

# San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

August 5, 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 Preliminary Recommendation for 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)

## Preliminary Staff Recommendation

The staff recommends that the Commission add a policy to Plan Map 4 of the *San Francisco Bay Plan* regarding completion of the Middle Harbor Enhancement Project at the Port of Oakland, as identified in the “Proposed Changes to Existing Bay Plan Policies” section of this report.

## 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 its Vision 2000 Maritime Development Program. As part of a significant negotiation among the regulatory agencies, resource agencies, and the environmental community, the Port and the USACE proposed to beneficially reuse the dredged sediment in three habitat restoration projects instead of disposing of it at the Deep Ocean Disposal Site. The three restoration projects included Hamilton Wetlands Restoration Project (Hamilton) in Novato, Montezuma Wetlands Restoration Project (Montezuma) in Suisun Marsh,<sup>1</sup> and the Port’s Middle Harbor area.

The Port’s Middle Harbor area was historically tidal wetlands, most of which were underwater at high tide. The wetlands in this area were dredged by the Navy in the early part of the 20<sup>th</sup> century to create berths for naval vessels at the Navy’s base. By the time the Navy base was decommissioned, the berthing areas had been dredged to minus 40 feet deep to accommodate Naval ships.<sup>2</sup> The Middle Harbor Enhancement Area (MHEA), a project conceived to restore the decommissioned Navy berths to shallow subtidal habitat, involved placing approximately five million cubic yards of sediment dredged from the deepening project over a ~180-acre subtidal and intertidal area. This project was viewed as an opportunity to beneficially reuse a significant volume of sediment that would otherwise be disposed in the ocean; create shallow subtidal habitat; and reduce the cost of the 50-foot deepening project, such that the Port and the USACE would support additional beneficial reuse at Hamilton and Montezuma. The proposed habitat benefits agreed to and required as part of the MHEA project (some completed and some still underway) include establishment of 15 acres of eelgrass beds (incomplete) and 55 acres of habitat suitable for eelgrass (complete); the creation of deep-water channels, shallow water channels, and flats to improve hydraulic connections (complete); and the provision of hard substrate (complete), sandy beach (partially complete), an educational salt marsh (incomplete), and four high tide refugia islands for birds (partially complete).<sup>3</sup>

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

<sup>2</sup> BCDC. October 24, 2014. Staff Report on Middle Harbor Enhancement Project

<sup>3</sup> Winzler & Kelly Consulting Engineers, Merkel & Associates, Inc. November 2001. Middle Harbor Enhancement Area Construction Period and Long-Term Monitoring, Maintenance, and Adaptive Management Program; Request for Remedial Action, Oakland Harbor Navigation Improvement Project, Middle Harbor Enhancement Area. November 06, 2018. Letter from BCDC to US Army Corps of Engineers.



The MHEA is a major project that stands out 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 San Francisco Bay Conservation and Development Commission (BCDC or Commission), and because it proposed the beneficial reuse of dredged sediment for subtidal restoration purposes. Because of this, the project was also controversial, and engendered extensive negotiations among the environmental community, regulatory agencies, and the project proponents. The USACE submitted a consistency determination (C1998.010.00) for the Port of Oakland's minus 50-foot deepening project and associated dredged sediment reuse projects—including the MHEA—in 1998. However, the Commission was not able to find the project consistent with its laws and policies at the time because the *San Francisco Bay Plan* (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.<sup>4</sup> As a result, the USACE, Port, and BCDC negotiated a series of actions to address the issues raised by the project, which were included in the consistency determination for C1998.010.00 *Commitments as Addenda*. The Commission subsequently voted to concur in C1998.010.00 as modified by the *Commitments as Addenda* on October 15, 1998. The first of the *Commitments as Addenda* stated that C1998.010.00 and the commitments were “to serve as the first stage of a staged consistency determination pursuant to 15 CFR Section 930.37(c),” and that reuse of dredged sediment at the MHEA would be submitted to BCDC through a second-stage consistency determination.

Additionally, the *Commitments as Addenda* stated that the Commission could not concur in a consistency determination for the MHEA unless several conditions were met, one of which was an amendment to the Bay Plan dredging policies to allow in-Bay beneficial reuse projects. Consequently, Bay Plan Amendment 3-00 was initiated, and after further discussion and negotiation with the environmental community, the project proponents, and other regulatory agencies, the Bay Plan was amended to allow in-Bay beneficial reuse projects as conditioned in the policies. New policies, including Dredging Policy 11, were added to ensure that lessons could be learned from this large-scale pilot project before other projects could use more than a minor amount of dredged sediment for habitat projects in the Bay<sup>5</sup>.

