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10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 12 SAN FRANCISCO DIVISION

13  
 14  
 15 **SAN FRANCISCO BAY CONSERVATION AND  
 DEVELOPMENT COMMISSION,**

16 Plaintiff,

17 v.

18  
 19 **UNITED STATES ARMY CORPS OF ENGINEERS;  
 LIEUTENANT GENERAL TODD T. SEMONITE,  
 20 IN HIS OFFICIAL CAPACITY; LIEUTENANT  
 COLONEL JOHN C. MORROW, IN HIS OFFICIAL  
 21 CAPACITY; AND JO ELLEN DARCY, ASSISTANT  
 SECRETARY OF THE ARMY FOR CIVIL  
 22 WORKS, IN HER OFFICIAL CAPACITY,**

23 Defendants.

**COMPLAINT FOR DECLARATORY  
 AND INJUNCTIVE RELIEF**

**(Coastal Zone Management Act, 16 U.S.C.  
 § 1451 *et seq.*; 33 C.F.R. Parts 335-338; and  
 Administrative Procedure Act, 5 U.S.C. §  
 551, 701 *et seq.*)**

1 Plaintiff San Francisco Bay Conservation and Development Commission alleges as follows:

2 **INTRODUCTION**

3 1. Plaintiff San Francisco Bay Conservation and Development Commission (Commission)  
4 brings this action against defendants the United States Army Corps of Engineers (Corps);  
5 Lieutenant General Todd T. Semonite, Chief Engineer and Commanding General of the Corps;  
6 and Lieutenant Colonel John C. Morrow, District Engineer of the San Francisco District of the  
7 Corps and Jo Ellen Darcy, Assistant Secretary of the Army for Civil Works (collectively,  
8 “Federal Defendants”) to require Federal Defendants to comply with the federal Coastal Zone  
9 Management Act (CZMA) and its implementing regulations, the Corps’ own dredging  
10 regulations, 33 C.F.R. Parts 335-338 (Corps Dredging Regulations), and the federal  
11 Administrative Procedure Act (APA) in conducting maintenance dredging activities of the federal  
12 deep draft navigation channels in San Francisco Bay (the Bay) from now through the end of  
13 federal fiscal year 2017.

14 2. The CZMA and the Corps Dredging Regulations require Federal Defendants’ maintenance  
15 dredging of the federal navigation channels in the Bay and management of associated dredged  
16 material to be consistent to the maximum extent practicable with the enforceable policies of the  
17 state’s federally-approved coastal zone management program (state coastal program). The San  
18 Francisco Bay Plan (Bay Plan) and McAteer-Petris Act (Cal. Gov. Code §§ 66600, *et seq.*) are a  
19 portion of the San Francisco Bay segment of California’s federally-approved coastal program that  
20 is administered by the Commission (Commission Program).

21 3. In order to satisfy the CZMA’s federal consistency requirement, prior to engaging in  
22 maintenance dredging activities in the Bay, the Corps is required to submit a determination to the  
23 Commission demonstrating that such activities will be consistent to the maximum extent  
24 practicable with the enforceable policies of the Commission Program. The CZMA requires the  
25 Commission to concur, conditionally concur or object to the Corps’ determination. The CZMA  
26 requires Federal Defendants to comply with any conditions imposed by the Commission to ensure  
27 consistency with the Commission Program unless they are legally prohibited from doing so.

28

1 4. In March and April of 2015, Federal Defendants submitted an initial and a supplemental  
2 and revised consistency determination (hereafter “Consistency Determinations”) to the  
3 Commission for maintenance dredging of the deep draft navigation channels in the Bay for fiscal  
4 years 2015-2017.<sup>1</sup> These channels are: Oakland Harbor, Richmond Harbor, Redwood City  
5 Harbor, Pinole Shoal Channel, Suisun Bay Channel/New York Slough, and the San Francisco  
6 Main Ship Channel (which is outside the Bay and the Commission’s jurisdiction).

7 5. Federal Defendants’ Consistency Determinations proposed dumping of dredged material at  
8 unconfined disposal sites in the Bay and along San Francisco’s ocean shoreline and at a federally-  
9 designated deep ocean disposal site. The Consistency Determinations also gave Federal  
10 Defendants complete discretion as to the manner of dredging, including unrestricted use of  
11 hydraulic (hopper) dredges, which Federal Defendants have admitted take (e.g. kill) delta smelt,  
12 longfin smelt, and other native aquatic species. Delta smelt are listed as threatened under federal  
13 Endangered Species Acts (ESA) and endangered under the state ESA, and longfin smelt are a  
14 candidate for listing under the federal ESA and listed as threatened under the state ESA.

