

# San Francisco Bay Conservation and Development Commission

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TO: Commissioners and Alternates

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SUBJECT: **Memorandum regarding Public Trust Findings (Appendix 3 to Bay Plan Amendment No. 1-26 Staff Report and Preliminary Recommendation)**  
(For Commission consideration on October 15, 2026)

## Memorandum regarding Public Trust Findings

### I. Introduction

The doctrine that the public owns the right to tidelands is traceable to Roman law. From this origin, the English common law evolved the concept of the public trust, under which the sovereign owns all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people. After the American revolution, the people of each state acquired absolute right to all navigable waters, and the soils under them, for their own common use. When California was admitted to statehood, the State acquired title as trustee for the public in the tidelands waterways within its borders.<sup>1</sup>

The public's rights in tidelands traditionally included navigation, commerce, and fishing. However, the objectives of the public trust have evolved with changing public perception of the values and uses of waterways, and the public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. The permissible range of public uses are far broader than the traditional triad of uses and include recreation and the preservation of tidelands in their natural state as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of an area.<sup>2</sup>

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<sup>1</sup> *National Audubon Society v. Superior Court* (1983) 33 Cal. 3d 419, 434; *City of Berkeley v. Superior Court* (1980) 26 Cal. 3d 515, 521; *Marks v. Whitney* (1971) 6 Cal. 3d 251, 258 n.5.

<sup>2</sup> *National Audubon Society v. Superior Court*, 33 Cal. 3d at 434-35; *City of Berkeley v. Superior Court*, 26 Cal. 3d at 521; *Marks v. Whitney* (1971) 6 Cal. 3d at 259-260.



Virtually all of the unfilled tidelands and submerged lands within the Commission's jurisdiction are subject to the public trust, as is the Bay itself.<sup>3</sup> Moreover, the Legislature enacted the McAteer-Petris Act in the State's capacity as trustee of tidelands.<sup>4</sup>

The Legislature has directed that the San Francisco Bay Plan and any amendments thereto "shall constitute the plan for the commission to use to establish policies for reviewing and acting on projects."<sup>5</sup> The Bay Plan currently contains a section entitled *Public Trust* with six findings and one policy. The Bay Plan also contains a section entitled *Filling for Public Trust Uses on Publicly-Owned Property Granted in Trust to a Public Agency by the Legislature* with one policy. Other Bay Plan sections contain findings or policies that reference the public trust or the Commission's responsibilities to ensure that projects do not interfere with public trust needs.<sup>6</sup>

As noted above, the Bay Plan's *Public Trust* section contains six findings (designated Findings A through F.) and one policy. Among other proposed changes to the Bay Plan, BPA 1-26 would revise two existing *Public Trust* findings, add five new *Public Trust* findings, and add one new *Public Trust* policy. The remainder of this memorandum provides legal and factual support for the existing, revised, and new *Public Trust* findings. Those findings, in turn, provide legal and factual support for the existing and proposed new *Public Trust* policies.

## II. Bay Plan Public Trust Findings

### A. Finding A

*Public Trust* Finding A states "Virtually all the publicly and privately-held unfilled tidelands and submerged lands within the jurisdiction of the Commission are subject to the public trust."

*National Audubon Society v. Superior Court* (1983) 33 Cal. 3d 419, 434 (all navigable waterways and the lands lying beneath them are subject to the public trust); *City of Berkeley v. Superior Court* (1980) 26 Cal. 3d 515, 534 (submerged lands and lands subject

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<sup>3</sup> See existing *Public Trust* Finding A, quoted in the text below, and the accompanying authorities cited and discussed in support of that finding.

<sup>4</sup> See existing *Public Trust* Finding E, quoted in the text below, and the accompanying authorities cited and discussed in support of that finding.

<sup>5</sup> Government Code § 66651.

<sup>6</sup> See, e.g. *Commercial Fishing* Finding A (commercial fishing facilities are consistent with state policies promoting public trust); *Recreation* Finding H (residential use in live-aboard boats is not a public trust use); *Other Uses of the Bay and Shoreline* Finding C (a houseboat is not a use that furthers the public trust), Policy 4.g and 4.h (if the Commission authorizes houseboats used for residential purposes in existing houseboat marinas, the project should provide for termination of residential use when the lands are needed for public trust purposes, and the Commission should conduct a study of public trust needs of the project area within five years of project authorization and every five years thereafter).

to tidal action that have not been filled or substantially improved remain subject to the public trust); *San Francisco Baykeeper, Inc. v. State Lands Com.* (2015) 242 Cal. App. 4th 202, 232 (when California became a state it succeeded to sovereign ownership of various tidelands and submerged lands under the common law trust doctrine); Government Code §§ 66610(a) (the Commission’s “Bay” jurisdiction includes “all areas subject to tidal action” within specified geographic boundaries) and 66610(e) (the Commission’s “certain waterways” jurisdiction includes “all areas subject to tidal action” on or tributary to the listed portions of specified waterways).

**B. Finding B**

*Public Trust* Finding B states “The public trust is a paramount public property right held in trust by the state for the benefit of the public.”