As required by the *Commitments as Addenda*, the USACE submitted a second-stage consistency determination (C2000.014.00) in 2000 to authorize the in-Bay placement of dredged sediment from the minus 50-foot deepening project and construction of the MHEA project. 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 C2000.014.00.<sup>6</sup> In 2001, consultants working with the MHEA Technical Advisory Committee (TAC) to the Port and USACE developed a monitoring, maintenance, and adaptive management framework, called the *Middle Harbor Enhancement Area Construction Period and Long-Term Monitoring, Maintenance, and Adaptive Management Program* (MHEA 3M Plan),<sup>7</sup> which has been used to guide the project's work since its initiation. The MHEA 3M Plan also details success criteria and timelines for constructing and completing various aspects of the MHEA project.

<sup>4</sup> BCDC. November 2, 1998. Letter of Agreement for Consistency Determination No. C1998.010.00.

<sup>5</sup> BCDC. Final Staff Recommendation on Proposed Bay Plan Amendment No. 3-00, Which Would Modify the San Francisco Bay Plan Regarding Dredging and Disposal of Dredged Material, Proposed Changes to the Commission's Implementing Regulations Regarding Disposal of Dredged Material, and the LTMS Management Plan. December 1, 2000.

<sup>6</sup> 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.

<sup>7</sup> Winzler & Kelly Consulting Engineers, Merkel & Associates, Inc. November 2001. Middle Harbor Enhancement Area Construction Period and Long-Term Monitoring, Maintenance, and Adaptive Management Program.

**Construction of MHEA.** By 2018, the Port and the USACE met some key construction milestones including placement and consolidation of 5.8 million cubic yards (cy) of dredged sediment to create shallow water habitat; final sculpting of 400,000 cy of sediment to create subtidal channels and shoals; initial construction of two small avian islands, an educational marsh, 5.1 acres of hard bottom habitat, and 101 acres of habitat suitable for eelgrass; restoring full tidal circulation to the site; and exploratory planting of eelgrass.<sup>8</sup> In recent months, pilot eelgrass plantings of 76 eelgrass plots were completed.<sup>9</sup> Additionally, the Port and USACE continue to meet with the TAC to discuss the status of the project and discuss next steps to work toward completion. However, several key features described in the MHEA 3M Plan (including eelgrass habitat, tidal marsh, avian islands, and beach) have either been only partially completed or not completed.

**Concerns Regarding Project Delays.** While the MHEA project has progressed, it has experienced significant delays, due in part to federal funding shortfalls, changes in construction materials, and other logistical challenges.<sup>10</sup> These challenges caused the provision of habitat benefits to lag 14 years behind the delivery schedule. Save the Bay first raised concerns to the Commission about the slow progress of the MHEA project in 2011, over ten years after the project was authorized.<sup>11</sup> In response, the Commission has received several briefings from the USACE and the Port on the status of the project, and BCDC staff has continued to engage with the USACE and the Port to work toward successful completion of the project. After continued delays, BCDC sent a request for remedial action to the USACE in November of 2018.<sup>12</sup> 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,<sup>13</sup> 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. These requested actions include: (1) planting an additional 3.4 acres of eelgrass for the temporal loss of habitat benefits; (2) expedited establishment of marsh habitat through sediment placement and plantings; (3) assessment of the status of bird roosting habitat, an explanation of the missing acreage that was required, and proposal of an alternative to meet the goals of this feature in the MHEA 3M Plan; and (4) working closely with the Port to ensure the safety of public access at the sandy beach.<sup>14</sup> Until the unfinished project features are completed in accordance with the MHEA 3M Plan, recent discussions at TAC meetings, and an agreed-upon remediation plan, BCDC will continue to encourage the Port and USACE to work toward accomplishing these goals. To reaffirm BCDC's commitment to the successful completion of the project, staff recommends 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.

---

<sup>8</sup> Ibid.

<sup>9</sup> Merkel & Associates, Inc. Middle Harbor Enhancement Area Phase 1 Eelgrass Pilot Transplant Effort to Guide Future Full Scale Transplant Program. May 23, 2019.

<sup>10</sup> 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; BCDC. Staff Report on Middle Harbor Enhancement Project. October 24, 2014.

<sup>11</sup> Ibid.

<sup>12</sup> 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.

<sup>13</sup> Winzler & Kelly Consulting Engineers, Merkel & Associates, Inc. November 2001. Middle Harbor Enhancement Area Construction Period and Long-Term Monitoring, Maintenance, and Adaptive Management Program

<sup>14</sup> 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.

**Bay Plan Map Policies.** The Bay Plan maps contain information about specific sites or geographic areas and provide direction to the Commission and staff regarding the application of policies at the respective site. Plan Map policies are enforceable policies and have the same authority as other policies in the Bay Plan. Plan Map policies typically refer to geographical areas where certain types of activities or uses (e.g. public access, restoration, resource conservation, or development) should occur, and sometimes detail conditions under which those activities should occur.

### Proposed Changes to Existing Bay Plan Policies

The staff preliminarily recommends 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 in language are shown as underlined.

#### Draft Policy Change to Plan Map 4

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 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.