15 6. Federal Defendants’ proposed dredging is inconsistent with the enforceable policies of the  
16 Commission Program, which requires, *inter alia*: 1) maximal beneficial reuse of dredged material  
17 as a resource to create and maintain levees and dikes, to create, enhance and restore tidal marshes  
18 and wetlands, to cover and seal sanitary landfills, and as fill in construction projects; 2) reduction  
19 of in-Bay disposal of dredged materials; 3) preservation of and avoidance of harm to the Bay’s  
20 fish and wildlife resources and their habitat; and 4) protection of water quality, including  
21 designated beneficial uses, in the Bay. Bay Plan Dredging Findings and Policies 1-3, 5; Bay Plan  
22 Fish, Other Aquatic Organisms and Wildlife (Fish and Wildlife) Findings and Policies 1 and 2;  
23 Bay Plan Subtidal Areas Findings and Policy 1; Bay Plan Mitigation Findings and Policy 1; Bay  
24 Plan Water Quality Findings and Policy 2; Cal. Gov. Code §§ 66600-66605, 66663.1, 66663.2.

25  
26 \_\_\_\_\_  
27 <sup>1</sup> Federal Defendants originally submitted a consistency determination in February 2015  
28 for maintenance dredging of the federal deep draft navigation channels in the Bay for fiscal years  
2015-2024. At the Commission staff’s request, Federal Defendants subsequently submitted a  
consistency determination for fiscal years 2015-2017.

1 7. The Commission conditionally concurred in Federal Defendants' Consistency  
2 Determinations in a Letter of Agreement dated June 15, 2015, imposing a number of special  
3 conditions designed to ensure that Federal Defendants' dredging activities would be consistent  
4 with the enforceable policies of the Commission Program to the maximum extent practicable.  
5 Defendant Morrow signed the Commission's conditional concurrence Letter of Agreement on  
6 behalf of the Corps on June 23, 2015. However, on November 10, 2015, Federal Defendants  
7 belatedly reversed course and notified the Commission that they would not comply with four of  
8 those conditions (the "Contested Conditions").

9 8. The four Contested Conditions require the Corps to: 1) beneficially reuse a minimum of  
10 40% of dredged material for wetland restoration and other beneficial projects and dispose of a  
11 maximum of 20% of dredged material in the Bay, commencing in calendar year 2017; 2) reduce  
12 the use of hydraulic (hopper) dredging equipment to prevent killing of delta smelt and longfin  
13 smelt, commencing in federal fiscal year 2017; 3) seek additional funding, if necessary, to  
14 implement the foregoing two conditions; and 4) obtain a Clean Water Act (CWA) Section 401  
15 water quality certification for the Corps' dredging activities from the San Francisco Bay Regional  
16 Water Quality Control Board (Regional Board).

17 9. The Contested Conditions are critical for ensuring consistency with the Commission  
18 Program's enforceable policies pertaining to dredging and protection of the Bay's fish and  
19 wildlife resources and their habitat and water quality, and for preventing undue environmental  
20 harm to the land and water uses and natural resources of the Bay. Maximizing beneficial reuse  
21 and reducing unconfined disposal of dredged sediment in the Bay as required by, *inter alia*, Bay  
22 Plan Dredging Policies 1 and 5 is important because the Bay is now in a period of sediment  
23 supply decline, and rising sea levels due to climate change have increased the need for the  
24 resiliency of Bay tidal marshes and associated habitat through tidal marsh and wetlands  
25 restoration projects.

26 10. In addition, protecting and avoiding harm to the Bay's endemic fish species and their  
27 habitat as required by, *inter alia*, Bay Plan Fish and Wildlife Policies 1 and 2 is important because  
28 "[f]ish, other aquatic organisms and wildlife . . . provide food, economic gain, and recreation" and

1 “are a resource for scientific research and education,” among other benefits. Bay Plan Fish and  
2 Wildlife Finding C. Delta smelt, in particular, are literally on the brink of extinction and require  
3 implementation of all reasonable and necessary protection measures in order to prevent complete  
4 extirpation of this species, and longfin smelt are also highly imperiled.

5 11. Federal Defendants are not legally prohibited from implementing any of the Contested  
6 Conditions by any statute or regulation and in fact are legally required to implement the  
7 Contested Conditions under the CZMA and its implementing regulations and the Corps Dredging  
8 Regulations. The Corps Dredging Regulations require all dredging to be conducted in an  
9 “environmentally acceptable” manner that satisfies the disposal criteria of CWA regulations  
10 referred to the Section 404(b)(1) Guidelines, and the provisions of other federal laws, including  
11 the CZMA. 33 C.F.R. §§ 335.2, 335.7, 336.1(a), (b)(4), (8)-(9), (c).