*National Audubon Society*, 33 Cal. 3d at 441 (the public trust is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands); *City of Berkeley v. Superior Court* 26 Cal. 3d at 521 (under the public trust doctrine the rights of the public prevail over the rights of private persons claiming under tidelands grants); *Marks v. Whitney* (1971) 6 Cal. 3d 251, 259 (public right to tideland not divested or affected by state’s sale of tideland; buyer received title to the soil subject the public right of navigation); *San Francisco Baykeeper, Inc. v. State Lands Com.* (2015) 242 Cal. App. 4th at 233 (the public trust doctrine functions largely as a public property right of access to public trust natural resources for various public purposes).

**C. Finding C**

Proposed *Public Trust* Finding C states “Title to this lands subject to the public trust ownership is vested in the State Lands Commission or legislative grantees.”<sup>7</sup>

Public Resources Code §§ 6216, 6301. *See City of Berkeley v. Superior Court* 26 Cal. 3d at 521 (when California was admitted to statehood, it succeeded to title in the tidelands within its borders not in its proprietary capacity but as trustee for the public).

**D. Finding D**

*Public Trust* Finding D states “The purpose of the public trust is to assure that the lands to which it pertains are kept for trust uses, such as commerce, navigation, fisheries, wildlife habitat, recreation, and open space.”

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<sup>7</sup> The revisions to *Public Trust* Finding C and Finding F are proposed because while title to lands subject to the public trust is vested in the State Lands Commission or legislative grants, the public trust is a property right rather than an ownership interest in land.

*National Audubon Society*, 33 Cal. 3d at 434 (the public trust is not limited to the traditional triad of uses — navigation, commerce and fishing; the public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs); *City of Berkeley v. Superior Court* 26 Cal. 3d at 521 (the scope of the public’s right in tidelands is far broader than navigation, commerce, and fishing and includes the right to hunt, bathe or swim, and the right to preserve the tidelands in their natural state as ecological units for scientific study); *Marks v. Whitney*, 6 Cal. 3d at 259-260 (one of the most important public uses encompassed within the tidelands trust “is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area”); *San Francisco Baykeeper, Inc. v. State Lands Com.* 242 Cal. App. 4th at 236 (by its very essence, a public trust use facilitates public access, public enjoyment, or public use of trust land) and 238 (the public trust doctrine protects and promotes public uses).

**E. Finding E**

*Public Trust* Finding E states “The McAteer-Petris Act and the Bay Plan are an exercise of authority by the Legislature over public trust lands and establish policies for meeting public trust needs.”

*City of Berkeley v. Superior Court*, 26 Cal. 3d at 531-32 (McAteer-Petris Act was enacted in the state’s capacity as trustee of tidelands) (citing *People ex rel. San Francisco Bay Conservation and Development Com. v. Town of Emeryville* (1968) 69 Cal. 2d 533, 544-549); *Town of Emeryville*, 69 Cal. 2d at 549 (McAteer-Petris Act amends, in effect, the terms of tidelands grant to require city to obtain a permit from the Commission before recommencing filling and diking activity based on any newly developed plans); *Zack’s Inc. v. City of Sausalito* (2008) 165 Cal. App. 4<sup>th</sup> 1163, 1188 (McAteer-Petris Act designed to protect tidelands and submerged lands); Government Code § 66600 (Legislature finds and declares that the public interest in San Francisco Bay is in its beneficial use for a variety of purposes, and that the public has an interest in the bay as the most valuable single natural resource of an entire region); Government Code §§ 66603 (Legislature finds and declares that the San Francisco Bay Plan is a comprehensive and enforceable plan for the conservation of the water of the bay and the development of its shoreline) and 66651 (the San Francisco Bay Plan and any amendments thereto shall constitute the plan for the Commission to use to establish policies for reviewing and acting on projects).

**F. Finding F**

Proposed *Public Trust* Finding F states “As a result, the public trust ~~ownership~~ provides additional support for Commission decisions affecting such lands.”

See authorities cited above in support of Findings A through E.

**G. Finding G**

Proposed *Public Trust* Finding G states “Dredging of sediment from lands subject to the public trust is necessary to meet public trust needs including navigation, commerce, and recreational boating.”

*City of Berkeley v. Superior Court* 26 Cal. 3d at 521 (early cases expressed the scope of the public's right in tidelands as encompassing navigation, commerce and fishing); *Marks v. Whitney*, 6 Cal. 3d at 259 (public trust easements traditionally defined in terms of navigation, commerce, and fisheries); *San Francisco Baykeeper, Inc. v. State Lands Com.*, 242 Cal. App. 4th at 238 (the public trust doctrine protects and promotes public uses, including commerce and navigation). Government Code § 66663 (Legislature finds and declares that dredging is essential to establish and maintain navigational channels for maritime commerce, which contributes substantially to the local, regional, and state economies, as well as for military navigation, flood control, recreational boating, and other public purposes.).