**Staff Analysis.** Proposed Bay Plan Amendment (BPA) 3-19 to add a policy to Bay Plan Map 4 regarding the MHEA supplements BPA 1-17 addressing Bay Fill for Habitat projects.<sup>15</sup> The preliminary recommendation for BPA 1-17<sup>16</sup> proposes deletion of Bay Plan Dredging Policy 11b, a policy which limits the amount of dredged sediment that can be used for habitat projects in tidal waters to a “minor amount” until the MHEA is successfully completed. Staff preliminarily recommended deletion because this policy limits potential dredged sediment reuse projects that have little or no similarity to the MHEA. If Bay Plan Dredging Policy 11b is deleted, there would be no reference to the MHEA in the Bay Plan. The Bay Plan Map 4 Policy regarding the MHEA, if adopted, would state the Commission’s desire for expeditious and successful completion of the delayed project. However, even if Dredging Policy 11b is not deleted or is amended, staff believes that the Bay Plan Map 4 Policy should be added to explicitly state the Commission’s direction to expeditiously complete the MHEA (which Bay Plan Dredging Policy 11b does not). Therefore, staff recommends that the Commission adopt the proposed Bay Plan Map 4 policy, whether the Commission deletes, amends, or leaves Bay Plan Dredging Policy 11b, in order to help address concerns that the MHEA project is not yet complete.

The USACE has stated concerns that including a new policy regarding the MHEA would impose new conditions on the consistency determination for the project. However, new or amended Bay Plan policies do not apply retroactively to alter the conditions of a permit or a letter of agreement concurring in a consistency determination. Rather, the new or amended policies would state the Commission’s policies going forward and would be applied when future projects (or potential project modifications) are analyzed for consistency with BCDC’s laws and policies. Thus, the proposed Plan Map policy regarding the completion of the MHEA would be used in reviewing any future amendments to the second-stage MHEA consistency determination, but otherwise could not be used to retroactively impose new requirements or conditions that were not specified in the 2000 Letter of Agreement for the MHEA beyond what is stated in that Letter of Agreement.

<sup>15</sup> BCDC. Staff Report and Preliminary Recommendation for Proposed Bay Plan Amendment No. 1-17 Concerning the Update of the Bay Plan Fill for Habitat Policies. May 21, 2019.

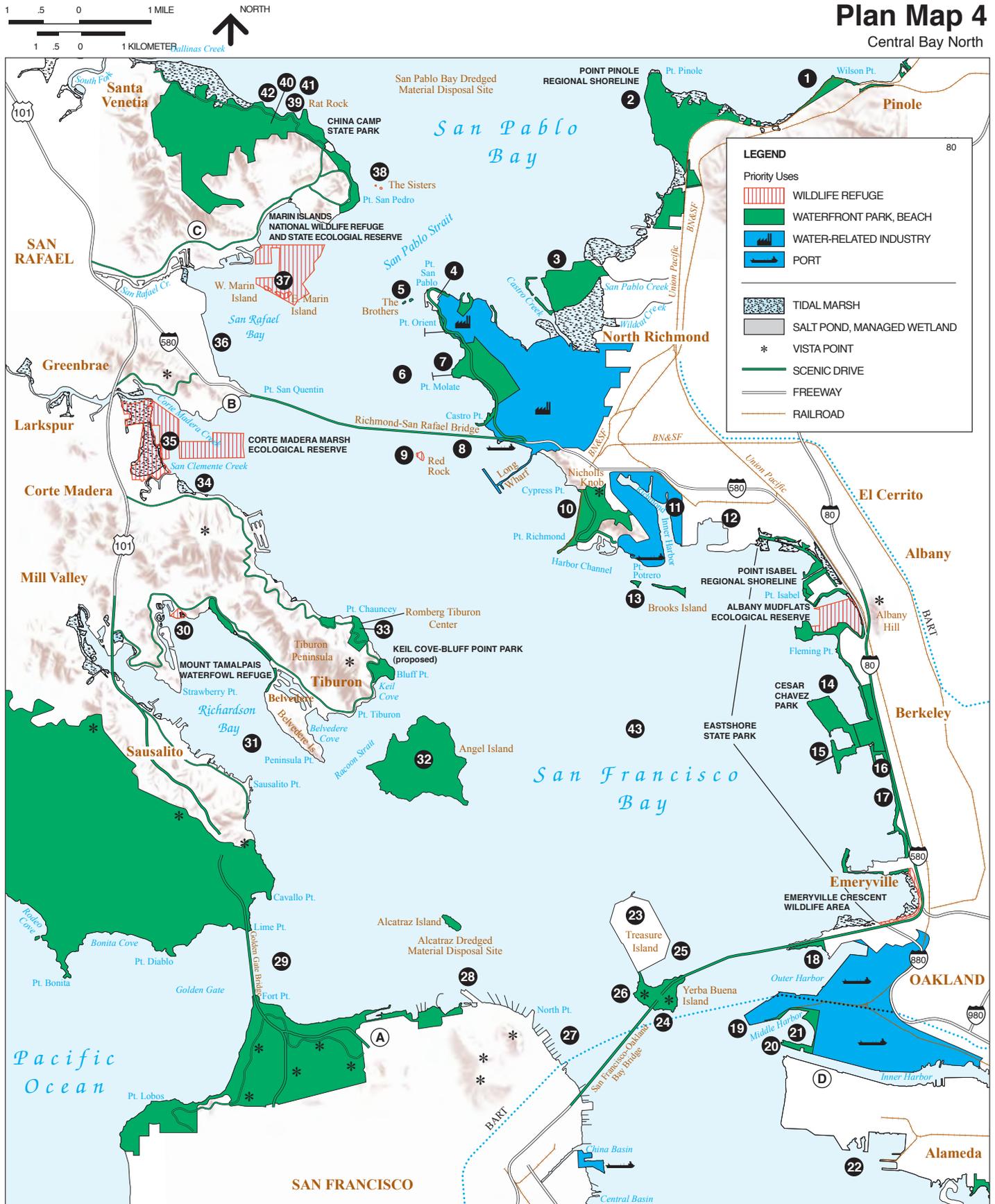
<sup>16</sup> Ibid.