12 12. In violation of the CZMA and its implementing regulations, the Corps Dredging  
13 Regulations, and the APA, Federal Defendants have arbitrarily and capriciously determined that  
14 they will not beneficially reuse any dredged material and instead will dump it in unconfined  
15 disposal sites in the Bay and the ocean, and will continue unrestricted use of hydraulic dredging  
16 equipment that kills delta smelt and longfin smelt. In making this decision, Federal Defendants  
17 rely on a gross misreading of the CZMA and the Corps Dredging Regulations, asserting that the  
18 least-cost, less environmentally protective alternative is the only alternative that Federal  
19 Defendants are legally authorized to implement under the so-called “Federal Standard” policy in  
20 the Corps Dredging Regulations.

21 13. Federal Defendants refuse to pay or even attempt to seek additional funds for any dredging  
22 alternative that is allegedly more expensive than Federal Defendants’ preferred least-cost option  
23 of simply dumping dredged material in the Bay or the ocean and continuing unrestricted use of  
24 hydraulic dredging equipment, which they incorrectly claim is required by the Federal Standard.

25 14. Federal Defendants erroneously assert that they are not legally permitted to comply with  
26 purportedly more costly but more environmentally protective alternatives, which require dredged  
27 material to be re-used for wetlands restoration and other beneficial purposes and that avoid or  
28 reduce the impacts on endangered and threatened fish. Federal Defendants claim that they can

1 only implement the Contested Conditions if the Commission or some other state entity pays for  
2 Federal Defendants' duties to comply with federal environmental laws by committing to pay the  
3 cost differential between Federal Defendants' less environmentally protective but purportedly less  
4 costly alternative and the Contested Conditions.

5 15. By this complaint, the Commission requests that this Court declare these actions of Federal  
6 Defendants to be arbitrary, capricious, an abuse of discretion and otherwise not in accordance  
7 with the law and require Federal Defendants to implement maintenance dredging of the Bay's  
8 federal navigation channels and manage dredged material in compliance with all special  
9 conditions in the Commission's June 15, 2015 conditional concurrence Letter of Agreement.

#### 10 **PARTIES**

11 16. Plaintiff San Francisco Bay Conservation and Development Commission (Commission) is  
12 an agency of the State of California created by the McAteer-Petris Act of 1965. Cal. Gov. Code  
13 §§ 66600, *et seq.* Under the McAteer-Petris Act and the Suisun Marsh Preservation Act (Cal.  
14 Pub. Res. Code §§ 29000, *et seq.*) the Commission has planning and regulatory authority over the  
15 Bay, its shoreline band, and Suisun Marsh. The Commission is the designated state coastal zone  
16 management agency under the CZMA for the San Francisco Bay portion of California's coastal  
17 zone, and is responsible for adopting, amending and implementing the Bay Plan and for  
18 implementing and enforcing the McAteer-Petris Act and the Suisun Marsh Preservation Act, the  
19 portion of the state's federally-approved coastal zone management program applicable to the Bay  
20 (Commission Program). 16 U.S.C. § 1455(d)(6). As such, the Commission has authority to  
21 determine whether federal agency activities are consistent with the enforceable policies of the  
22 Commission Program to the maximum extent practicable under the CZMA and its implementing  
23 regulations. The Commission also has the power to sue. Cal. Gov. Code § 66633(d).

24 17. Defendant United States Army Corps of Engineers (Corps) is an agency of the United  
25 States and a subdivision of the United States Department of the Army, which is in the United  
26 States Department of Defense. The Corps is responsible for, among other things, protecting the  
27 nation's rivers and harbors in a manner that meets all environmental standards and requirements  
28 and for conducting maintenance dredging of the federal navigation channels of the United States

1 to maintain the navigability of the channels to the Congressionally-authorized maximum depth or  
2 a lesser regulatory depth. Specifically, the Corps is responsible for the maintenance dredging and  
3 associated dredged material management for the deep draft navigation channels in the Bay.

4 18. Defendant Lieutenant General Todd T. Semonite is the Chief of Engineers and the  
5 Commanding General of the Corps, and is the federal official responsible for overseeing and  
6 directing the operations of the Corps, including maintenance dredging of federal navigation  
7 channels of the United States to maintain the navigability of the channels. Defendant Semonite is  
8 sued in his official capacity and bears responsibility, in whole or in part, for the acts complained  
9 of in this complaint.

