FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION,
Plaintiff-Appellant,

SAN FRANCISCO BAYKEEPER,
Intervenor-Plaintiff-Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; TODD T. SEMONITE, in his official capacity; JOHN D. CUNNINGHAM, in his official capacity; RICKEY DALE JAMES, Assistant Secretary of the Army for Civil Works, in his official capacity,
Defendants-Appellees.

No. 20-15576

D.C. No. 3:16-cv-05420-RS

OPINION

Appeal from the United States District Court
for the Northern District of California
Richard G. Seeborg, Chief District Judge, Presiding

Argued and Submitted June 14, 2021
San Francisco, California

Filed August 6, 2021

Before: Mary M. Schroeder, Milan D. Smith, Jr., and Lawrence VanDyke, Circuit Judges.

Opinion by Judge Schroeder

SUMMARY[*]

Coastal Zone Management Act / Clean Water Act

The panel affirmed the district court's summary judgment in favor of the U.S. Army Corps of Engineers in an action challenging plans proposed by the Corps for the dredging of San Francisco Bay's eleven navigational channels during and after 2017.

Federal laws require review of such plans by two California state agencies: the San Francisco Bay Conservation and Development Commission, and the San Francisco Regional Water Control Board. The Corps submitted its dredging proposals for 2017 and later years to the state agencies, which approved the proposals subject to certain conditions. The Commission alleged that the Corps' failure to comply with certain conditions violated the Coastal Zone Management Act ("CZMA"). San Francisco Baykeeper, an environmental nonprofit organization, intervened, contending that the Corps also violated the Clean Water Act ("CWA"). First, the Commission sought a commitment from the Corps regarding what to do with the dredged material. Second, in order to protect imperiled

[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Case: 20-15576, 08/06/2021, ID: 12193755, DktEntry: 52-1, Page 3 of 28

native fish, the Commission and Board sought to limit the Corps' use of a certain dredging method – hydraulic dredging – in two specific Bay Channels.

The panel held that the condition about where to dispose of dredged material was not itself an enforceable policy under the CZMA and its implementing regulations, 15 C.F.R. §§ 930.4(a)(1), 930.11(h), nor was it tied to any enforceable policy as contemplated by those regulations. The Corps was therefore not obligated to comply with that regulation.

The panel held that as for the state agencies' condition limiting the Corps' hydraulic dredging in two particular channels, the Corps' final 2017 plan complied with the express terms of that condition. The Corps' plan therefore did not violate the CZMA or the CWA.

The panel concluded that the Corps' decision was not arbitrary or capricious or in violation of any reporting requirements.

COUNSEL

Tara L. Mueller (argued), Deputy Attorney General; David G. Anderson, Supervising Deputy Attorney General; Daniel A. Olivas, Senior Assistant Attorney General; Attorney General's Office, Oakland, California; Marc A. Zeppetello, Chief Counsel, San Francisco Bay Conservation and Development Commission, San Francisco, California; for Plaintiff-Appellant.

Case: 20-15576, 08/06/2021, ID: 12193755, DktEntry: 52-1, Page 4 of 28

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OPINION

SCHROEDER, Circuit Judge:

INTRODUCTION

This case illustrates how the San Francisco Bay Area's economic and environmental destinies are entrusted to multiple governmental agencies, state and federal, and how those agencies must resolve difficult issues when one agency proposes to take action impacting the interests of others. The issues raised here relate to plans proposed by the United States Army Corps of Engineers ("the Corps") for the dredging of the Bay's eleven navigational channels during and after 2017. Federal laws require review of such plans by two California state agencies: the San Francisco Bay Conservation and Development Commission ("the Commission"), as the proposed dredging would affect the coastal environment, and the San Francisco Regional Water Control Board ("the Water Board" or "the Board"), as the proposed plan would affect water quality. The claims before

us are the result of disagreements about where to deposit dredged material, how often to dredge certain channels, and what equipment to use to dredge those channels.

When, in 2015, the Corps submitted its dredging plans for 2017 and subsequent years to the Commission and Board for approval, those state agencies attempted to receive assurances from the Corps with respect to two aspects of the proposed dredging. First, the Commission sought a commitment from the Corps regarding what to do with the dredged material. It was particularly concerned with how much of the dredged material would be deposited back into the Bay and how much would be committed to beneficial reuse projects such as wetland restoration. Second, in order to protect imperiled native fish, both the Commission and the Board sought to limit the Corps' use of a certain dredging method—hydraulic dredging—in two specific Bay channels. The Corps ended up giving different answers to these two conditions when it made its final decision in early 2017. It refused to comply with the first condition about where to dispose of dredged material. It purported to comply with the second condition by proposing to hydraulically dredge only one of the two channels in question each year and to leave the other undredged until the next year.