The draft policy language proposed here is different than the draft language that was proposed in the staff report and preliminary recommendation for BPA 1-17. In response to comments received on the initial draft language, the language was altered to clarify and avoid any ambiguity about whether the policy addition was intended to impose new obligations on the existing authorization.

#### **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. Figure 2 below indicates how the map would change with the addition of the new policy.

Figure 2  
Proposed Amendment to Plan Map 4 numbers



## Amendment Consistency with the McAteer Petris Act

The McAteer-Petris Act, Government Code Section 66652, requires that amendments to the Bay Plan be consistent with the Findings and Declarations of Policy in Chapter 1 of the McAteer-Petris Act. The policy change proposed herein states that the MHEA project (which is already underway) should be completed. As part of the Letter of Agreement concurring with the second-stage consistency determination, the project was found to be consistent to the maximum extent practicable with the Commission's coastal zone management program for San Francisco Bay (C2000.014.00), which includes the McAteer-Petris Act.

The consistency determination for the MHEA consisted of two stages—(1) the first-stage consistency determination (C1998.010.00), which authorized the Port of Oakland's minus 50-foot deepening project, but not the construction of the MHEA with dredged sediment from that project; and (2) the second-stage consistency determination (C2000.014.00), which authorized the placement of sediment and construction of the MHEA project. As described in the Letter of Agreement to the second-stage consistency determination:

“In the first-stage consistency determination, the Commission concluded that the MHEA was not entirely consistent with some portions of existing law and policy, but also preliminarily concurred, on a conceptual level, with many aspects of the proposed MHEA. The first-stage consistency determination preliminarily found that the MHEA was consistent with (1) water quality policies, assuming approval from the Regional Board was granted; (2) fish and wildlife policies, based on a future coordinated review with the California Department of Fish and Game (CDFG), U.S. Fish and Wildlife Service (USFWS), and the National Marine Fisheries Service (NMFS) during the second-stage consistency review to ensure that impacts to fish and wildlife would be mitigated to less than a significant level; (3) the no alternative upland location portion of the Commission's fill policies because the MHEA provides a unique opportunity to create shallow-water habitat within the Bay; (4) marsh and mudflat policies because the MHEA would create some new marsh; and (5) water surface area and volume policies because the navigation channel deepening would offset any impacts resulting from construction of the MHEA.

But the Commission also found that the MHEA was not entirely consistent with some portions of existing law and policy. For example, the first-stage consistency determination notes that the Bay Plan dredging policies do not address the use of dredged material for in-Bay habitat (if an alternative upland site is feasible) nor is the Middle Harbor a designated disposal site. In addition, the Commission's fill policies, in part, require that projects involving Bay fill must provide public benefits that outweigh the public detriments and that the amount of fill involved must be minimized. The Commission was unable to determine through the first-stage consistency determination the potential success of the proposed MHEA and, thus, its public benefit. In addition, the Commission was unable to determine the required size of the habitat to be successful (i.e., how much fill was needed). These types of unknown issues, as well as others, led to the Commitments as Addendum to the first-stage consistency determination.”<sup>17</sup>

---

<sup>17</sup> BCDC. January 19, 2001. Letter of Agreement for consistency determination C2000.014.00.

The *Commitments as Addenda* to the first-stage consistency determination outlined plan changes, approvals, and analyses that had to occur before the Commission could find the project consistent with its laws and policies.<sup>18</sup> Once these Commitments were fulfilled, the USACE submitted a second-stage consistency determination on September 15, 2000, and the Commission found the MHEA project consistent to the maximum extent practicable with its amended coastal zone management program for San Francisco Bay.

Because the proposed policy addition of BPA 3-19 calls for the completion of a project that has already been found to be consistent with the McAteer-Petris Act for the reasons described in C1998.010.00, C2000.014.00, and C2000.014.01, the policy amendment is consistent with the McAteer-Petris Act.