10 19. Defendant Lieutenant Colonel John C. Morrow is the District Engineer of the San Francisco  
11 District of the Corps and is responsible for overseeing and directing the operations of the San  
12 Francisco District of the Corps. The San Francisco District is the district of the Corps responsible  
13 for conducting maintenance dredging of the federal navigation channels in the Bay to maintain  
14 the navigability of the channels. Defendant Morrow is sued in his official capacity and bears  
15 responsibility, in whole or in part, for the acts complained of in this complaint.

16 20. Defendant Jo Ellen Darcy is Assistant Secretary for Civil Works in the United States  
17 Department of the Army, and is responsible for establishing policy direction and providing  
18 supervision for the Department of the Army's functions relating to all aspects of the Corps' Civil  
19 Works program. Ms. Darcy's responsibilities include programs for conservation and  
20 development of the nation's water and wetland resources, flood control, navigation, and shoreline  
21 protection. Defendant Darcy is sued in her official capacity and bears responsibility, in whole or  
22 in part, for the acts complained of in this complaint.

### 23 **JURISDICTION AND VENUE**

24 21. This action arises under the federal Coastal Zone Management Act, 16 U.S.C. § 1451 *et*  
25 *seq.* (CZMA) and its implementing regulations, 15 C.F.R. Part 930; the Corps Dredging  
26 Regulations, 33 C.F.R. Parts 335-338; and the Administrative Procedure Act, 5 U.S.C. §§ 551,  
27 701 *et seq.* (APA), and is brought against a federal agency of the United States. Accordingly, this  
28 court has jurisdiction over the action under 28 U.S.C. §§ 1331, 1346(a)(2) and 1361.

1 22. An actual, present and justiciable controversy exists between the parties, and this Court has  
2 authority to grant declaratory and injunctive relief under 5 U.S.C. §§ 705 and 706 and 28 U.S.C.  
3 §§ 2201(a) and 2202. The APA waives sovereign immunity for lawsuits against agencies and  
4 officials of the United States, including defendants. 5 U.S.C. §§ 701(b)(1), 702. The  
5 Commission also is entitled to an award of costs and attorney fees pursuant to the Equal Access to  
6 Justice Act, 28 U.S.C. § 2412.

7 23. Federal Defendants' decision to refuse to comply the Commission's June 15, 2015  
8 conditional concurrence Letter of Agreement constitutes final agency action subject to judicial  
9 review under 5 U.S.C. § 704. The Commission has no other adequate judicial remedy by which  
10 to challenge Federal Defendants' final agency action. This case is ripe for judicial review  
11 because Federal Defendants have finally and unequivocally stated that they will not comply with  
12 the Contested Conditions, four conditions that the Commission imposed on their dredging  
13 activities in the Bay pursuant to the Commission's authority as a designated coastal zone  
14 management agency under the CZMA.

15 24. The Commission has suffered a legal wrong and has been adversely affected and aggrieved  
16 and injured by Federal Defendants' actions within the meaning of 5 U.S.C. § 702 and Article III  
17 of the United States Constitution. As such, the Commission has standing to bring this action.

18 25. The Commission has exhausted all available legal remedies under the CZMA prior to  
19 bringing this action, including requesting that the Secretary of Commerce mediate this dispute  
20 pursuant to the CZMA's implementing regulations, 15 C.F.R. Part 930, Subpart G.

21 26. The United States District Court, Northern District of California is the proper venue for this  
22 case under 28 U.S.C. § 1391(b) and (e)(1) because it is the district in which a substantial part of  
23 the events and omissions giving rise to the claims herein occurred and in which the property that  
24 is the subject of this action is situated.

## 25 **LEGAL BACKGROUND**

### 26 **Coastal Zone Management Act**

27 27. The CZMA permits a coastal state to submit for approval its state coastal zone management  
28 program (state coastal program) to the Secretary of Commerce, acting through the federal Office

1 of Coastal Management (OCM) within the National Oceanic and Atmospheric Administration.  
2 16 U.S.C. § 1454. OCM approval of a state coastal program provides a federally-authorized  
3 vehicle for state regulation and protection of the land and water uses and natural resources in the  
4 state's coastal zone. Such programs must meet certain stringent requirements in order to be  
5 approved. *See* 16 U.S.C. § 1455(d); 15 C.F.R. Part 923.

6 28. Once OCM approves a state coastal program, the CZMA requires, *inter alia*, all federal  
7 agency activities that affect any land or water use or natural resource in the coastal zone to be  
8 "carried out in a manner which is consistent to the maximum extent practicable with the  
9 enforceable policies" of that program. 16 U.S.C. § 1456(c)(1)(A). "Federal agency activities"  
10 include all activities initiated by a federal agency that may foreseeably affect coastal resources.  
11 15 C.F.R. § 930.31(a).