By the time the Corps made its final decision, the Commission had filed this action in federal district court pursuant to the Administrative Procedure Act (APA). The Commission contended that the Corps' refusal to comply with the two conditions violated the Coastal Zone Management Act (CZMA) because it violated policies adopted pursuant to that statute and was arbitrary and capricious. San Francisco Baykeeper, an environmental nonprofit organization, intervened, contending the Corps' decision also violated the

Case: 20-15576, 08/06/2021, ID: 12193755, DktEntry: 52-1, Page 6 of 28

Clean Water Act (CWA). The district court granted summary judgment to the Corps, holding it had not violated any applicable provision of law. The Commission and Baykeeper ("Plaintiffs") appeal. The legal issues before us relate only to the Corps' 2017 final decision, not to the subsequent operations conducted pursuant to it.

We affirm the district court. The condition about where to dispose of dredged material was not itself an enforceable policy under the CZMA and its implementing regulations, nor was it tied to any enforceable policy as contemplated by those regulations. *See* 15 C.F.R. §§ 930.4(a)(1), 930.11(h). The Corps was therefore not obligated to comply with that condition. As for the state agencies' condition limiting the Corps' hydraulic dredging in two particular channels, the Corps' final 2017 plan complied with the express terms of that condition. The Corps' plan therefore did not violate the CZMA or the CWA. Nor was the Corps's decision arbitrary or capricious or in violation of any material reporting requirements.

BACKGROUND

A. DREDGING OVERVIEW

Because sediment accumulates in channels over time, dredging—removing sediment from channel beds, often for transport and disposal elsewhere—is required to keep channels navigable. One aspect of this case involves where dredgers may deposit dredged sedimentary material. There are three alternatives: (1) in-Bay disposal sites, which are the cheapest to use but environmentally disfavored; (2) beneficial reuse sites, which are environmentally favored but the most expensive; or (3) ocean disposal sites. The Commission

Case: 20-15576, 08/06/2021, ID: 12193755, DktEntry: 52-1, Page 7 of 28

wanted the Corps to commit to depositing at least 40% of its dredged material at beneficial reuse sites, and no more than 20% at in-Bay sites ("the 20/40 Disposal Condition").

The second aspect of this case deals with the differences between two methods of dredging: hydraulic (or "hopper") dredging and mechanical (or "clamshell") dredging. Hydraulic dredging works by using a suction to remove material from the channel floor, while mechanical dredging scoops such material in order to remove it. The state agencies sought to limit use of hydraulic dredging in the Richmond Outer Harbor ("Richmond channel") and the Pinole Shoal Channel ("Pinole channel") out of concern for the delta and longfin smelt, two imperiled native fish species. Hydraulic dredging is less expensive than the alternative method of mechanical dredging, but more likely to kill imperiled fish. Both state agencies thus sought to limit the Corps' use of hydraulic dredging in these two channels to one channel per year. The Corps decided to comply with this condition, but in an unexpected manner: by hydraulically dredging only one of the two channels each year in alternating fashion—and, rather than mechanically dredging the other channel, simply leaving it entirely undredged that year. Plaintiffs claim that the Corps' decision violated federal law.

We therefore turn to the two major federal statutes involved, the Coastal Zone Management Act and the Clean Water Act. Our review must include the policies and procedures for federal-state cooperation that these statutes and related regulations prescribe.

B. APPLICABLE STATUTES AND PROCEDURES

1. The Coastal Zone Management Act (CZMA) and the San Francisco Bay Plan

The Coastal Zone Management Act was enacted in 1972 "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone." 16 U.S.C. § 1452(1). The coastal zone includes both the coastal waters and the adjacent shorelands. 16 U.S.C. § 1453(1). The CZMA, invoking cooperative federalism, encourages states to develop management programs for their coastal zones. 16 U.S.C. § 1451(i). Once approved by the National Ocean and Atmospheric Administration (NOAA), each such state-submitted coastal zone management program becomes the governing federal standard for federal agency activity involving that coastal zone. 16 U.S.C. §§ 1455, 1456(c)(1)(A); 15 C.F.R. § 930.11(h).

California has a federally approved management program for the San Francisco Bay Area. One of the central components of this management program is a comprehensive coastal conservation and development plan known as the San Francisco Bay Plan ("Bay Plan"), San Francisco Bay Conservation & Dev. Comm'n (May 2020), https://bcdc.ca.gov/pdf/bayplan/bayplan.pdf. The creation of the Bay Plan preceded the CZMA because the California Legislature acted before Congress did. *See Acme Fill Corp. v. S.F. Bay Conservation & Dev. Comm'n*, 232 Cal. Rptr. 348, 353 (Ct. App. 1986). The 1965 McAteer–Petris Act, Cal. Gov. Code § 66600 *et seq.*, created the Commission in 1965, and the Commission completed and adopted the Bay Plan over the following three years. *Acme Fill*, 232 Cal. Rptr. at 353. Thus, by the time Congress enacted the CZMA in

Case: 20-15576, 08/06/2021, ID: 12193755, DktEntry: 52-1, Page 9 of 28

1972, California already had a statutory scheme and comprehensive coastal management program in place. *Id.* In 1977, NOAA formally approved the management program for the San Francisco Bay Area, and the Commission and its Bay Plan were accordingly wholly incorporated into the CZMA's federal scheme. *Id.* at 350; *see* Bay Plan, at 9.