### Environmental Assessment

BCDC's planning and permitting programs under the McAteer-Petris Act are, as a result of being a Certified State Regulatory Program pursuant to section 21080.5 of the California Environmental Quality Act (CEQA) and CEQA Guidelines section 15251(h) (14 CCR § 15251(h)), exempt from the CEQA requirements to prepare an environmental impact report (EIR), mitigated negative declaration, negative declaration, or initial study. Instead, BCDC's regulations provide for preparation of an Environmental Assessment, which is considered the "functional equivalent" of an EIR (14 CCR §11521 and §11003(b)(6)). An Environmental Assessment is required to be part of the staff planning report prepared and distributed prior to amending the Bay Plan. The Environmental Assessment must either: (1) state that the proposed amendment will have no significant adverse environmental impacts; or (2) describe the significant adverse environmental effects, the public benefits of the proposed amendments, any feasible mitigation measures that would lessen the significant adverse environmental impacts, and any feasible alternatives (*Id.*). Because the proposed amendment is a programmatic policy change, rather than a specific project with more quantifiable impacts, the discussion in this Environmental Assessment is more general than an Environmental Assessment for a specific project would be.

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.

<sup>18</sup> BCDC and USACE. 1998. Commitments as Addenda to Federal Consistency Determination No. CN 10-98 (attachment to C1998.010.00)

## Summary of Written Comments and Summary of Responses to All Significant Environmental Points Raised<sup>19</sup>

Three written comments were received prior to the initiation of BPA 3-19. Comments are addressed below. The comments correspond to numbers on the attached comment letters (Attachments A-C)

### **Attachment A: Jan Novak, Port of Oakland. June 6, 2019**

*General Comment:* BCDC recognizes the progress that has been made toward completing the MHEA, and appreciates the Port's and the USACE's hard work and dedication to complete the project. The added policy is intended to supplement language that had already existed in the Bay Plan to continue encouraging the completion of this project. It is not an enforcement threat, and does not require anything of the project other than what was already required through the consistency determination.

#### *Specific Comments:*

1. Comment noted. BCDC is aware of and pleased to see this progress.
- 2-6. Comments noted. These comments address progress of the MHEA project and BCDC's remediation request to the USACE. They do not address the proposed amendment.
7. BCDC also looks forward to continued collaboration to accomplish the project goals of the MHEA. The proposed amendment aims to maintain a statement of that commitment in the Bay Plan.

### **Attachment B: Lt. Col. Travis Rayfield, United States Army Corps of Engineers. June 6, 2019**

1. The proposed amendment is not arbitrary in addressing the Middle Harbor Enhancement Area. As was described in the staff report proposing initiation of BPA 3-19, and the public hearing to initiate BPA 3-19, the initiation of this amendment process was directly related to staff's proposed removal of Dredging Policy 11b, which addresses the MHEA, from the Bay Plan (BPA 1-17). The MHEA project is unique in its size, extent of delay, and direct reference in a policy that limits other habitat projects in the Bay until its completion. It is because of the unique situation of this project that BCDC recommends addressing it through the Bay Plan. Additionally, the proposed amendment does not retroactively apply new policies or requirements. It states that the work that already was intended to be completed should be completed. However, the draft policy language proposed here is different than the draft language that was proposed in the staff report and preliminary recommendation for BPA 1-17. In response to comments received on the initial draft language, the language was altered to clarify and avoid any ambiguity about whether the policy addition was intended to impose new obligations on the existing authorization.
2. Comment noted. BCDC is glad to see this progress.
3. The proposed amendment aims to ensure that this recent progress continues and that the project is completed per the Commission's concurrence as set forth in the Letter of Agreement.

<sup>19</sup> As required by 14 CCR §11003(b)(7) and (b)(8)

4. The proposed amendment does not seek to apply a new standard to this existing project. BCDC recognizes that The Coastal Zone Management Act (CZMA) requires the USACE to be consistent with the Bay Plan as it exists at the time of its concurrence, and that the project is only required to be completed per the consistency determination and Letter of Agreement. As described in the staff report, Bay Plan policies are not intended to retroactively alter conditions of previously authorized projects or the project as authorized, nor do they have any power to do so.
5. Comment noted.

**Attachment C: David Lewis, Save the Bay. May 31, 2019**

1. Comment noted.
2. Comment noted.
3. The current amendment process does not address Dredging Policy 11b, so this comment will be addressed via the BPA 1-17 response to comments.
4. Comment noted.
5. Staff does not agree that the proposed policy would weaken efforts to secure habitat benefits of the MHEA project from the USACE and the Port of Oakland. The existing Letter of Agreement remains the enforceable document, which will be the crux of ongoing negotiations to secure the habitat benefits proposed. However, it appears that Save the Bay's concern may have been primarily in the context of BPA 1-17, in which the proposed language was suggested as a replacement for Dredging Policy 11b.
- 6-7. Staff appreciates suggested language modifications. The current amendment process does not address Dredging Policy 11b, so this comment will be addressed via the BPA 1-17 response to comments.
8. Comment noted.