12 29. The CZMA requires each federal agency that proposes to carry out an activity that may  
13 affect any land or water use or natural resource in the coastal zone to provide a "consistency  
14 determination" to the designated state coastal zone management agency (state coastal agency --  
15 here, the Commission) at least ninety days prior to the federal agency's approval of the activity.  
16 16 U.S.C. § 1456(c)(1)(C); 15 C.F.R. § 930.36(b)(1). The consistency determination must  
17 explain whether and how the proposed federal activity is "consistent to the maximum extent  
18 practicable" with the "enforceable policies" of the federally-approved state coastal program. 15  
19 C.F.R. § 930.36(a), 930.39(a), (c), (e).

20 30. "Consistent to the maximum extent practicable" means "fully consistent with the  
21 enforceable policies of management programs unless full consistency is prohibited by existing  
22 law applicable to the Federal agency." 15 C.F.R. § 930.32(a)(1). "Enforceable policies" are  
23 "[s]tate policies which are legally binding through constitutional provisions, law, regulations,  
24 land use plans, ordinances, or judicial or administrative decisions, by which State exerts control  
25 over private and public land and water uses and natural resources in the coastal zone." 16 U.S.C.  
26 § 1453(6a); 15 C.F.R. § 930.11(h).

27 31. The CZMA and its implementing regulations explicitly prohibit reliance on a lack of funds  
28 as a criterion for determining inconsistency with a state coastal program. *See* 16 U.S.C. §

1 1456(c)(1)(B) (“[n]o . . . exemption [from the CZMA’s consistency requirement] shall be granted  
2 on the basis of a lack of appropriations unless the President has specifically requested such  
3 appropriations as part of the budgetary process and the Congress has failed to make [them]  
4 available”); 15 CFR § 930.32(a)(3) (“[t]he only circumstance where a Federal agency may rely on  
5 a lack of funding as a limitation on being fully consistent with an enforceable policy is the  
6 Presidential exemption”).

7 32. The state coastal agency has sixty days to concur, conditionally concur, or object to the  
8 federal agency’s consistency determination. 15 C.F.R. § 930.41(a). If a state coastal agency  
9 conditionally concurs in a consistency determination, and the federal agency does not agree to  
10 comply with the conditions, then the state coastal agency’s conditional concurrence is treated as  
11 an objection to the federal agency activity. 15 C.F.R. § 930.4(b).

12 33. If the state and federal agency cannot resolve their differences within the time remaining of  
13 the initial ninety-day period, then the federal agency may not proceed with the activity unless the  
14 federal agency finds that: 1) consistency with the enforceable policies of the state’s coastal  
15 program “is prohibited by existing law applicable to the federal agency” and the federal agency  
16 has “clearly described, in writing, to the State agency the legal impediments to full consistency;”  
17 or 2) its proposed action is fully consistent with the state coastal program notwithstanding the  
18 state’s objections. 15 C.F.R. § 930.43(d).

### 19 **Clean Water Act**

20 34. Corps dredging projects for maintenance of federal navigation channels also are subject to  
21 applicable provisions of the CWA, 33 U.S.C. § 1251 *et seq.*, particularly sections 401 and 404 of  
22 the CWA, 33 U.S.C. §§ 1341 and 1344, and the section 404 implementing regulations adopted by  
23 the U.S. Environmental Protection Agency (EPA), 40 C.F.R. Part 230 (commonly referred to as  
24 the CWA “Section 404(b)(1) Guidelines”).

25 35. Section 404 of the CWA requires any person to obtain a permit from the Secretary of the  
26 Army, acting through the Chief of Engineers, for the discharge of dredged or fill material into  
27 navigable waters of the United States. 33 U.S.C. § 1344(a), (d). The criteria for issuance of such  
28

1 permits are set forth in pertinent part in the Section 404(b)(1) Guidelines. 33 U.S.C. §  
2 1344(b)(1); 40 C.F.R. Part 230.

3 36. Section 401 of the CWA provides that any applicant for a federal license or permit to  
4 conduct any activity which may result in any discharge into navigable waters of the United States  
5 must provide a certification from the state that the proposed discharge complies with specified  
6 provisions of the CWA. 33 U.S.C. §§ 1323(a), 1341(a), 1344(t); 33 C.F.R. § 336.1(a)(1). Such  
7 certification is commonly referred to as a CWA “Section 401 certification.”

