicated: "[I]n order for a claim to arise 'under the Constitution, laws, or treaties of the United States,' 'a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiffs' cause of action."' *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974) (citing 28 U.S.C. § 1331 and *Gully v. First Nat'l Bank of Meridian*, 299 U.S. 109, 112 (1936)). Section 1331 is not an independent basis for the Court to exercise jurisdiction. For Plaintiffs' CZMA-related claims to "arise under" Federal law, the CZMA must supply a private right of action. *Merrell Dow Pharmas., Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (finding no jurisdiction under § 1331 over claim alleging violations of Food, Drug, and Cosmetic Act because the Federal Act did not supply a cause of action); *see also Utley v. Varian Assoc., Inc.*, 811 F.2d 1279, 1283 (9th Cir. 1987) ("Under *Merrell Dow*, if a Federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a "substantial" Federal question."). Because Plaintiffs' claims do not state a viable cause of action under the CZMA, CWA, or any other Federal statute, there is no Federal right to be adjudicated, and section 1331 therefore cannot form the basis for the Court's jurisdiction in this matter.

Plaintiffs also allege that this Court has jurisdiction pursuant to 28 U.S.C. § 1346(a)(2), a statutory provision known as the "Little Tucker Act." Section 1346(a)(2) only waives Federal sovereign immunity to monetary claims and does not provide a general waiver of sovereign immunity for Plaintiffs' complaints seeking declaratory and injunctive relief. *See United States v. Mitchell*, 463 U.S. 206, 216-17 (1983) (internal quotations omitted); *Gabriel v. Gen. Servs. Admin.*, 547 F. App'x 829, 830-31 (9th Cir. 2013); *Bobula v. U.S. Dep't of Justice*, 970 F.2d 854, 858 (Fed. Cir. 1992). Thus, neither jurisdiction over nor a waiver of sovereign immunity to suit is available under the Little Tucker Act.

Similarly, the Mandamus Act provides that district courts may entertain actions "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. Relief under the Mandamus Act is "available to compel a Federal officer to perform a duty only if: (1) the individual's claim is clear and certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available." *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1998). Plaintiffs have identified no nondiscretionary duty owed them under any statute and therefore, the Mandamus Act does not provide jurisdiction for Plaintiffs claims.

Lastly, though the CWA can provide a basis for jurisdiction over citizen suits, 33 U.S.C. § 1365, but any claim that the Corps violated the CWA can only be brought pursuant to the CWA's citizen suit provision that requires pre-suit notice of intent to sue. *Id*. § 1365[ ]. To the extent that Plaintiffs allege that the Corps is in violation of the WQC, Baykeeper has not met the statutory prerequisites for bringing a claim under the citizens' suit provision. Baykeeper's second cause of action alleges a violation of the CWA. *See* Baykeeper Am. Compl. ¶¶ 154-162.

CWA Section 505 provides that "any citizen may commence a civil action on his own behalf— (1) against any person (including (i) the United States, . . .) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." 33 U.S.C. § 1365(a)(1). "[E]ffluent standard or limitation under this chapter means . . . a certification under section 1341 of [title III of the CWA.]" 33 U.S.C. § 1365(f). Accordingly, Baykeeper's claims that the Corps

has violated CWA section 1341 arises under the citizen suit provision of section 505.

Claims that may be brought pursuant to CWA section 505 may not be brought under the APA. *Allegheny Cty. Sanitary Auth. v. EPA*, 732 F.2d 1167, 1177 (3d Cir. 1984). Such claims are foreclosed by the terms of the APA, which authorizes judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The APA does not confer "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. As described above, CWA section 505(a)(1) expressly grants consent to sue agencies of the United States for the kind of violation alleged by Baykeeper, therefore they cannot bring their claims under the APA.

In addition, a plaintiff may not use the APA to circumvent pre-suit notice requirements imposed by the CWA. *Allegheny Cty. Sanitary Auth.*, 732 F.2d at 1177. Section 505(b)(2) of the CWA provides that a citizen may not file a suit under section 505(a)(1) unless he first furnishes notice to the violator sixty days before commencing suit in the manner prescribed by regulation. 33 U.S.C. § 1365(b)(1)(A); *see* 40 C.F.R. § 135.2(a). Strict compliance with the notice requirements is a mandatory precondition to suit. *See Hallstrom*, 493 U.S. at 26 (requiring strict compliance with notice requirement for similar statutory notice provision); *Public Interest Research Grp. of New Jersey, Inc. v. Hercules, Inc.*, 50 F.3d 1239 (3d Cir. 1995) (notice requirements are mandatory preconditions to suit). Baykeeper failed to provide pre-suit notice. Courts may not use "flexible or pragmatic" or equitable modifications to cure or waive notice defects. *Hallstrom*, 493 U.S. at 20-21.

Accordingly, to the extent that Plaintiffs allege direct violation of the CWA, those claims must be dismissed.

VI. CONCLUSION

For the reasons explained above, the Court should deny Plaintiffs' motion for summary judgment and grant the Corps' cross-motion for summary judgment and enter the Corps' proposed order.

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Respectfully submitted,

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