

San Francisco Bay Conservation and Development Commission

375 Beale Street, Suite 510, San Francisco, California 94105 tel 415 352 3600 fax 415 352 3606

State of California | Gavin Newsom – Governor | info@bcdc.ca.gov | www.bcdc.ca.gov

September 27, 2019

TO: Commissioners and Alternates

FROM: Larry Goldzband, Executive Director (415/352-3653; larry.goldzband@bcdc.ca.gov)
Megan Hall, Coastal Scientist (415/352-3626; megan.hall@bcdc.ca.gov)

SUBJECT: **Staff Report and Recommendation for Proposed Bay Plan Amendment No. 3-19 to add a Policy regarding the Middle Harbor Enhancement Area Project to Plan Map 4**
(For Commission consideration on October 3, 2019)

Staff Recommendation Summary

To address the need to complete the Middle Harbor Enhancement Area project, staff recommends that the Commission adopt the attached Resolution No. 2019-06 (Attachment A) that would:

1. Amend *San Francisco Bay Plan* (Bay Plan) Plan Map 4 (staff report pages 5-6).

An affirmative vote of two-thirds of the Commission membership (18 members) is required to amend the Bay Plan.

Background

In 1998, the Port of Oakland (Port) and the US Army Corps of Engineers (USACE) proposed to deepen the federal navigation channel that serves the Oakland Harbors to minus 50 feet Mean Lower Low Water (MLLW) as part of the Port's Vision 2000 Maritime Development Program. The Port and the USACE proposed to beneficially reuse the dredged sediment from deepening the channel in three habitat restoration projects instead of disposing of the material at the Deep Ocean Disposal Site. One of these projects is the Middle Harbor Enhancement Area (MHEA), which placed 5.8 million cubic yards of sediment dredged from the Port's -50-foot deepening project in shallow subtidal waters to create habitat. This project was approved by the San Francisco Bay Conservation and Development Commission (BCDC) in 2000 when BCDC issued a Letter of Agreement (LOA) for USACE consistency determination C2000.014.00. The habitat benefits agreed to and required as part of the MHEA project include establishment of 15 acres of eelgrass beds and 55 acres of habitat suitable for eelgrass; the creation of deep-water channels, shallow-water channels, and flats to improve hydraulic connections; and the provision of hard substrate, sandy beach, an educational salt marsh, and four high tide refugia islands for birds.



The MHEA is a major project that is notable because of the large volume of Bay fill it used, which was significantly greater than the amount of fill used for any other habitat project in the Bay since the creation of BCDC, and because it proposed the beneficial reuse of large volumes of dredged sediment in the Bay for subtidal restoration purposes. Because of this, the project was controversial, and required extensive negotiations among the environmental community, regulatory agencies, and the project proponents in the design and permitting process. BCDC was not able to find the project consistent with its laws and policies at the time because the Bay Plan did not allow for in-Bay beneficial reuse projects; the regulations did not list Middle Harbor as an in-Bay disposal area for dredged sediment; and the potential benefits of the project were difficult to assess, among other reasons.¹

For these reasons, BCDC approved Bay Plan Amendment No. 3-00 prior to issuing the LOA. The amendment included the addition of Dredging Policy 11b, which limits the beneficial reuse of dredged sediment for habitat projects in the Bay to a minor amount until the MHEA project is successfully completed, in addition to two other conditions. Dredging Policy 11b states:

“To ensure protection of Bay habitats, the Commission should not authorize dredged material disposal projects in the Bay and certain waterways for habitat creation, enhancement or restoration, except for projects using a minor amount of dredged material, until:

1. Objective and scientific studies have been carried out to evaluate the advisability of disposal of dredged material in the Bay and certain waterways for habitat creation, enhancement and restoration. Those additional studies should address the following:
 - a. The Baywide need for in-Bay habitat creation, enhancement and restoration, in the context of maintaining appropriate amounts of all habitat types within the Bay, especially for support and recovery of endangered species; and
 - b. The need to use dredged materials to improve Bay habitat, the appropriate characteristics of locations in the Bay for such projects, and the potential short-term and cumulative impacts of such projects; and
2. The Commission has adopted additional Baywide policies governing disposal of dredged material in the Bay and certain waterways for the creation, enhancement and restoration of Bay habitat, which narratively establish the necessary biological, hydrological, physical and locational characteristics of candidate sites; and
3. The Oakland Middle Harbor enhancement project, if undertaken, is completed successfully.”

¹ BCDC. November 2, 1998. Letter of Agreement for Consistency Determination No. C1998.010.00.

While the MHEA project has made substantial progress in recent months, it has generally experienced significant delays, due in part to federal funding shortfalls, changes in construction materials, and other logistical challenges. These challenges caused the provision of some habitat benefits to lag over 10 years behind the delivery schedule laid out in the 2001 *Middle Harbor Enhancement Area Construction Period and Long-Term Monitoring, Maintenance, and Adaptive Management Program* (MHEA 3M Plan),² and prompted BCDC to send a request for remedial action to the USACE in November of 2018.³ The letter called for the USACE to complete those aspects of the MHEA project that still do not meet specifications outlined in the MHEA 3M Plan, specifically the eelgrass beds, salt marsh, avian islands, and beach.

The MHEA project has not been successfully completed, and will likely not be completed for many years still. Therefore, as currently written Dredging Policy 11b would continue to limit in-Bay habitat projects from using dredged sediment that could be vital for sea level rise adaptation in the coming years. To address this policy limitation, the staff report and preliminary recommendation for the Fill for Habitat Bay Plan Amendment (BPA 1-17), released on May 21, 2019, proposed the removal of Dredging Policy 11b from the Bay Plan.