### 8 **Corps Dredging Regulations**

9 37. Corps dredging projects for maintenance of federal navigation channels also are subject to  
10 the Corps Dredging Regulations, entitled “Operation and Maintenance of Army Corps of  
11 Engineers Civil Works Projects Involving the Discharge of Dredged or Fill Materials Into Waters  
12 of the United States or Ocean Waters,” 33 C.F.R. Parts 335-338. These regulations provide that,  
13 while “the Corps does not issue itself a CWA permit to authorize Corps discharge of dredged  
14 material or fill material into U.S. waters,” it “does apply the 404(b)(1) guidelines and other  
15 substantive requirements of the CWA and other environmental laws,” including the CZMA. 33  
16 C.F.R. § 335.2; *see also* 33 C.F.R. § 336.1(a).

17 38. The Corps Dredging Regulations also provide that: 1) “[t]he CWA requires the Corps to  
18 seek water quality certification for discharges of dredged or fill material into waters of the U.S.”;  
19 and 2) “[s]ection 307 of the . . . CZMA requires that certain activities that a Federal agency  
20 conducts or supports be consistent with the Federally-approved state management plan to the  
21 maximum extent practicable.” 33 C.F.R. § 336.1(a); *see also* 33 C.F.R. § 336.1(b)(8)-(9).

22 39. The Corps Dredging Regulations further provide that:

23 [i]t is the Corps’ policy to regulate the discharge of dredged material from its projects  
24 to assure that dredged material disposal occurs in the least costly, environmentally  
25 acceptable manner, consistent with engineering requirements established for the  
26 project. The environmental assessment or environmental impact statement, in  
27 conjunction with the section 404(b)(1) guidelines and public notice coordination  
28 process, can be used as a guide in formulating environmentally acceptable  
alternatives. The least costly alternative, consistent with sound engineering practices  
and selected through the 404(b)(1) guidelines or ocean disposal criteria, will be  
designated the Federal standard for the proposed project.

33 C.F.R. § 336.1(c)(1). This policy is commonly referred to as the “Federal Standard.”

1 40. The Corps is required to fully consider all practicable and reasonable alternatives on an  
2 equal basis. 33 C.F.R. § 335.4.

### 3 **Administrative Procedure Act**

4 41. The APA, 5 U.S.C. §§ 551, 701, *et seq.*, provides that judicial review is appropriate if an  
5 individual or entity has suffered a legal wrong because of a federal agency action, or has been  
6 adversely affected or aggrieved by a federal agency action. 5 U.S.C. §§ 551(2), 702. Section 551  
7 of the APA defines “agency action” to include “the whole or part of an agency rule, order,  
8 license, sanction, relief or the equivalent or denial thereof, or [agency] failure to act.” 5 U.S.C. §  
9 551(13). Agency actions are subject to judicial review under the APA if they are final agency  
10 actions. 5 U.S.C. § 704.

11 42. A reviewing court can, pursuant to the APA, compel agency action unlawfully withheld or  
12 unreasonably delayed, or set aside agency action, findings, or conclusions if they are found to be  
13 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law or  
14 without observance of the procedure required by law, among other things. 5 U.S.C. § 706.

## 15 **FACTUAL ALLEGATIONS**

### 16 **Environmental and Economic Importance of San Francisco Bay**

17 43. San Francisco Bay is the nation’s second largest estuary and the most important estuary on  
18 the Pacific Coast, both for the habitat it provides for fish and wildlife and for the many  
19 recreational benefits it offers the Bay Area’s 7.5 million residents, as well as visitors from around  
20 the country and world. The Bay estuary’s significant ecological value lies in the subtidal Bay,  
21 tidal marshes, wetlands, and sloughs along its edges, and in the riparian habitats of the streams  
22 and rivers feeding into it. The Bay and its shoreline habitats support abundant fish and wildlife,  
23 are the nursery for many commercial and recreational fisheries, and host millions of migratory  
24 birds every year as they move up and down the Pacific Flyway. The Bay and its shoreline  
25 habitats also provide clean water, open space for a broad range of recreational opportunities, and  
26 flood protection. Today, management of the Bay and its shores must account for a future of  
27 rising sea levels and more extreme weather events, while continuing to address the challenges of  
28 a growing urban population.

1 44. The Bay is one of the world’s great natural harbors, and maritime commerce through the  
2 Bay Area’s five ports — Oakland, San Francisco, Redwood City, Richmond, and Benicia — is of  
3 primary importance to the entire economy of the Bay area and the nation. Cargo ships and  
4 tankers from around the Pacific Rim depend on these ports and their associated infrastructure to  
5 transport goods to and from inland California and other areas of the West Coast of the United  
6 States. The Port of Oakland is the fourth largest and fifth busiest port in the United States, and  
7 handles more than 99% of the ocean containers passing through Northern California. In 2015, the  
8 Port of Oakland both imported and exported 6.8 million metric tons of cargo (for a total  
9 throughout of 13.6 million metric tons) while supporting approximately 73,000 jobs in the region.  
10 The other Bay Area ports, while smaller, transport substantial additional cargo tonnage and  
11 support thousands of additional jobs, and the Port of San Francisco also handles millions of cruise  
12 ship and ferry passengers annually.