The Bay Plan contains dozens of findings and policies on dredging and other topics, so it is no surprise that the Commission has periodically amended the Bay Plan since its adoption a half-century ago. See *id.*, Letter (before Table of Contents). The CZMA allows states to amend their coastal zone management programs, but, importantly, it mandates that any amendment must be approved by NOAA in order to render it legally enforceable against the federal government. 16 U.S.C. § 1455(e); 15 C.F.R. § 930.11(h); *see* Coastal Zone Management Act Program Changes, National Oceanic and Atmospheric Organization (May 21, 2021), https://coast.noaa.gov/czmprogramchange/#/public/home (click "Learn About Program Changes") ("State programs are not static – laws and issues change. Changes to programs, including new or revised enforceable policies, must be submitted to NOAA for approval through the program change process."). Such federal approval of plan amendments has been required since the CZMA's inception in 1972. Pub. L. No. 92-583 § 306(g), 86 Stat. 1280, 1285 (1972); 16 U.S.C. § 1455(e).

Disposal of dredged material in the San Francisco Bay Area, in particular, has been shaped by extensive federal-state cooperative efforts. Between 1990 and 1999, numerous federal and state agencies—the Corps, the Environmental Protection Agency (EPA), the Commission, the regional Water Board, and the State Water Resources Control

Case: 20-15576, 08/06/2021, ID: 12193755, DktEntry: 52-1, Page 10 of 28

Board—developed a Long-Term Management Strategy (LTMS) meant to guide the agencies' decisions about placement of dredged material in the Bay Area over the next 50 years. *See* LTMS Volume 1, Executive Summary, at 1-1 to 1-2 (Aug. 1998), https://www.spn.usace.army.mil/Portals/68/docs/Dredging/LMTS/1998/1-%20execsummary.pdf. The LTMS endorsed a "long-term approach" of "low in-Bay disposal (approximately 20 percent), medium ocean disposal (approximately 40 percent), and medium upland/wetland reuse (approximately 40 percent)" while acknowledging that these goals "cannot be achieved immediately." *See id.* at 1-1, 1-11, 1-16. These long-term numerical targets from the LTMS line up with the figures from the disposal condition that the Commission communicated to the Corps in 2015.

The LTMS itself has never undergone NOAA approval, however, and is therefore unenforceable under the CZMA. *See* 16 U.S.C. § 1455. The LTMS did inform several NOAA-approved amendments to the Bay Plan in 2001, as outlined in the Final LTMS Management Plan, at ES-1, 10-1 (July 2001), https://www.spn.usace.army.mil/Portals/68/docs/Dredging/LMTS/entire%20LMTF.pdf. Plaintiffs' argument relies on three of the Bay Plan's dredging policies, all adopted as part of the 2001 amendments. *See id.* at 10-1 to 1-10. These three policies envision reducing the disposal of dredged material back into the Bay and increasing reuse of such material for environmentally friendly purposes:

> *Bay Plan Dredging Policy 1:*
> Dredging and dredged material disposal should be conducted in an environmentally and economically sound manner. Dredgers should reduce disposal in the Bay and certain

Case: 20-15576, 08/06/2021, ID: 12193755, DktEntry: 52-1, Page 11 of 28

> waterways over time to achieve the LTMS goal of limiting in-Bay disposal volumes to a maximum of one million cubic yards per year [1.0 mcy/yr]. 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 . . . .
>
> *Bay Plan Dredging Policy 3:*
> Dredged materials should, if feasible, be reused or disposed outside the Bay and certain waterways. Except when reused in an approved fill project, dredged material should not be disposed in the Bay and certain waterways unless disposal outside these areas is infeasible . . . .
>
> *Bay Plan Dredging Policy 5:*
> [D]redging projects should maximize use of dredged material as a resource consistent with protecting and enhancing Bay natural resources, such as creating, enhancing, or restoring tidal and managed wetlands . . . .

Id. at 10-5 to 10-6; Bay Plan, at 54.

Plaintiffs rely on these Bay Plan Policies because, while the LTMS itself is not itself enforceable, the Bay Plan is. Plaintiffs argue that these Policies empowered the Commission to, at its discretion, instruct the Corps to abide by the LTMS' 20% and 40% figures. According to the Plaintiffs, such a condition was necessary in order to ensure

Case: 20-15576, 08/06/2021, ID: 12193755, DktEntry: 52-1, Page 12 of 28

that the Corps' actions would be consistent with the Bay Plan Policies. *See* 15 C.F.R. §§ 930.4(a)(1), 930.11(h).

Consistency between federal actions and a state's enforceable policies is a major theme of the CZMA. In order to achieve this consistency, the CZMA and its regulations spell out step-by-step procedures for coordination and cooperation between state and federal agencies. *See* 16 U.S.C. § 1456; 15 C.F.R. Part 930.