In conjunction with the recommended removal of Dredging Policy 11b, staff proposed the addition of a Bay Plan policy to Plan Map 4, Central Bay North, stating that the MHEA project should be completed in a timely manner. This policy addition was proposed to address stakeholder concerns that the Bay Plan would no longer address the significantly delayed MHEA project if Dredging Policy 11b were removed altogether, which could potentially impact BCDC's efforts to ensure the project's completion. Site-specific policies are typically included in the Bay Plan Maps. Plan Map policies are enforceable and carry equal weight to policies in other sections of the Bay Plan, and like any part of the Bay Plan, they are not applied retroactively to permits or consistency determinations that have already been issued. However, the Bay Plan Maps were not included in the scope of the Fill for Habitat amendment (BPA 1-17), so in order to keep the BPA 1-17 amendment process on schedule, the Plan Map Policy addition was proposed as a separate amendment (BPA 3-19). On June 6, 2019, the Commission held a public hearing followed by a vote to initiate BPA 3-19, a Bay Plan Amendment to consider adding a policy regarding the Middle Harbor Enhancement Area project to Plan Map 4. A Brief Descriptive Notice was mailed on June 7, 2019.

² Winzler & Kelly Consulting Engineers, Merkel & Associates, Inc. November 2001. Middle Harbor Enhancement Area Construction Period and Long-Term Monitoring, Maintenance, and Adaptive Management Program.

³ Request for Remedial Action, Oakland Harbor Navigation Improvement Project, Middle Harbor Enhancement Area. November 06, 2018. Letter from BCDC to United States Army Corps of Engineers.

Prior to the initiation of BPA 3-19, and at the public hearing on BPA 1-17 on June 20, the public and the Commission raised concerns about the proposal to move language regarding the completion of the MHEA project from Dredging Policy 11b to the Plan Map policies. Save the Bay and the Commission were concerned that removing Dredging Policy 11b and replacing it with a Plan Map policy requiring the completion of the MHEA project would detract from the goal of ensuring the project's completion. Staff discussed public comment and Commission concern with the Bay Fill Policies Working Group (BFWG), a subcommittee comprised of BCDC Commissioners that provided guidance throughout the Bay Plan Amendment process, and concluded that regardless of changes to Dredging Policy 11b, the Plan Map policy should be added to explicitly state the Commission's direction to expeditiously complete the MHEA (which Dredging Policy 11b does not). The staff planning report and preliminary recommendation on BPA 3-19 recommending the addition of a Plan Map policy was released on August 5, 2019. After a 30-day public comment period, the Commission held the first public hearing on the amendment on September 5, 2019.

BCDC staff also met with the USACE and the Port several times between the initiation of BPA 3-19 and the publication of this staff report and final recommendation on September 27, 2019 to discuss the USACE's and Port's concerns that the proposed Plan Map policy was unnecessary and an overstep of BCDC's authority. At these meetings, staff discussed policy alternatives to the preliminary staff recommendation for BPA 1-17, including alternative language and the possibility of developing a Memorandum of Understanding among the three agencies. Staff met with the BFWG during this time to discuss the outcome of negotiations with the USACE and Port, and to gather the Working Group's input. The revised recommendation for BPA 3-19 resulted from these discussions.

After additional discussions with the BFWG, staff concluded that, in conjunction with the proposed Plan Map policy addition, the retention of some version of Dredging Policy 11b was an important component of BCDC's work toward ensuring the completion of the MHEA project (see the BPA 1-17 Staff Recommendation for more detail: <https://www.bcdc.ca.gov/BPAFHR/BPA1-17StaffUpdateBPFillHabitat.pdf>).

Staff Recommendation

Staff recommends that the Commission adopt the attached Resolution No. 2019-06 (Attachment A) that would amend the Bay Plan as follows:

1. Proposed Changes to Bay Plan Map 4
 - a. Add a policy regarding the completion of the Middle Harbor Enhancement Area project.
 - b. Renumber sites 21-42 on Plan Map 4 to account for the addition of a new policy 21
 - c. Renumber policies 21-42 in the text of Plan Map 4 to account for the addition of a new policy 21.

Proposed Addition to Bay Plan Map 4

Staff recommends that the Commission add the following Bay Plan Policy associated with Plan Map 4, the Central Bay North Plan Map, as shown in the draft language below. Proposed additions to the Bay Plan are underlined. Deletions between staff’s preliminary recommendation and the final recommendation are ~~struck through~~ and **bold**, and additions are **bold**. The preliminary recommendation can be found on BCDC’s website at: <https://www.bcdc.ca.gov/BPAFHR/BPA3-19FinalStaffReport.pdf>

Plan Map 4		
Policy Changes	Preliminary Staff Analysis	Final Staff Analysis
<p><u>21. Middle Harbor Enhancement Area – The US Army Corps of Engineers and the Port of Oakland should complete work at Middle Harbor Enhancement Area as quickly as possible to provide the full suite of habitat and public access benefits at the U.S. Army Corps of Engineers’ (USACE) and the Port of Oakland’s Middle Harbor Enhancement Area (MHEA) project as described in the performance criteria of the USACE’s MHEA Construction Period and Long-Term Monitoring, Maintenance, and Adaptive Management Program, which have long been delayed.</u></p>	<p>Staff preliminarily recommended that the Commission add the proposed Bay Plan Map 4 policy, regardless of whether the Commission deletes, amends, or retains Bay Plan Dredging Policy 11b, in order to help address concerns that the MHEA project is not yet complete.</p>	<p>The preliminary language proposed for the Plan Map policy was not consistent with the standard syntax of Plan Map policies because the language was directed specifically to the USACE and the Port of Oakland. Existing Plan Map policies begin with a specific action command (e.g. “Protect”, “Preserve”, “Provide”, “Create”, “Encourage”, etc.), to guide future use of the Bay and shoreline. Thus, to ensure consistency with existing Plan Map policies, the language is changed in the revised staff recommendation and staff has proposed alternative language to eliminate any concern that this policy would overstep BCDC’s authority over the MHEA project.</p>
<p><u>Renumber Plan Map policies 21-42 to account for the addition of a new policy #21</u></p>	<p>This change would be necessary to incorporate the new policy in the appropriate location on the Plan Map.</p>	<p>No further changes.</p>