**ATTACHMENT A**

**June 6, 2019**

**Larry Goldzband  
Executive Director  
Bay Conservation and Development Commission  
455 Golden Gate Avenue, Suite 10600  
San Francisco, CA 94102**

Dear Mr. Goldzband,

Please find below the statement I plan on reading at the BCDC commission hearing today regarding the Middle Harbor Enhancement Area.

Sincerely,

A handwritten signature in black ink that reads "Jan Novak".



Jan Novak, PWS  
Environmental Scientist and Planner  
Port of Oakland



# PORT OF OAKLAND

## Item #8 - Public Hearing and Possible Vote to Initiate Bay Plan Amendment 3-19 Regarding Plan Map 4

Hello BCDC Commissioners and Staff,

My name is Jan Novak. I'm a member of the Port of Oakland's (Port) Environmental Programs and Planning Department and am the Port's project manager for the Middle Harbor Enhancement Area. The Port of Oakland is the local sponsor for this project, working in conjunction with the United States Army Corps of Engineers (Army Corps). My role is to ensure that the monitoring and adaptive management programs are fully implemented.

1 I wanted to start by updating the Board on one of the primary habitat goals of the Middle Harbor Enhancement Area (MHEA) project. I am happy to report that eelgrass is being planted in the MHEA as we speak. By the end of tomorrow, we'll have between 76 and 80 planting plots within the MHEA. Our model projections for eelgrass habitat suitability, based on three years of data collection, are very encouraging for us meeting our eelgrass habitat goals.

2 Since joining the Port in October 2017, I have organized four meetings of the Technical Advisory Committee, of which BCDC is a member, and have familiarized myself extensively with the applicable permits for this area. As you may or may not know, **the project's overall goals were to create subtidal habitat that provided foraging opportunities for birds and create habitat for a wider diversity, and larger populations, of prey-based fish. I'm pleased to report that these goals have unequivocally been accomplished.** This is well documented in our comparative surveys of 1997 pre-project and 2004-5 post-project conditions, which show significant increases in the presence of prey-based fish species and least terns foraging in the MHEA.

3 We look forward to initiating the monitoring period surveys, that now commence after the planting of the eelgrass. For the period since our last surveys were performed, we can utilize citizen science as a proxy for the MHEA's habitat values. This is data collected by the general public, such as the avid Bay Area birding community. From 2010 through the present, 850 bird checklists have been created for the MHEA on the eBird website, which identify 172 species of birds. Many lists show hundreds or thousands of birds present. For comparison's sake, the 2004 surveys of the Deepwater Middle Harbor Naval base performed before the MHEA restoration found only 38 species of birds, with a few hundred birds present (mostly less desirable gulls and regionally common cormorants). Most excitingly, the Federally Endangered California Least Tern and the Brown Pelican, which was a Federally threatened species during the planning stages of this project, are now regular visitors and foragers in the MHEA, just as this restoration project intended. It should come as no surprise then, that the Golden Gate Audubon Society lists the MHEA as a local birding hot spot on their website.



## PORT OF OAKLAND

Regarding the ancillary project features which BCDC Staff is currently very focused on, we are talking about a 3-5-acre educational marsh, an approximately 3-acre area of submerged land seaward of the beach, and 4,500 square feet of avian island roosting habitat. For context, the MHEA area is 189 acres, of which 181 acres are functioning well and meeting all permit conditions by any standard.

4 We acknowledge that much of the planned marsh is currently a mudflat as it was underfilled during design and construction. What makes marsh creation challenging, is that eelgrass and marshes are competing environments. Eelgrass beds, the primary habitat goal in the MHEA, exist in areas with low sediment loads in the water columns, as the eelgrass needs clear water in order to photosynthesize. Marshes exist in areas with high sediment content in the water column. Restored marshes are typically underfilled with the goal of sediment accreting over time. For the MHEA educational marsh, as it was originally planned, to be developed to fruition in a sustainable manner, it will need to be designed in a way that reconciles these naturally competing and mutually incompatible forces.

5 We are also aware of BCDC Staff's complaints that the submerged land seaward of the beach area is muddy and is apparently less attractive to swimmers than Staff would like. Indeed, BCDC staff has described this natural condition as impeding public access to the Bay. Based on the plain reading of the applicable permit and a detailed review by the Port's special counsel, the Port simply cannot agree to this characterization. This is the San Francisco Bay and it will never look like San Francisco's Ocean Beach. Nothing in the applicable permit conditions ever contemplated that kind of beach for this area. The reality for this area, similar to the marsh, is that sandy beaches simply do not occur naturally in low energy environments, such as the MHEA. As every scientist will concur, sandy beaches require significant wave energy to sort material. As with the marsh, a sustainable beach area would need to be designed to be self-sustaining with no possibility of natural recharge. While the Army Corps and Port have absolutely committed to reviewing and evaluating this issue further, we don't believe the type of beach now being envisioned by BCDC Staff is feasible, without regular massive and extremely costly artificial sand recharges in the beach area. This is in direct conflict the one of the MHEA plan goals, which is for the site to be self-sustaining. It is also anathema to the natural habitat of the Bay.