Any federal agency that seeks to carry out activity "affect[ing] any land or water use or natural resource of the coastal zone" must first submit a planning document known as a consistency determination ("CD") to the state agency. 16 U.S.C. § 1456(c)(1) The CD must explain the federal plans and how they are, "consistent to the maximum extent practicable with the enforceable policies of approved State management programs." *Id.* § 1456(c)(1)(A), (c)(2). NOAA regulations further clarify that this standard requires federal actions to be "fully consistent with the enforceable policies of management programs[,] unless full consistency is prohibited by existing law applicable to the Federal agency." 15 C.F.R. § 930.32(a)(1).

The state agency then responds to the CD. The state may concur, conditionally concur, or object to the CD. *Id.* §§ 930.4, 930.6, 930.43. A conditional concurrence is a communication from the state telling the federal agency that it must meet certain conditions in order to be deemed consistent with the state's policies. *Id.* § 930.4. If the state conditionally concurs in the CD, the state must "identif[y] . . . specific enforceable policies of the management program" and explain why its conditions are "necessary to ensure consistency with [those] specific enforceable policies." *Id.*

Case: 20-15576, 08/06/2021, ID: 12193755, DktEntry: 52-1, Page 13 of 28

§ 930.4(a)(1). If the federal agency rejects the conditions in the state's conditional concurrence, the concurrence effectively becomes an objection. *Id.* § 930.4(b).

The federal agency may not proceed with a proposed action over the state's objection unless the agency concludes that the action is "fully consistent with the enforceable policies of the management programs" or that "full consistency is prohibited by existing law applicable to the Federal agency." *Id.* §§ 930.32, 930.43(d)(1)–(2). A federal agency may generally not evade an "enforceable policy of a management program" solely on the basis of cost. *Id.* § 930.32(a)(3).

The CZMA issues in this litigation concern chiefly whether the 20/40 Disposal Condition is anchored in an "enforceable policy" that the Corps may not evade on the basis of cost.

2. The Clean Water Act (CWA)

Like the CZMA, the Clean Water Act requires state approval before proceeding with certain environmentally consequential actions. More specifically, any activity that "may result in any discharge into the navigable waters" requires a federal permit issued by the Corps. 33 U.S.C. §§ 1311(a), 1341(a)(1). The Corps, in turn, may not issue such a permit without obtaining a water quality certification (WQC) from the appropriate state agency—in this case, the Water Board—unless the state agency waives the certification requirement. *Id.* § 1341(a)(1). Where, as here, it is the Corps' activity that will result in discharge, the Corps does not process and issue permits to itself. 33 C.F.R. § 336.1(a)(1). The Corps must nonetheless obtain a WQC

from the Water Board in order to perform dredging—or, more precisely, in order to discharge dredged material into the navigable waters. *See* 33 U.S.C. §§ 1323(a), 1344(t), 1362(6).

The WQC represents the state agency's conclusion that the proposed activity will comply with the applicable state water quality standards. *See id.* § 1341. State agencies enjoy substantial latitude in this certification process: in addition to limitations on chemical discharges and other restrictions contemplated by the CWA, an issuing state agency may set forth in a WQC "any other appropriate requirement of State law." *Id.* § 1341(d); *see PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 511 U.S. 700, 713 (1994) (interpreting "appropriate" to encompass, "at a minimum," certain limitations related to state water quality standards). Once a requirement is included in the WQC, it becomes a binding condition that is incorporated into any relevant federal permit. 33 U.S.C. § 1341(d). Generally, federal agencies may not reject or alter the conditions imposed by state agencies' WQCs. *See, e.g.*, *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1218 (9th Cir. 2008).

C. THE CORPS' 2017 DREDGING PROPOSAL AND RESPONSES

The events giving rise to this case began when the Corps submitted its dredging proposals for 2017 and later years to the Commission and Water Board pursuant to 16 U.S.C. § 1456(c)(2) and 33 U.S.C. § 1323. Both state agencies approved the proposals subject to certain conditions. The issues before us concern the Corps' obligations to comply with those conditions.

Case: 20-15576, 08/06/2021, ID: 12193755, DktEntry: 52-1, Page 15 of 28

1. The Commission's Letter of Agreement ("LOA")

In March 2015, the Corps submitted its dredging proposal to the Commission for approval in the form of a consistency determination ("CD"), as required by the CZMA. 16 U.S.C. § 1456(c). The CD proposed dumping up to 48 percent of the Corps' dredged material back into the Bay, and it did not propose reducing hydraulic dredging in the Bay.

In June 2015, the Commission responded to the Corps with a proposed LOA conditionally concurring in the Corps' CD. The Commission's LOA stated the conditions under which it would approve the Corps' dredging proposal. The two conditions relevant here concerned reducing the volume of material deposited in the Bay and limiting the use of hydraulic dredging equipment:

> *Special Condition II.B ("the 20/40 Disposal Condition"):*
> The Corps would, in 2017, "reduce [its] in-Bay disposal volume to meet the LTMS goals of a maximum of twenty percent in-Bay disposal and a minimum of forty percent beneficial reuse."
>
> *Special Condition II.J.2.a ("the Hydraulic Dredge Condition"):*
> The Corps would, in fiscal year 2017, "use a maximum of one hydraulic hopper dredge in either [the] Richmond . . . or Pinole . . . channels."