Proposed Changes to Bay Plan Map 4

The addition of a new policy #21 to Plan Map 4 would require the addition of a corresponding number to the Plan Map, and renumbering of the subsequent policies on the plan map and in the text. Attachment B indicates how the map would change with the addition of the new policy.

Environmental Assessment

As staff concluded in the preliminary recommendation, the proposed amendment is intended to encourage the completion of the MHEA project. The Bay Plan amendment would not have negative environmental effects because it is encouraging the completion of a project that has already been found consistent with BCDC's laws and policies (C2000.014.00), and for which an EIR/environmental impact statement (EIS) and an addendum thereto have already been prepared to evaluate the effects of the project. The proposed policy addition would not result in the authorization of any new projects in the Bay. Thus, the Commission's adoption of the proposed amendment to the Bay Plan would have no clearly identifiable significant adverse effects on the environment.

Response to Comments

BCDC received three public comment letters during the public comment period from August 5 – September 6, 2019. Comments are addressed in accordance with numbers assigned to each individual comment on the comment letter (see Attachment C).

Response to Specific Comments:

Amy Hutzel, California State Coastal Conservancy, August 29, 2019

1. Comment noted.
2. Staff's revised recommendation for BPA 1-17 would not remove Dredging Policy 11b. This recommendation is explained in more detail in the September 24, 2019 staff report and recommendation on BPA 1-17.
3. Comment noted, and BCDC staff appreciate the Coastal Conservancy staff's comments and engagement in both the BPA 1-17 and BPA 3-19 processes to date.
4. Staff believes that the language crafted for the amended version of Dredging Policy 11b would ensure that this policy is not an impediment to any currently conceivable project in the Bay.
5. Staff agrees that future innovative projects could be similar to the Middle Harbor Enhancement Area (MHEA) project in the ways defined by the policy (i.e. similar in scale, bathymetric modification, and type of habitat creation). However, staff believes that if the MHEA project has still not been completed at the time of a similar proposed project, it is not advisable to proceed without carefully assessing the ways in which the proposed project could avoid the same outcome.

6. The proposed amendment to Dredging Policy 11b would not preclude these projects. Strategic placement of dredged material to augment mudflats and wetlands is not similar in type of habitat creation, nor is the aquatic transfer facility. Neither of these projects would convert deep subtidal habitat into shallow water eelgrass habitat.
7. Placement of fill at Skaggs island if it is accidentally breached would also not be precluded by the proposed language for Dredging Policy 11b. This type of fill would not be similar in type of habitat conversion or bathymetric modification to the MHEA project.
8. Staff agrees that we should be thinking outside the box in terms of beneficial reuse of dredged sediment. However, staff also believes that retention of Dredging Policy 11b in some form is important to continue to encourage the completion of the MHEA project. Staff believes the proposed amendment to Dredging Policy 11b will accomplish both of these goals.
9. Staff appreciates the State Coastal Conservancy's extensive engagement through the BPA 1-17 and BPA 3-19 processes as well.

E. Stu Townsley, United States Army Corps of Engineers, August 30, 2019

1. Staff also appreciates the United States Army Corps of Engineers' continued working relationship with BCDC.
2. Comment noted.
3. While this proposed plan map policy would be an enforceable policy, it would not apply retroactively to alter or supplement the conditions contained in the Commission's January 19, 2001 Letter of Agreement concurring in the USACE's Second-Stage Consistency Determination for the Oakland Harbor Navigation Improvement Project (-50 ft). Thus, the plan map policy could not be used to require the completion of the Middle Harbor Enhancement Area project.
4. Staff appreciates the statement of commitment, and all the work that the USACE has recently completed and planned to work toward project completion.
5. Staff appreciates the suggestion of a Memorandum of Understanding (MOU) between the USACE and the Commission as an alternative means for the USACE to reaffirm its commitment to completing the MHEA project. Per discussions between the USACE and BCDC staff since this letter was received, both parties have agreed that an MOU is no longer necessary with the revised recommendation for language for a Plan Map policy.
6. Staff appreciates the suggested alternative language for a Plan Map policy. Staff believes that the revised recommendation for a Plan Map policy addition, which has been discussed with USACE staff, will also be acceptable as an alternative to the language provided in the preliminary recommendation.
7. Comment noted.

8. Staff recognizes that BCDC retains its enforcement abilities under the existing 2000 Letter of Agreement, and that the USACE and Port have made recent progress toward completing the MHEA project. Nonetheless, staff believes that the addition of the proposed Plan Map policy is important to reaffirm BCDC's commitment to working with the USACE and Port to ensure that the MHEA is completed.