6 The avian islands were designed primarily to ensure the MHEA hydrology for subtidal habitat functioned properly. The goal was to make them as small as possible to reduce the amount of fill in the Bay. Ironically, now they are being criticized for being too small and providing insufficient high water refugia. Again, the Army Corps and Port have committed to further evaluating these areas. We will specifically be reviewing the feasibility of adaptive management to provide high water refugia within the MHEA in other locations that would be easier to reach with mechanical equipment, thus reducing impacts to current MHEA habitats.



## **PORT OF OAKLAND**

7 In closing, as the local sponsor, it is our goal to make this project as successful as possible. We welcome working collaboratively with BCDC on accomplishing project goals through sound science and adaptive management. However, the USACE and the Port have been spending a little too much of our bandwidth responding to aggressive BCDC enforcement threats. We would prefer to focus our time on collaborating with BCDC Staff to develop practical, feasible, and deliverable project solutions. Thank you for your time.



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

ATTACHMENT B

June 6, 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) proposal to add an amendment to the Bay Plan Dredging policies, Bay Plan Map 4 regarding the Middle Harbor Enhancement Area (MHEA). The United States Army Corps of Engineers (Corps) cannot support the amendment as it arbitrarily singles out the MHEA, retroactively applying new rules to a project that BCDC has already deemed consistent in its 2001 Letter of Agreement, Consistency Determination No. C2000.014 (LOA).

2 The Corps has been working diligently with the Technical Advisory Committee (TAC) and BCDC to meet the original intent and performance criteria for the MHEA, as outlined in the "Middle Harbor Enhancement Area Construction Period and Long-term Monitoring, Maintenance and Adaptive Management Program" (3M Program). Specifically, the Corps is currently executing its eelgrass planting plan, which will plant over 100 acres, the maximum area allowed, of eelgrass at a greater density than previously designed. The Corps hopes that this aggressive planting program will result in approximately 50 acres of eelgrass establishment, well over the 18.4 acres requested in BCDC's November 6, 2018 letter and the 15 acres originally committed to in the 3M Program. The Corps made BCDC aware of this fact in our March 13, 2019 letter and in numerous conversations with BCDC staff. It is unclear what BCDC hopes to gain from this amendment, when the MHEA is executing plans that are already expected to exceed the Project's original goals.

3  
4 The Coastal Zone Management Act (CZMA) requires the Corps to be consistent with the Bay Plan as it exists at the time of its concurrence. The Corps has abided with that requirement and is committed to honoring the LOA. However, this amendment seeks to apply an entirely new standard solely on an already approved project, which amounts to an impermissible second bite at the consistency apple. Neither the CZMA nor its regulations endorse this type of action. The result would be that project proponents could not rely on BCDC's decisions and therefore, would never be able to appropriately plan.

5 The Corps strongly urges BCDC to reject this amendment. Implementation would do nothing to improve the status of the MHEA and the precedent set by this amendment would only endanger support for future federal projects, by penalizing any project that might fall behind schedule and exponentially increasing project costs. This amendment would tip the balance too far against worthy environmental restoration projects that due to unforeseen circumstances might slip their schedule.

Sincerely,

RAYFIELD.TRAVIS Digitally signed by  
.JAY.1161002867 RAYFIELD.TRAVIS.JAY.1161002867  
Date: 2019.06.06 09:15:16 -07'00'

TRAVIS J. RAYFIELD  
Lieutenant Colonel, U.S. Army  
Commanding



## ATTACHMENT C

May 31, 2019

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

Dear Mr. Chairman and Commissioners:

1 We write with objections to language in the preliminary recommendation for Bay Plan Amendment No. 1-17 concerning the use of fill for creation of habitat in the Bay. As the organization that led the creation of BCDC and the Bay Plan decades ago, Save The Bay strongly supports Plan amendments that strengthen protection and enhance restoration of the Bay's natural resources, that improve protection of the public's right to access the Bay shoreline, and that protect water-dependent uses of the shoreline for commerce and recreation.

2 Save The Bay has for many years encouraged BCDC to recognize the urgency of adapting to climate change by updating Bay Plan policies, including to facilitate accelerated permitting and implementation of tidal marsh habitat restoration projects that require placement of fill. Most of the language recommended by staff this month does advance the goal of increasing habitat restoration using placement of appropriate fill material.