The proposed LOA also directed the Corps to obtain funding to accomplish these changes, citing to the Corps'

own regulations. *See* 15 C.F.R. § 930.32. A representative of the Corps signed the LOA on June 23, 2015.

2. The Water Board's Water Quality Certification ("WQC") and Provision 10

During the same period that the Corps was negotiating with the Commission, the Corps was pursuing a parallel approval process with the Water Board for the Corps' proposed dredging plans through 2024. In February 2015, the Corps wrote a letter to the Water Board requesting a WQC for its dredging proposal. The Board issued a conditional WQC to the Corps in May 2015. The WQC contained several conditions, only one of which is relevant here.

Provision 10 of the WQC called for hydraulic dredging to be used in, at most, one of the Richmond and Pinole channels in any given year. Provision 10 was therefore in substance the same as the Commission's Hydraulic Dredge Condition (Special Condition II.J.2.a). The relevant language in Provision 10 provided that, beginning in fiscal year 2017, the Corps was to either (1) "[l]imit hopper [hydraulic] dredge use to a maximum of one in-Bay federal channel, either the Richmond [channel] or the Pinole [channel]" or (2) avoid hopper dredge use in any in-Bay channels.

As a matter of historical practice, whether hydraulically or mechanically, the Corps had typically dredged both channels every year. All parties were aware of this. The language of Provision 10, however, did not refer to this historical practice, nor did it expressly call for annual dredging of each channel. It called only for limiting hydraulic dredging to one of the two channels per year.

Case: 20-15576, 08/06/2021, ID: 12193755, DktEntry: 52-1, Page 17 of 28

3. The Corps' Rejection of the Agencies' Conditions

In November 2015, the Corps wrote a letter to the Commission rescinding its earlier acceptance of the LOA and the conditions set forth in it. Citing funding limitations and the need to maintain flexibility in planning, the Corps' letter took issue with both the LOA conditions—i.e., the 20/40 Disposal Condition and the Hydraulic Dredge Condition. The Corps' principal reason was cost. The letter cited the relevant federal standard making cost an important criterion. See 33 C.F.R. §§ 335.7, 336.1. The letter stated that the LOA conditions "exceed[ed] the constraints established by the federal standard, defined as the 'least costly, environmentally acceptable factor, consistent with engineering requirements . . .'" and concluded that the Corps "lack[ed] the necessary authority to comply with" those conditions. *See* 33 C.F.R. § 336.1(c)(1).

The Corps sent a similar letter to the Water Board the same day formally disavowing Provision 10 of the WQC. The letter went further and stated that the Corps would not perform any dredging of the Richmond or Pinole channels unless the Board removed Provision 10 from the WQC.

4. The Corps' Final Decision ("Course of Action #2")

The record developed in this case reflects that, after further discussion with the Commission and the Board, the Corps was considering four potential courses of action ("COAs"):

- COA #1: status quo dredging and placement (annually dredging both the Richmond and Pinole channels, either hydraulically or mechanically, and

disposing of dredged material at sites previously deemed acceptable);

- COA #2: dredge in accordance with the WQC, but not the LOA (reducing hydraulic dredging by dredging only one of the Richmond and Pinole channels each year in alternating fashion, and making no commitments with respect to in-Bay disposal or beneficial reuse);

- COA #3: dredge in accordance with the LOA and the WQC (reducing hydraulic dredging and describing a number of alternatives for doing so, and committing to decreasing in-Bay disposal and increasing beneficial reuse); or

- COA #4: defer all maintenance dredging of San Francisco Bay Channels.

Internal Corps memos recommended COA #2, which, according to the Corps' analysis, would have only a minimal impact on navigation safety. By comparison, the Corps' analysis indicated that full compliance with the LOA and WQC dredging and disposal requirements—i.e., COA #3—would, given funding constraints, result in "less than half of the typical annual maintenance [being] accomplished in any year" and a corresponding increase in navigational risk.

The Corps decided to adopt COA #2 in January 2017. The Corps publicly announced a month later that it would not dredge the Richmond channel in 2017.

As relevant here, this decision was a final action with two consequences. It made clear that the Corps would leave one

Case: 20-15576, 08/06/2021, ID: 12193755, DktEntry: 52-1, Page 19 of 28

of the Richmond and Pinole channels undredged each year, and it made no commitment with respect to disposal of dredged material. It thereby rejected the Commission's 20/40 Disposal Condition.