Richard Sinkoff, Port of Oakland, September 5, 2019

1. Staff also appreciates the Port's engagement with BCDC on BPA 3-19.
2. The proposed plan map policy would not apply retroactively to alter or supplement the conditions contained in the Commission's January 19, 2001 Letter of Agreement concurring in the USACE's Second-Stage Consistency Determination for the Oakland Harbor Navigation Improvement Project (-50 ft). Therefore, staff does not agree that BCDC is overstepping its jurisdiction. Staff appreciates the Port's support of the USACE's proposed alternatives.
3. Staff appreciates the suggestion of a Memorandum of Understanding (MOU) as an alternative means for the USACE to reaffirm its commitment to completing the MHEA project. Per discussions between the USACE and BCDC staff since this letter was received, both parties have agreed that an MOU is no longer necessary with the revised recommendation for language for a Plan Map policy.
4. Staff appreciates the suggested alternative language for a Plan Map policy. Staff believes that the revised recommendation for a Plan Map policy addition, which has been discussed with USACE staff, will also be acceptable as an alternative to the language provided in the preliminary recommendation.
5. Comment noted. BCDC agrees that it retains its enforcement authority under the Commission's January 19, 2001 Letter of Agreement concurring in the USACE's Second-Stage Consistency Determination for the Oakland Harbor Navigation Improvement Project (-50 ft). Nevertheless, staff recommends the addition of the revised proposed Bay Plan policy to Plan Map 4 to reaffirm BCDC's commitment to the successful completion of the MHEA project.
6. Staff appreciates the Port's commitment to completing all MHEA project habitat design goals, and greatly appreciates all of the Port's recent efforts toward this end.
7. Comment noted.

Attachment A: Resolution No. 2019-06

Adoption of Bay Plan Amendment No. 3-19 Adding a Policy to
Bay Plan Map 4

San Francisco Bay Conservation and Development Commission

375 Beale Street, Suite 510, San Francisco, California 94105 tel 415 352 3600 fax 415 352 3606

State of California | Gavin Newsom – Governor | info@bcdc.ca.gov | www.bcdc.ca.gov

Resolution No. 2019-06

Adoption of Bay Plan Amendment No. 3-19 Adding a Policy to Bay Plan Map 4

Whereas, Government Code Section 66652 states that “the Commission at any time may amend, or repeal and adopt a new form of, all or any part of the San Francisco Bay Plan but such changes shall be consistent with the findings and declaration of policy” contained in the McAteer-Petris Act; and

Whereas, the Legislature directed the Commission to keep the Plan up-to-date so that it reflects the latest scientific research on the Bay and addresses emerging issues that could impact the Bay in the future. To accomplish this, the Legislature empowered the Commission to amend the Bay Plan if two thirds (18) of the 27 members of the Commission vote for the amendment, after providing an opportunity for public review of the proposed amendment and after holding a public hearing on the amendment. Over its history, the Commission has made numerous amendments to the Bay Plan, some of which dealt with simple matters, such as changing a boundary of a Bay Plan map designation, and some of which have addressed major issues, such as climate change; and

Whereas, the initial step in revising the Bay Plan is a policy decision by the Commission whether to consider an amendment dealing with a specified issue. Thereafter, the staff prepares a report containing the results of research and policy analysis on the issue, preliminary recommended findings and policies, and an environmental assessment of the proposed amendment; and

Whereas, the Commission voted to initiate the Fill for Habitat Bay Plan Amendment (BPA 1-17) on July 20, 2017, to consider amendment of the following sections of the Bay Plan: Fish, Other Aquatic Organisms, and Wildlife; Tidal Marshes and Tidal Flats; Subtidal Areas; Dredging; Shoreline Protection; and potentially Public Access. The Commission then voted to expand the scope of the Bay Plan Amendment to include the Major Conclusions and Policies on March 7, 2019; and

Whereas, the preliminary staff recommendation for BPA 1-17 proposed the removal of Dredging Policy 11b, a policy that restricts the amount of dredged sediment that can be used for habitat projects in the Bay until the successful completion of the Middle Harbor Enhancement Area (MHEA) project. Staff proposed the removal of this policy to allow more beneficial reuse of dredged sediment in the Bay, noting that it is unnecessarily limiting to restrict habitat projects based on the performance of one dissimilar project.



Whereas, in 1998, the Port of Oakland (Port) and the US Army Corps of Engineers (USACE) proposed to deepen the federal navigation channel that serves the Oakland Harbors to minus 50 feet Mean Lower Low Water (MLLW) as part of the Port's Vision 2000 Maritime Development Program. The Port and the USACE proposed to beneficially reuse the dredged sediment from deepening the federal navigation channel in three habitat restoration projects, including at the Port's Middle Harbor, instead of disposing of such material at the Deep Ocean Disposal Site. The MHEA project placed 5.8 million cubic yards of dredged sediment in the Bay to create shallow water habitat. The habitat benefits agreed to and required as part of the MHEA project include establishment of 15 acres of eelgrass beds and 55 acres of habitat suitable for eelgrass; the creation of deep-water channels, shallow water channels, and flats to improve hydraulic connections; and the provision of hard substrate, sandy beach, an educational salt marsh, and four high tide refugia islands for birds; and

Whereas, on December 21, 2000, the Commission concurred with the USACE that the construction of the MHEA was consistent to the maximum extent practicable with the Commission's coastal zone management program, including the Bay Plan, and issued a Letter of Agreement concurring with USACE's second-stage consistency determination C2000.014.00¹; and

Whereas, the provision of certain habitat benefits of the MHEA project has lagged more than ten years behind schedule, which prompted BCDC to send a request for remedial action to the USACE in November of 2018.² The letter called for the USACE to complete those aspects of the MHEA project that still do not meet specifications outlined in the MHEA 3M Plan,³ specifically the eelgrass beds, salt marsh, avian islands, and beach. The letter also requested that the USACE compensate for temporal loss of the delayed habitat benefits that would have been provided if the project had been completed in the intended timeframe; and

Whereas, staff, in consultation with the Bay Fill Policies Commissioner Working Group and interested parties, concluded that, in conjunction with the proposed revision of Bay Plan Dredging Policy 11B as part of BPA 1-17, the Bay Plan should include a policy to continue to encourage the completion of the MHEA project; and

Whereas, policies referencing specific sites or projects are typically located in the Bay Plan Maps, and Bay Plan Map policies are fully enforceable; and

¹ US Army Corps of Engineers. September 15, 2000. Second-stage Consistency Determination for the Oakland Harbor Navigation Improvement Project (-50 ft); BCDC. January 19, 2001. Letter of Agreement for Consistency Determination No. C2000.014.00.