13 45. The Corps estimates that approximately 8,000-10,000 vessel trips are made on the Bay’s  
14 federal deep-draft navigation channels each year. April 2015 Consistency Determination  
15 Addendum at 24. The Corps also estimates that the goods-movement industry accounts for 51%  
16 of the total regional economic output and 32% of the regional employment. “Bay Area ports and  
17 harbors play a major role in efficient movement of goods throughout the region, as well as in  
18 California and the West Coast of the United States.” *Id.* at 25.

19 46. Maintaining safe and efficient navigation in the Bay is one of the overarching goals of the  
20 Bay Plan. “It is the [Corps’] primary mission to maintain safe navigation of its channels, and  
21 maintenance dredging of the federal deep-draft navigation channels is vital to ensuring safe and  
22 efficient movement of goods to any from Bay Area ports and harbors.” April 2015 Consistency  
23 Determination Addendum at 24. Such maintenance dredging is also vital to the Bay Area’s  
24 economy, since it provides navigation access to and from the Bay Area’s ports and harbors. *Id.* at  
25 25-26.

### 26 **San Francisco Bay Segment of California’s State Coastal Program**

27 47. In 1969, the Commission prepared, and the California Legislature adopted, the San  
28 Francisco Bay Plan (Bay Plan). The Bay Plan is “a comprehensive and enforceable plan for the

1 conservation of the water[s] of the bay and the development of its shoreline.” Cal. Gov. Code §  
2 66603; *see also* Cal. Gov. Code § 66651. On February 16, 1977, OCM approved the entirety of  
3 the Bay Plan as part of California’s state coastal program, along with the McAteer-Petris Act,  
4 Suisun Marsh Preservation Act and certain other state laws and Commission plans. These laws  
5 and plans are collectively referred to as the San Francisco Bay Segment of California’s federally-  
6 approved state coastal program (Commission Program).

7 48. The Bay Plan and McAteer-Petris Act contain numerous enforceable policies regarding the  
8 importance of and public interest in: 1) preventing uncoordinated and haphazard filling of the  
9 Bay; 2) encouraging beneficial reuse of dredged sediment and discouraging unconfined in-Bay  
10 disposal of sediment; and 3) protecting the Bay and its land and water uses and natural resources,  
11 including fisheries and water quality. *See* Bay Plan Fish and Wildlife, Subtidal Areas, Dredging,  
12 Water Quality, and Mitigation Findings and Policies; Cal. Gov. Code §§ 66600-66605, 66663.1,  
13 66663.2.

#### 14 **Long Term Management Strategy for Placement of Dredged Materials in the Bay**

15 49. In 1990, the Corps, the EPA, the Commission, the Regional Board and the California State  
16 Water Resources Control Board (hereafter collectively referred to as the “LTMS agencies”)  
17 joined together in a cooperative effort to establish a comprehensive Long-Term Management  
18 Strategy for the Placement of Dredged Material in the San Francisco Bay Region (LTMS). The  
19 LTMS is designed to produce a long-range approach to meeting the San Francisco Bay Region’s  
20 dredging and disposal needs over the next fifty years.

21 50. The LTMS sets forth the following overarching goals: 1) maintain in an economically and  
22 environmentally sound manner channels necessary for navigation and eliminate unnecessary  
23 dredging activities in the Bay and Estuary; 2) conduct dredged material disposal in the most  
24 environmentally sound manner; 3) maximize the use of dredged material as a resource; and 4)  
25 establish a cooperative permitting framework for dredging and dredged material disposal  
26 applications.

27 51. In October 1998, the LTMS agencies published a final LTMS Policy Environmental Impact  
28 Statement/Program Environmental Impact Report (LTMS EIS/EIR) under the National

1 Environmental Policy Act and California Environmental Quality Act. The final LTMS EIS/EIR  
2 selected Alternative 3 as the environmentally preferred alternative, which provides for a  
3 maximum of 20% in-Bay disposal, a maximum of 40% ocean disposal, and a minimum of 40%  
4 upland/wetland beneficial reuse of dredged materials.

5 52. In July 1999, the Corps and the EPA signed a federal Record of Decision (ROD) for the  
6 LTMS, which selected and formally approved Alternative 3 as “the alternative which will guide  
7 federal dredged material disposal decisions in the San Francisco Bay for the next 50 years.”