D. DISTRICT COURT PROCEEDINGS

The Commission originally filed this suit in district court in September 2016, seeking a declaration that the Corps was required to conduct dredging as outlined in the Commission's LOA, and related relief. After the Corps adopted COA #2 several months into the litigation, San Francisco Baykeeper, a regional non-profit environmental organization, intervened as an additional plaintiff in the litigation. Plaintiffs jointly filed an amended complaint in June 2017 challenging both the Corps' rejection of the Commission's conditions and its adoption of COA #2. The amended complaint took particular issue with the Corps' cost-based rationales for these actions.

The parties filed cross-motions for summary judgment. Plaintiffs' joint motion argued that the Corps' actions violated the CZMA because lack of funding could not excuse the Corps from its obligation to act fully consistently with the conditions of the LOA. According to Plaintiffs, the LOA's conditions were enforceable because they were necessary to ensure the Corps' operations' consistency with enforceable policies of the Bay Area management plan—primarily Bay Plan Dredging Policies 1 and 5. Plaintiffs also contended that the Corps had violated the CWA, violated certain regulatory reporting requirements, and acted arbitrarily and capriciously in violation of the APA. The Corps' opposition and cross-motion argued (1) that the conditions in the Commission's LOA were not themselves, and were not based on, enforceable policies; (2) that the Corps had not violated the

CWA because COA #2 complied with Provision 10 of the WQC; (3) that the Corps had also complied with its reporting regulations; and (4) that all the Corps' actions were reasonable.

The district court granted summary judgment to the Corps. It considered first the contention that the Corps was required to abide by the 20/40 Disposal Condition from the LOA in order to ensure compliance with the Bay Plan Dredging Policies. The district court concluded that the Bay Plan Policies were generalized policy statements and that the Corps was therefore not legally obligated to accept the 20/40 Disposal Condition in the absence of direct support from any enforceable policy. Next, with respect to Provision 10 of the WQC (and the Commission's equivalent Hydraulic Dredge Condition), the district court found that "COA #2 meets the letter of that requirement, because the Corps is in fact using a hydraulic dredge in only one channel each year." Reasoning that "the Corps' plan does not violate the maximum limits on dredging imposed by the state agencies" and that Plaintiffs had not shown "a basis to force the Corps to do more dredging than it has agreed to carry out," the district court concluded that Plaintiffs "cannot prevail." The district court entered judgment in favor of the Corps.

Plaintiffs timely appeal. Plaintiffs argue that the Corps' adoption of COA #2 violated the CZMA because the Commission's conditions are linked to federally enforceable policies; that the Corps violated the CWA by failing to comply with Provision 10; and that the Corps' action was arbitrary and capricious in violation of the APA, as well as in violation of the Corps' own procedural regulations.

DISCUSSION

A. Plaintiffs' claim that the Corps must comply with the Commission's 20/40 Disposal Condition fails because the condition is not supported by any enforceable policy.

Plaintiffs contend that the Corps was required to comply with the conditions in the Commission's LOA, including the 20/40 Disposal Condition. That condition required the Corps to meet specific targets: to "reduce [its] in-Bay disposal volume to meet the LTMS goals of a maximum of twenty percent in-Bay disposal and a minimum of forty percent beneficial reuse." Plaintiffs' central argument is that the Corps' refusal to comply was based solely on cost and therefore unlawful. They correctly identify federal regulations that prohibit federal agencies from citing a general lack of funds in order to avoid compliance with an enforceable policy of an approved coastal zone management program. 15 C.F.R. § 930.32(a)(3) ("Federal agencies shall not use a general claim of a lack of funding or insufficient appropriated funds . . . as a basis for being consistent to the maximum extent practicable with an enforceable policy of a management program.").

The problem for Plaintiffs is that the statute and implementing regulations require compliance only with the "enforceable policies" of approved management programs. *See, e.g.*, 16 U.S.C. §§ 1455, 1456(c)(1)(A); 15 C.F.R. §§ 930.32(a)(3), 930.39. Governing regulations specify that this federal approval must come from NOAA. 15 C.F.R. § 930.11(h), (l). The specific numerical targets in the 20/40 Disposal Condition—no more than 20% of the Corps' dredged material disposed of in the Bay, and no less than

Case: 20-15576, 08/06/2021, ID: 12193755, DktEntry: 52-1, Page 22 of 28

40% of it committed to beneficial reuse—are not drawn from any provision of a NOAA-approved program. Nor does any provision resembling or contemplating the terms of the 20/40 Disposal Condition appear in any NOAA-approved program. The Corps was therefore not required to comply with the condition.

The 20% and 40% figures instead derive from the LTMS, which, as Plaintiffs acknowledge, has never received NOAA approval. Plaintiffs' argument is that the 20/40 Disposal Condition can be traced back to and made enforceable by three dredging policies found in the NOAA-approved Bay Plan. The Bay Plan does have the requisite federal approval as part of the NOAA-approved management program for the San Francisco Bay Area. NOAA first approved the Bay Plan in 1977, and it has approved subsequent amendments to the Bay Plan. *See Acme Fill*, 232 Cal. Rptr. at 350; Bay Plan, at 9. The Bay Plan's provisions are therefore enforceable.