² Request for Remedial Action, Oakland Harbor Navigation Improvement Project, Middle Harbor Enhancement Area. November 06, 2018. Letter from BCDC to United States Army Corps of Engineers.

³ Winzler & Kelly Consulting Engineers, Merkel & Associates, Inc. November 2001. Middle Harbor Enhancement Area Construction Period and Long-Term Monitoring, Maintenance, and Adaptive Management Program

Whereas, in accord with the requirements and procedures set out in Government Code Section 66652 and the California Code of Regulations, Sections 11001, 11003, 11004, and 11005, (1) on June 6, 2019, the Commission voted to initiate a Bay Plan Amendment to consider adding a policy regarding the Middle Harbor Enhancement Area project to Plan Map 4, the Bay Plan Map for Central Bay North (BPA 3-19) and issued a Brief Descriptive Notice setting July 18, 2019 as the initial public hearing date on the amendment; (2) on June 18, 2019, the staff released a Notice of Revised Date of Public Hearing to set a new public hearing date of September 5, 2019; (3) on August 5, 2019, the staff released a staff planning report that included an environmental assessment and preliminary recommendation on a proposed policy addition to Plan Map 4; (4) the Commission held a public hearing on the preliminary staff recommendation on September 5, 2019. During the public comment period, three agencies provided comment letters, and one of these organizations provided oral public comment at the public hearing; (5) on September 27, 2019, staff distributed a final staff planning recommendation and response to comments to all agencies, organizations and individuals interested in the proposed amendment; and (6) on October 3, 2019, the Commission voted on the staff's final recommendation; and

Whereas, the Commission has evaluated the potential environmental impact of adding a policy regarding the Middle Harbor Enhancement Area project to Plan Map 4 of the San Francisco Bay Plan as analyzed in the environmental assessment prepared by staff in accordance with the Commission's regulations, which have been certified as a Certified State Regulatory Program pursuant to Public Resources Code section 21080.5 and California Environmental Quality Act (CEQA) Guidelines section 15251(h) (14 C.C.R. § 15251(h)). Because the proposed Bay Plan amendment would not result in the authorization of any new projects in the Bay, and calls for the provision of habitat benefits that have already been determined consistent with the McAteer-Petris Act through the Letter of Agreement for Consistency Determination C2000.014.00, the Commission finds that the proposed amendments to the Bay Plan will have no significant environmental impacts;

Whereas, the amendment to the Bay Plan enacted by this resolution is intended to be a revision in the Commission's coastal management program for the San Francisco Bay segment of the California coastal zone as approved by the U.S. Department of Commerce under the federal Coastal Zone Management Act of 1972, as amended; and

Whereas, these amendments are adopted pursuant to the McAteer-Petris Act (Gov. Code §§66600 et seq.) and the Suisun Marsh Preservation Act of 1977 (Pub. Res. Code §§29000 et seq.), and they are not intended to, and do not, increase or decrease BCDC's jurisdiction or authority under those acts.

Now, Therefore, Be it Resolved, that the San Francisco Bay Conservation and Development Commission hereby adopts Bay Plan Amendment No. 3-19, which amends the Bay Plan as follows:

1. Add a policy to Plan Map 4 stating the following:

POLICY 21:

Middle Harbor Enhancement Area – ~~The US Army Corps of Engineers and the Port of Oakland should complete work at Middle Harbor Enhancement Area as quickly as possible to provide the full suite of habitat and public access benefits at the U.S. Army Corps of Engineers’ (USACE) and the Port of Oakland’s Middle Harbor Enhancement Area (MHEA) project as described in the performance criteria of the USACE’s MHEA Construction Period and Long-Term Monitoring, Maintenance, and Adaptive Management Program, which have long been delayed.~~ Provide the full suite of habitat and public access benefits at the U.S. Army Corps of Engineers’ (USACE) and the Port of Oakland’s Middle Harbor Enhancement Area (MHEA) project as described in the performance criteria of the USACE’s MHEA Construction Period and Long-Term Monitoring, Maintenance, and Adaptive Management Program, which have long been delayed.

2. Change the numbering on Plan Map 4 to reflect the addition of a new policy #21. The new map is shown in Attachment B.
3. Renumber Plan Map policies # 21-42 in the text of Plan Map 4 to account for the addition of a new policy #21; and

Be it Further Resolved, that the San Francisco Bay Conservation and Development Commission authorizes the Executive Director to make minor, non-substantive editorial changes to this Resolution, in particular to comply with the determinations of the Office of Administrative Law in its review of the Resolution under the California Administrative Procedures Act.

We certify that this resolution was adopted by a vote of _____ “yes” votes, _____ “no” votes and _____ abstentions at the Commission meeting held October 3, 2019 in San Francisco, California.

Executed on this _____ day of _____, 2019 in San Francisco, California.