**H. Finding H**

Proposed *Public Trust* Finding H states:

As sea level continues to rise, it is necessary to preserve, restore, and enhance bay and shoreline habitats on lands subject to the public trust in San Francisco Bay and along its shoreline. By 2100, an estimated 450 to 650 million metric tons of sediment is needed to preserve, restore, and sustain bay and shoreline habitats and to adapt to rising sea levels.

Dusterhoff, SD; McKnight, K; Grenier, L; Kauffman, N. 2021. Sediment for Survival: A Strategy for the Resilience of Bay Wetlands in the Lower San Francisco Estuary. SFEI Contribution No. 1015. San Francisco Estuary Institute: Richmond, CA. 150 pgs.

**I. Finding I**

Proposed *Public Trust* Finding I states, “Sediment dredged from lands subject to the public trust in the Bay and its tributaries is a public trust resource.”

*San Francisco Baykeeper, Inc. v. State Lands Com.* 242 Cal. App. 4th at 232 (issue on appeal was whether public trust was violated by agency's failure to consider whether sand mining leases constitute a permissible use of public trust property), 238-239

(rejecting factual contention that sand mining does not deplete a trust resource; during CEQA review, State Lands Commission acknowledged that sand mining depletes a trust resource), and 239 (sand mining involves private use of public trust property); Government Code § 66663.1(b) (Legislature finds and declares that it is in the interest of the state to promote the use of dredged materials as a resource, such as creating new wetlands and maintaining existing levees).

**J. Finding J**

Proposed *Public Trust* Finding J states:

Beneficial reuse of dredged sediment protects public trust uses and meets public trust needs by preserving and restoring Bay and shoreline habitats as ecological units to provide food and habitat for birds and wildlife and for scientific study, by preserving and restoring tidelands and the shoreline for public enjoyment, including recreation, public access, and open space, and by increasing the resilience of Bay and shoreline habitats to rising sea levels and flooding. Beneficial reuse of dredged sediment on lands subject to the public trust is a public trust use of a public trust resource.

*National Audubon Society*, 33 Cal. 3d at 435 (protection of ecological and recreational values are among the purposes of the public trust) and 441 (public trust doctrine is affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands); *Berkeley v. Superior Court*, 26 Cal. 3d at 521 (the scope of the public's right in tidelands includes the right to preserve tidelands in their natural state as ecological units for scientific study); *Marks v. Whitney*, 6 Cal. 3d at 259-260 (one of the most important public uses encompassed within the tidelands trust "is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area"); *San Francisco Baykeeper, Inc. v. State Lands Com.* (2018) 29 Cal. App. 5th 562, 570 (a public trust use is a use that facilitates public access, public use, or public enjoyment of trust land) and 578 (a public trust use is a use that facilitates public access and enjoyment of trust property for such purposes as navigation, commerce, and recreation); *San Francisco Baykeeper, Inc. v. State Lands Com.*, 242 Cal.App.4th at 233 (an important public trust use is the preservation of trust lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area), 236 (by its very essence, a public trust use facilitates public access, public enjoyment, or public use of trust land) and 238

(the public trust doctrine protects and promotes public uses); Government Code § 66663.1(b) (Legislature finds and declares that it is in the interest of the state to promote the use of dredged materials as a resource, such as creating new wetlands and maintaining existing levees).

**K. Finding K**

Proposed *Public Trust* Finding K states:

When dredged sediment is dumped at designated Bay disposal sites, the sediment is discarded as a waste and dissipates into adjacent deep water channels and shoals. When dredged sediment is dumped at the deep ocean disposal site, it is discarded as a waste and entirely removed from the Bay system. Dumping of dredged sediment at aquatic disposal sites in the Bay or ocean precludes beneficial reuse of dredged sediment to protect public trust uses and meet public trust needs and constitutes waste and an unreasonable use of this public trust resource.

Pub. Res. Code § 40191 (“solid waste” means all solid, semisolid, and liquid wastes); Water Code § 13050(d) (“‘Waste’ includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation...”); Government Code § 66663.1(b)(Legislature finds and declares that it is in the interest of the state to promote the use of dredged materials as a resource, such as creating new wetlands and maintaining existing levees). See California Constitution, Article X, § 2 (the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented); *Joslin v. Marin Muni. Water Dist.* (1967) 67 Cal. 2d 132, 141 (use of stream waters to expose or to carry and deposit sand, gravel, and rock is as a matter of law unreasonable within the meaning of Cal. Const., Article X, § 2); Public Resources Code § 3300 (the unreasonable waste of natural gas is opposed to the public interest and is unlawful); *Richfield Oil Corp. v. Crawford* (1952) 39 Cal. 2d 729, 738 (the prevention of waste of oil and gas is a matter of public concern, and the California Supreme Court has repeatedly upheld the legislative power to prevent such waste); *People v. Associated Oil Co.* (1930) 211 Cal. 93, 102-05 (the property right of the owner of land in and to the gas and oil beneath the surface is not an absolute one; the public has an interest in the preservation from waste and destruction of certain natural resources due to their nature and character, and the waste of certain natural resources may be regulated and the unreasonable waste thereof may be prohibited by the state).