Plaintiffs specifically maintain that the 20/40 Disposal Condition is based on Policies 1, 3, and 5 of the Bay Plan. These express the overall goals of the LTMS as they relate to dredged material. Policy 1 describes achieving, "over time," "the LTMS goal" of 1.0 mcy/yr or less of dredged material deposited back into the Bay. Policy 3 provides that dredged material "should, if feasible, be reused or disposed outside the Bay." Policy 5 calls for maximizing reuse of dredged material. Bay Plan, at 54.

These policies speak in fairly general terms and do not contain any ratio- or percentage-based targets. Plaintiffs point out that policies need not be so specific in order to be enforceable. It is true that CZMA regulations provide that, to be enforceable, a policy "need not establish detailed criteria

Case: 20-15576, 08/06/2021, ID: 12193755, DktEntry: 52-1, Page 23 of 28

such that a proponent of an activity could determine the consistency of an activity without interaction with the State agency." 15 C.F.R. § 930.11(h). Policies must, however, provide some meaningful guidance as to what is and is not permissible; accordingly, the previous sentence in the regulation requires policies to "contain standards of sufficient specificity to guide public and private uses" in order to be enforceable. *Id.* Bay Plan Dredging Policies 1, 3, and 5 do provide general policy guidance for dredgers to deposit dredged material outside of the Bay and maximize reuse where possible. But they do not appear to contemplate requiring any specific ratios or allocations among different sites for the disposal of dredged materials, much less imposing such requirements on an individual basis; yet that is what the Commission attempted to impose here.

The language of Policy 1 in fact disfavors any mandatory limitations on deposits in the Bay. The policy explicitly endorses only "voluntary efforts" to reduce in-Bay disposal until and unless such efforts fail. Bay Plan, at 54. Plaintiffs acknowledge that voluntary compliance efforts have not yet failed. Policy 1 therefore does not support the imposition of a mandatory in-Bay deposit limitation on the Corps. Similarly, Policy 1's source, the Final LTMS Management Plan, describes a two-phase plan for managing in-Bay disposal, with numerous steps the Commission and the Board must satisfy before transitioning from voluntary compliance efforts (Phase I) to binding allotments imposed on individual dredgers (Phase II). *See* Final LTMS Management Plan, at 6-1 to 6-7.

Plaintiffs have not shown any textual or practical connection between the 20/40 Disposal Condition and the Bay Plan Policies that they rely upon. The only numerical

reference in any of those Policies is Policy 1's target of 1.0 mcy/yr for in-Bay disposal. Bay Plan, at 54. But the policy describes that figure as a goal to be achieved "over time" and as an aggregate limit, not one subject to enforcement against individual dredging entities like the Corps. *Id.*

We therefore must conclude that the 20/40 Disposal Condition is unenforceable. It is not "necessary to ensure consistency with" enforceable policies pursuant to 15 C.F.R. § 930.4(a)(1). Nor is the 20/40 Disposal Condition "based on enforceable policies" as permitted under 15 C.F.R. § 930.11(h). The Corps was not required to comply with the condition.

B. Plaintiffs' Clean Water Act (CWA) claim fails because the Corps' plan complied with Provision 10 of the Water Quality Certification (WQC).

The key condition that the Water Board's WQC imposed on the Corps was labeled Provision 10. Like the Commission's Hydraulic Dredge Condition, Provision 10 of the WQC placed a limit on the amount of hydraulic dredging the Corps could do in the Richmond and Pinole channels. Specifically, Provision 10 provided that the Corps would either (1) "[l]imit hopper [hydraulic] dredge use to a maximum of one in-Bay federal channel, either the Richmond [channel] or the Pinole [channel]" or (2) avoid hopper dredge use in any in-Bay channels. This limitation on hydraulic dredging, as opposed to mechanical or other types of dredging, was intended to protect imperiled native fish species.

The Corps does not dispute that the CWA required it to comply with the conditions specified in the Board's WQC, including Provision 10. *See* 33 U.S.C. § 1341. The Corps instead argues that the course of action it eventually adopted, COA #2, complied with the plain language of Provision 10 and therefore with the CWA. Under COA #2, the Corps proposed to dredge only one of the Richmond and Pinole channels each year in alternating fashion, thereby leaving the other channel undredged until next year. Based on past practice and their representations before the court, this is not at all what the Commission and Board intended. They wanted the Corps to switch from hydraulic dredging to mechanical dredging in order to protect imperiled fish, not reduce the frequency of the Corps' dredging.

Plaintiffs therefore argue Provision 10 required the Corps to transition from hydraulic dredging to mechanical dredging in at least one of the Richmond and Pinole channels, while still dredging both channels annually in accordance with past practice. They contend COA #2 represented an unlawful refusal to fully implement Provision 10. Provision 10, however, only directs the Corps to limit its use of hydraulic dredging. COA #2 does exactly that. In the district court's words, "COA #2 meets the letter of that requirement, because the Corps is in fact using a hydraulic dredge in only one channel each year."