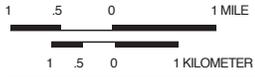
R. ZACHARY WASSERMAN
Chair

Executed on this _____ day of _____, 2019 in San Francisco, California

LAWRENCE J. GOLDZBAND
Executive Director

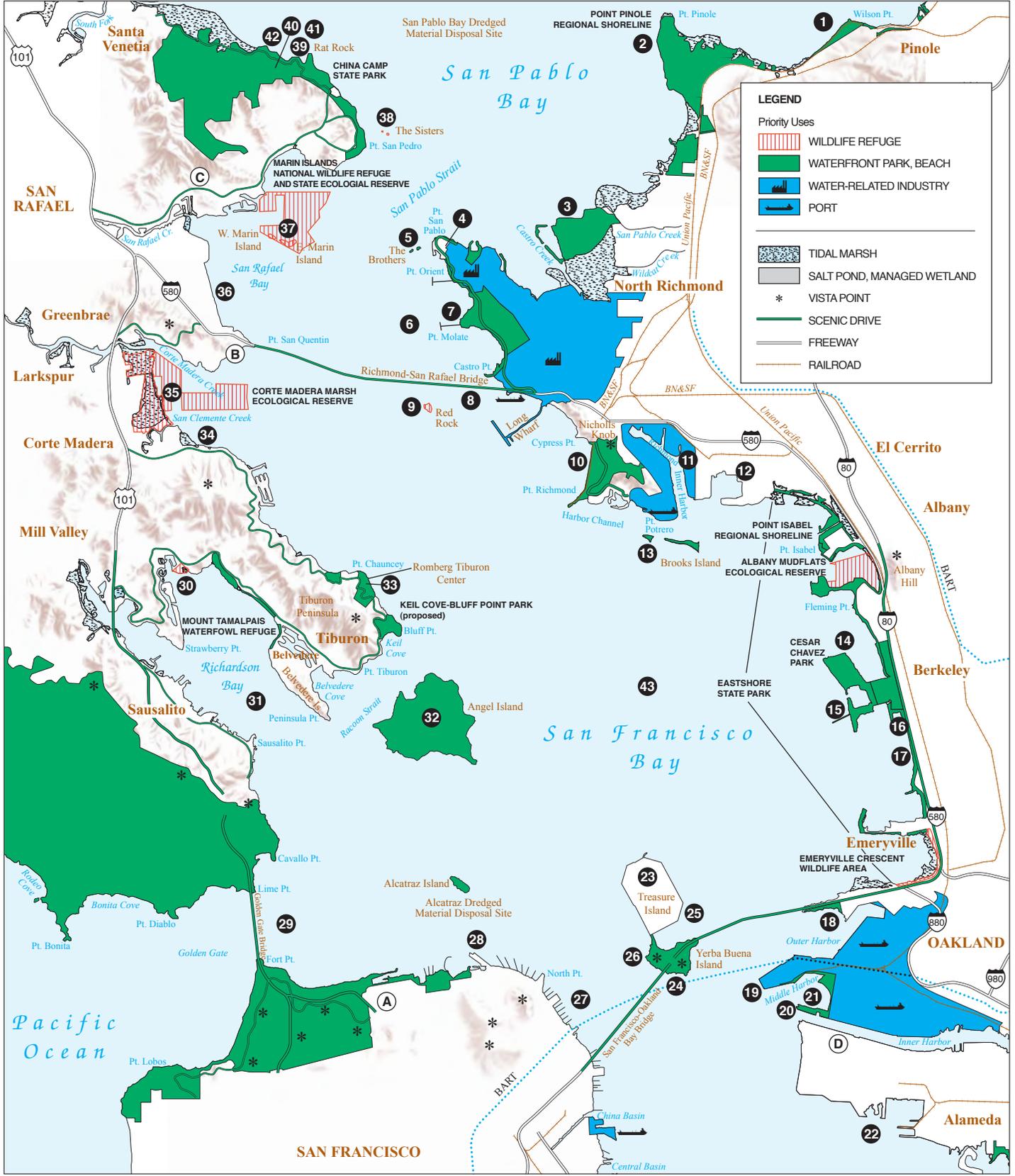


Attachment B: Proposed Revisions to Plan Map 4



Plan Map 4

Central Bay North



LEGEND

Priority Uses

- WILDLIFE REFUGE
- WATERFRONT PARK, BEACH
- WATER-RELATED INDUSTRY
- PORT

- TIDAL MARSH
- SALT POND, MANAGED WETLAND
- VISTA POINT
- SCENIC DRIVE
- FREEWAY
- RAILROAD

Attachment C: Numbered Public Comment Letters regarding
BPA 3-19



August 29, 2019

The Honorable Zachary Wasserman, Chair
Bay Conservation and Development Commission
455 Golden Gate Avenue, Suite 10600
San Francisco, CA 94102

RE: Proposed Bay Plan Amendment No. 3-19 Concerning the Potential Addition of a Bay Plan Policy to Plan Map 4 (for Commission Consideration on September 5, 2019.)

Dear Chair Wasserman and Commissioners:

Thanks for the opportunity to provide comments on the proposed Bay Plan Amendments and for the efforts to incorporate our feedback to date. Please see below for the State Coastal Conservancy staff's comments on the recent Staff Report and Preliminary Recommendation for the **Proposed Bay Plan Amendment No. 3-19 Concerning the Potential Addition of a Bay Plan Policy to Plan Map 4** (for Commission Consideration on September 5, 2019), dated August 5, 2019, and which was provided at the July 18, 2019 Bay Fill for Habitat Work Group meeting, at which Conservancy staff were in attendance.