3 However, the suggested changes to dredging policy 11b undercut the original purpose and intent of that policy, which has still not achieved its goal. While few commissioners may know the history of dredging policy 11b, it was itself an amendment to the Bay Plan two decades ago whose sole purpose was to permit the Port of Oakland to place more than 5 million cubic yards of dredged material from its 50-foot channel deepening project as "fill" in the Port's decommissioned Middle Harbor. The Port aimed to reduce the cost of channel deepening by slurring the dredged material to this adjacent Middle Harbor site, instead of transporting it by barge to a more distant reuse or ocean disposal site. Without the then-new policy 11b, BCDC could not legally approve the Port's project to change a deep hole to a shallow hole and establish eelgrass habitat on top of it. This unprecedented effort was dubbed a "pilot project" that could not be repeated unless and until it was successful, per policy 11b. As the current BCDC staff acknowledges:

"the Commission amended the Bay Plan in 2000 to ensure that additional large projects using dredged sediment for Bay restoration could not occur until the Middle Harbor project was successfully completed (BPA 3-00.) The Middle Harbor project is currently about 14 years behind schedule in completing the habitat features"<sup>1</sup>

Save The Bay and other stakeholders negotiated that agreement with the Port of Oakland, U.S. Army Corps of Engineers and BCDC. Unfortunately, despite many years of effort and millions of

---

<sup>1</sup> BCDC Staff Report: "Bay Fill for Habitat Restoration, Enhancement, and Creation in a Changing Bay," May 24, 2019, p.11

dollars, the Middle Harbor Enhancement Area has not yielded successful creation of promised habitat. While the fish and wildlife did endure environmental harm from turbidity and other impacts during the channel's dredging, the Bay has not yet received the required environmental benefits that are now many years overdue. As the staff report underscores:

While the project has progressed since its initial construction, it is still significantly behind schedule and the regulatory agencies, Save the Bay, the Sierra Club, Audubon Society, and others are concerned that it will not meet its proposed habitat enhancement goals.<sup>2</sup>

BCDC's efforts to secure full achievement of the Middle Harbor Enhancement Area's benefits from the Port of Oakland and the U.S. Army Corps of Engineers have continued without success for many years, and the federal consistency determination used to enable the project (Consistency Determination No. C2000.014.01) has proven challenging to enforce. BCDC continues to seek remedial action from the Corps of Engineers, to make the project consistent with original USACE commitments and to compensate for the temporal loss of habitat benefits during substantial project delays. [See BCDC's detailed letter of November 6, 2018, attached]

- 4 The incomplete status of the Middle Harbor Enhancement Area and the Commission's continuing efforts to secure the project's promised habitat benefits for the Bay make staff's recommendation to eliminate all of Dredging Policy 11b, and to instead relegate this important requirement to a note on Plan Map 4, inappropriate and counterproductive.

- 5 It is disappointing that the staff report, "Bay Fill for Habitat Restoration, Enhancement, and Creation in a Changing Bay," does not even mention Consistency Determination C2000.014, when BCDC efforts to secure required habitat benefits from the USACE and Port of Oakland are still in process. The staff's proposed draft of a Plan map note would weaken those efforts, suggesting merely that the USACE and Port "should provide habitat benefits ...[and] complete work as quickly as possible," when in fact those habitat benefits are legally required by C2000.014.01 and are long overdue, as the Commission's November 6, 2018 letter to USACE emphasizes.

- 6 Bay Plan Amendment No. 1-17 should allow for and encourage the appropriate use of fill material – including dredged material from the Bay and material from upland – for habitat restoration, without eliminating Dredging Policy 11b. Instead, that policy should be updated to reflect the original purpose and intent of the Bay Plan Amendment that created it, and should be strengthened to emphasize that the Middle Harbor Enhancement Project must be completed successfully to provide required benefits. This should be a pre-requisite to the Commission approving any fill project similar to the Middle Harbor Enhancement Project's particular scale, bathymetric modification, and type of habitat creation. It should not remain a pre-requisite to approval of fill for tidal marsh or similar habitat.

- 7 This outcome can best be accomplished by modifying Dredging Policy 11b to require that "the Commission should not authorize dredged sediment disposal projects in the Bay and certain waterways to create, enhance or restore sub-aquatic habitat in shallow water, except for projects using a minor amount of dredged sediment, until the Oakland Middle Harbor Enhancement project authorized by the Commission is completed successfully and provides the required benefits, including remedial action for temporal loss of benefits.

---

<sup>2</sup> Ibid., p. 19.

8

We have made these suggestions to staff and now make them directly to the Commission in support of the goal Save The Bay has long championed – accelerating Bay habitat restoration to keep pace with rapid climate change and rising sea levels. That goal can and must be accomplished without relieving already-authorized projects and the agencies responsible for them from obligations in BCDC permits and Consistency Determinations, especially projects whose authorization required unprecedented amendment of the Bay Plan itself. The Commission should zealously protect and reinforce those obligations, especially at a time when the integrity of its enforcement regime and the fairness of its enforcement practices is under intense scrutiny in the wake of the State of California’s recent audit of the Commission.

We offer our continued assistance to you and your staff on this issue, and look forward to a resolution of this matter that Save The Bay can fully support.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "David Lewis". The signature is written in a cursive, flowing style.

David Lewis  
Executive Director

Attachment