Plaintiffs point to past practice. They emphasize that, in past years, the Corps had typically dredged both channels every year, whether hydraulically or mechanically. Plaintiffs also point out that all parties were initially operating with the understanding that both channels were to be dredged annually, and that hydraulic dredging traps and kills more fish than mechanical dredging does, since it requires removing

Case: 20-15576, 08/06/2021, ID: 12193755, DktEntry: 52-1, Page 26 of 28

much more water from the channel. The Corps does not dispute this history.

Given the cooperative federal-state process dictated by the CWA, however, the issue before this court is whether the Corps' plan complied with the condition that the Water Board imposed: Provision 10. The requirements set forth in a WQC are what is legally enforceable under the CWA. *See* 33 U.S.C. § 1341(d) ("[An] [a]ppropriate requirement of State law set forth in [a water quality] certification . . . shall become a condition on any Federal license or permit subject to the provisions of this section."). Under the CWA, the "appropriate requirement[s] of State law" that federal agencies must follow result from a cooperative approval process involving federal agencies like the Corps and state agencies like the Board. *Id.* The requirement that resulted from this process, Provision 10, did not mandate any dredging beyond the limited hydraulic dredging proposed in COA #2.

Plaintiffs argue that the Corps' adoption of COA #2 is nonetheless unlawful because it reflected an improper plea of insufficient funding to evade the Commission's conditions. See 15 C.F.R. § 930.32(a)(3). Plaintiffs cite to *Ohio v. U.S. Army Corps of Engineers*, 259 F. Supp.3d 732 (N.D. Ohio 2017), where the Corps refused to accommodate the state's WQC condition and would not dredge the channel in question unless it received non-federal funds for that purpose. *Id.* at 742–43. Its refusal on the basis of cost was held to be unlawful. *Id.* at 754. The difference is that, here, the Corps did not refuse to comply with the WQC condition. It complied with Provision 10's specific terms. The decision in *Ohio* is therefore inapposite.

Case: 20-15576, 08/06/2021, ID: 12193755, DktEntry: 52-1, Page 27 of 28

C. The Corps' adoption of COA #2 was not arbitrary or capricious or in violation of any material reporting requirements.

Plaintiffs contend that the Corps' decision was arbitrary and capricious in violation of the APA both because COA #2 is a generally unreasonable means of complying with Provision 10 and because the Corps did not adequately explain and justify its decision to depart from past dredging practices. *See* 5 U.S.C. § 706(2)(A); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–15 (2009).

These arguments ignore that the Corps engaged in a lengthy cooperative process of negotiations, one embedded in the CZMA and the CWA. COA #2 did not appear out of the blue. Rather, it was one of several alternatives the Corps considered in response to discussions with the state agencies about conditions that had, in turn, been crafted in response to the Corps' initial dredging plans. It is hard to see how the adoption of COA #2 could be arbitrary and capricious when, as we have seen, it complied with the relevant enforceable policies and with Provision 10. The Corps' course of action was thus not irrational. The Corps' deliberations reflect the agency's understanding that COA #2 represented a change relative to its historical practice. *See FCC v. Fox*, 556 U.S. at 515–16.

Plaintiffs also suggest that the Corps' 2017 adoption of COA #2 has turned out to be problematic because the Corps had to dredge the Pinole channel on an emergency basis in 2020. Such subsequent developments are not relevant to the issues before us, which relate to the validity of the Corps' decision to adopt COA #2 in 2017. *See Lands Council v. Powell*, 395 F.3d 1019, 1029–30 (9th Cir. 2005) (quoting *Sw.*

Case: 20-15576, 08/06/2021, ID: 12193755, DktEntry: 52-1, Page 28 of 28

Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir.1996)) ("[R]eview of an agency decision typically focuses on the administrative record in existence at the time of the decision . . . ."). We have earlier denied Plaintiffs' request that we take judicial notice of subsequent events. We express no opinion as to whether the 2020 dredging may be relevant in other, later proceedings related to how the Corps conducted its dredging operations or on the effects of those operations.

Finally, Plaintiffs contend that the Corps failed to comply with various procedural regulations contained in 33 C.F.R. Part 337 and dealing for the most part with internal reporting requirements. For example, Plaintiffs argue that the Corps was required by 33 C.F.R. § 337.8(a)(3)–(4) to report to higher echelons on certain funding considerations but did not do so. Even assuming without deciding that the Corps failed to follow these regulations, Plaintiffs have not explained what relief would be warranted by such violations or how such violations might affect the validity of COA #2. Nor have they cited any authority—statutory, regulatory, or judicial—for setting aside an agency decision on such a basis.

We understand Plaintiffs' concerns that the Corps' chosen course of action represents a departure from understandings the parties had in the past and may lead to problems in the future. Nevertheless, we must agree with the district court that the adoption of COA #2 did not violate any applicable law.

CONCLUSION

The judgment of the district court is **AFFIRMED**.