- 1 **Conservancy staff support the addition of a policy calling for the successful completion of the Middle Harbor Enhancement Area to Bay Plan Map 4 as identified in the "Proposed Changes to Existing Bay Plan Policies" section of the BCDC Staff Report and Preliminary**
- 2 **Recommendations dated August 5, 2019, in combination with removing Dredging Policy 11b.** This approach would enable the Commission to remove the reference to Middle Harbor from the general policies of the Bay Plan while creating a policy that only applies to the specific location of Middle Harbor.
- 3 Conservancy staff have previously commented on Dredging Policy 11b, and the Middle Harbor Enhancement Area project, at the July 18, 2019 Bay Fill for Habitat work group meeting and previous work group meetings, as well as via our comment letter dated June 14, 2019, regarding Proposed Bay Plan Amendment No 1-17 Concerning the Update of the Bay Plan Fill for Habitat Policies. We have included this background below, in case helpful, and our staff are available to answer any questions, provide any additional information, or discuss, as needed.

Background Information Regarding Conservancy Input and Dredging Policy 11b:

Our response to the BCDC staff recommendation regarding Dredging Policy 11b, as included in the comment letter dated **June 14, 2019 regarding the Proposed Bay Plan Amendment No 1-17 Concerning the Update of the Bay Fill for Habitat Policies**, was as follows:

“Remove Dredging Policy 11b that requires the Middle Harbor Enhancement Area project to be completed successfully before the Commission authorizes additional projects that involve placement of dredged material in the bay for habitat creation, enhancement or restoration. We agree with staff that “the success of Middle Harbor is not an accurate proxy for the potential success of every other habitat project in the Bay that uses dredged sediment. Thus, it is imprudent to limit the options of all other projects based on this one very specific type of project.” Recognizing the need to carry forward the spirit of this policy, we support the staff recommendation to add a new policy note to Bay Plan Map 4 to require that Middle Harbor provide the habitat benefits that were intended.”

Conservancy staff attended the subsequent **BCDC Bay Fill for Habitat Work Group meeting on July 18, 2019**, at which Dredging Policy 11b regarding Middle Harbor, and the Middle Harbor Enhancement Area project in general, were discussed. Specifically, BCDC staff preliminarily proposed potentially removing Dredging Policy 11b, except for projects “like Middle Harbor.”
4 Leaving in policy 11b, regarding Middle Harbor, even if only for projects “like Middle Harbor”, could still be an impediment to projects of ours, our partners, and others seeking to undertake restoration and conservation work in the SF Bay. We still recommend taking out this policy completely for the reasons and instances outlined below:

- 5 • We do not currently know all the projects that may be impacted in the future. This Bay Plan Amendment is not just to address the current set of project ideas being pursued, but to set the stage for sea level rise adaptation efforts. Over the next decade, there may be ideas for projects that are similar to Middle Harbor, and BCDC may not yet have determined that the Port of Oakland and U.S. Army Corps of Engineers have successfully completed Middle Harbor. An innovative project to address sea level rise may be prevented from being permitted based on a project by a third party.
- 6 • Policy 11b, even with the addition of the proposed language, could negatively impact the permitting of projects that have been considered, including strategic placement of dredged material to “feed” mudflats and tidal wetlands and a project that the Conservancy previously considered to set up an aquatic transfer facility for Bel Marin Keys, for example.
- 7 • Skaggs Island is a specific project which may be seen as similar to Middle Harbor and impeded by waiting on the success of Middle Harbor. If the US Fish and Wildlife Service cannot import sediment prior to breaching and decide to breach Skaggs to shallow water habitat (or there is an accidental breach), they may later want to bring in sediment to raise the elevation. This is not the plan for Skaggs or other restoration sites at the moment, but the need to import sediment to a tidal area could happen in any

number of places where there is an early or accidental breach of a deeply subsided area intended for wetland restoration.

- 8
- Overall, we should be thinking outside the box in terms of beneficial use of dredged sediment, not hampering the development of adaptation ideas based on the success of one project, even for projects “like Middle Harbor”.

9 Thank you for your consideration of our comments, as well as your extensive engagement with stakeholders during the development of the proposed amendment and following the public hearing. We are hopeful that these changes will help the entire conservation community advance habitat restoration and related shoreline protection and sea level rise adaptation in San Francisco Bay.

Sincerely,



Amy Hutzl
Deputy Executive Officer



DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, U.S. ARMY CORPS OF ENGINEERS
450 GOLDEN GATE AVE.
SAN FRANCISCO, CA 94102

August 30, 2019

R. Zachary Wasserman
Commission Chair
Bay Conservation and Development Commission
455 Golden Gate Avenue, Suite 10600
San Francisco, California 94102

Dear Mr. Wasserman,

1 Thank you for the opportunity to comment on the Bay Conservation and
Development Commission's (BCDC) proposed Bay Plan Amendment No. 3-19
Concerning the Potential Addition of a Bay Plan Policy to Plan Map 4. The United
2 States Army Corps of Engineers (Corps) appreciates our continued working relationship
with BCDC, as exemplified by the many meetings we have had with your staff regarding
this amendment. However, despite the removal of the language requiring the Middle
Harbor Enhancement Area (MHEA) to "provide habitat benefits to sufficiently account
for the delay in project completion", the Corps is still unable to support this amendment.

3 The Corps continues to be unable to support the Bay Plan Amendment No. 3-19
as this amendment can be fairly interpreted as creating an enforceable policy, which
requires the completion of the MHEA. By doing so, BCDC takes the extraordinary step
of attempting to expand its limited regulatory authority to include the ability to require
completion of a federal project. The Coastal Zone Management Act of 1972 (16 U.S.C.
§§ 1451 *et seq*) (CZMA) does not afford BCDC such power. Congress has not waived
sovereign immunity to allow the State the ability to mandate federal action.

4 To be clear, the Commission should not interpret the Corps' concerns about this
amendment as an abandonment of our intentions to complete the MHEA. As explained
at the June 6, 2019 Commission meeting and in our accompanying letter, the Corps is
committed to finishing this project, as outlined in the "Middle Harbor Enhancement Area
Construction Period and Long-term Monitoring, Maintenance and Adaptive
Management Program" (3M Program). Phase I of the eelgrass planting was completed
last month and coordination with USGS in implementing the monitoring plan is ongoing.
A design meeting is being scheduled for this fall to brainstorm with experts on the
development of a design to successfully complete the educational marsh, bird Islands
and beach area in accordance with the 3M Plan.

5 The Corps proposes two alternatives to this amendment to memorialize the
government's continued commitment to completing the project. The Corps' preferred
option would be a Memorandum of Understanding with BCDC reaffirming its

commitment to the MHEA. Alternatively, the Corps proposes that Bay Plan Amendment No. 3-19 be modified to:

6 The US Army Corps of Engineers and the Port of Oakland are authorized and encouraged to expedite action to provide habitat benefits described in the performance criteria of the MHEA Construction Period and Long-Term Monitoring, Maintenance, and Adaptive Management Program.

7 The Corps believes either option would meet BCDC's objective of further encouraging the expeditious and successful completion of the project.

8 Ultimately, the Corps does not believe any amendment is necessary. BCDC retains its enforcement abilities under the existing 2001 Letter of Agreement, Consistency Determination No. C2000.014 (LOA) and the Corps and the Port have recently made great progress toward completing the MHEA, despite historical delays. Implementation of Bay Plan Amendment No. 3-19 would do nothing to improve the status of the MHEA and would improperly infringe on federal sovereignty.

Sincerely,



E. Stu Townsley
Deputy District Engineer
for Project Management



September 5, 2019

R. Zachary Wasserman
Chair
San Francisco Bay Conservation and Development Commission
375 Beale Street, Suite 510
San Francisco, California 94105

SUBJECT: Bay Plan Amendment 3-19

Dear Mr. Wasserman:

1 Thank you for the opportunity to comment on the Bay Conservation and Development Commission's (BCDC) Bay Plan Amendment No. 3-19 Concerning the Potential Addition of a Bay Plan Policy to Plan Map 4 (BPA 3-19). The Port of Oakland (Port) appreciates BCDC's past and present efforts to address the Port's concerns with BPA 3-19, which, as currently written, would add the following language to the Bay Plan:

Middle Harbor Enhancement Area – The US Army Corps of Engineers and the Port of Oakland should complete work at Middle Harbor Enhancement Area as quickly as possible to provide the full suite of habitat benefits described in the performance criteria of the MHEA Construction Period and Long-Term Monitoring, Maintenance, and Adaptive Management Program, which have long been delayed.

2 While the Port agrees with the overall goals of this statement, we have been made aware of concerns that our project partner agency, the U.S. Army Corps of Engineers (Corps) has with this statement. Specifically, the Corps believes BCDC is overstepping its jurisdiction with BPA 3-19. Therefore, consistent with the Corps' proposed alternative approach, the Port also supports two alternatives, which we believe better address the Middle Harbor Enhancement Area project's objective of completing all its habitat design goals.

3 The Port's preferred option would be for the Corps and BCDC to sign a Memorandum of Understanding, reaffirming their mutual commitment to the Middle Harbor Enhancement Area Project. Alternatively, if BCDC chooses to proceed with
4 BPA 3-19, the Port proposes that the language be modified to read:

Middle Harbor Enhancement Area - The US Army Corps of Engineers and the Port of Oakland are authorized and encouraged to expedite action to provide habitat benefits described in the performance criteria of the MHEA Construction Period and Long-Term Monitoring, Maintenance, and Adaptive Management Program.

5 The Port believes either option would meet BCDC's objective of promoting the expeditious and successful completion of the MHEA project. The Port believes that BCDC retains its enforcement authority under the existing 2001 Letter of Agreement and Consistency Determination No. C2000.014 (LOA), without the need for BPA 3-19.

6 The Port is committed to completing all MHEA habitat design goals in collaboration with the Corps, as outlined in the "Middle Harbor Enhancement Area Construction Period and Long-term Monitoring, Maintenance and Adaptive Management Program" (3M Program). To that end, the Corps completed Phase I of the eelgrass planting in July 2019 after successfully completing the warranty period for the MHEA's subtidal habitats. In addition, the Corps has initiated contracting discussions with USGS to commence restoration monitoring. The Port has organized four Technical Advisory Committee meetings in the last two years and is organizing a design "charrette" (workshop) on November 14, 2019, to brainstorm with restoration experts on the development of designs to successfully complete the educational marsh, avian roosting habitat, and beach area in accordance with the 3M Program goals.

7 The Port and the Corps have recently made great progress toward completing the MHEA and believe the implementation of BPA 3-19 is not needed to expedite project completion. We look forward to continued cooperation with BCDC on successfully completing the MHEA project.

Sincerely,



Richard Sinkoff
Director of Environmental Programs and Planning

Port of Oakland
530 Water Street
Oakland, CA 94607
Tel: 510-627-1182

cc:

Edwin "Stu" Townsley (Corps)
Roselyn J Wang (Corps)
Tessa Beach (Corps)
Eric Jolliffe (Corps)
Robert Andrews (Port)
Catrina Fobian (Port)
Edwin Draper (Port)