8 LTMS ROD at 2. The LTMS ROD states that Alternative 3 “is a long-term approach that  
9 emphasizes beneficial reuse and ocean disposal of dredged material, with limited in-Bay  
10 disposal,” and that this alternative:

11 provides the greatest environmental benefit of the action alternatives because it has  
12 the greatest amount of upland/wetland reuse for habitat restoration projects (which  
13 can benefit water quality, fish and wildlife habitat, and special status species) and  
14 other projects such as levee maintenance or construction fill (which can have flood  
control benefits or reduce cumulative effects). . . . In addition, Alternative 3 best  
reflects national dredging policy as it encourages the beneficial reuse of dredged  
material as a resource.

15 LTMS ROD at 3-4. In 2001, the LTMS agencies adopted a Management Plan to implement  
16 Alternative 3 as approved in the 1999 ROD.

### 17 **Applicable Bay Plan Policies and Basin Plan Designated Beneficial Uses**

18 53. In 2002, the Commission amended the Bay Plan to incorporate the LTMS goals and  
19 policies, including maximizing beneficial reuse of dredged sediment.

20 a. Bay Plan Dredging Policy 5 provides in pertinent part that “dredging projects should  
21 maximize use of dredged material as a resource consistent with protecting and enhancing Bay  
22 natural resources, such as creating, enhancing, or restoring tidal and managed wetlands, creating  
23 and maintaining levees and dikes, providing cover and sealing material for sanitary landfills, and  
24 filling at approved construction sites.” Bay Plan Dredging Policy 1 provides in pertinent part that  
25 “[d]redging and dredged material disposal should be conducted in an environmentally and  
26 economically sound manner. Dredgers should reduce disposal in the Bay and certain waterways  
27 over time to achieve the LTMS goal of limiting in-Bay disposal volumes to a maximum of one  
28 million cubic yards per year.”

1           b. Bay Plan Fish and Wildlife Policies 1 and 2 require protection of, and avoidance and  
2 minimization of harm to, Bay species listed as endangered or threatened under the federal or state  
3 ESAs and their habitat. *See also* Fish and Wildlife Policy 4 [projects that may result in a taking  
4 of an endangered or threatened species should not be authorized without the appropriate take  
5 authorization]; Bay Plan Subtidal Area Policy 1 [requiring projects in subtidal areas to minimize  
6 and, if feasible, avoid any harmful effects on Bay fish and wildlife]; Dredging Policy 2 [dredging  
7 should only be authorized where “important fisheries and Bay natural resources” are protected  
8 through “appropriate measures”]; Mitigation Policy 1 “[p]rojects should be designed to avoid  
9 adverse environmental impacts to Bay natural resources,” including fish and other aquatic  
10 organisms, wildlife, subtidal areas and tidal marshes].

11           c. Bay Plan Water Quality Policy 2 provides that “[w]ater quality in all parts of the Bay  
12 should be maintained at a level that will support and promote the beneficial uses of the Bay as  
13 identified in the . . . Water Quality Control Plan, San Francisco Bay Basin.”

14 54. In 2001, the Regional Board also adopted amendments to its San Francisco Bay Region  
15 Water Quality Control Plan (Basin Plan) to implement the LTMS goals and policies. The Basin  
16 Plan designates preservation of rare and endangered species, marine habitat, estuarine habitat,  
17 wildlife habitat, fish migration and fish spawning as beneficial uses of San Francisco Bay to be  
18 protected by specific water quality objectives. The designated beneficial uses and water quality  
19 objectives in the Basin Plan together constitute the federal CWA water quality standards for the  
20 Bay, which were approved by the Regional Board and EPA pursuant to section 303 of the CWA.  
21 33 U.S.C. § 1313.

22 55. In April 2013, the LTMS agencies published a twelve-year report on implementation of the  
23 LTMS. The report concludes that: 1) beneficial reuse sites are available and need material; 2) the  
24 LTMS long-term target of a minimum of 40% beneficial reuse was slightly exceeded for the first  
25 twelve years of the program; and 3) the LTMS in-Bay volume disposal reduction targets also  
26 were met for each three-year increment of the transition period to achieve the LTMS long-term  
27 goal of a maximum of a maximum of 20% in-Bay disposal. LTMS 12-Year Review Report at 6,  
28 9-10, 13.

1 **Environmental Assessment/Environmental Impact Report on Corps' Maintenance**  
2 **Dredging of the Bay**

3 56. In December 2014, the Corps and the Regional Board circulated for public comment a draft  
4 environmental assessment/environmental impact report (EA/EIR) for Corps maintenance  
5 dredging of the Bay's federal navigation channels for fiscal years 2015 through 2024. The Corps  
6 and Regional Board published a final EA/EIR in April 2015. The EA/EIR states that the project  
7 objectives are to: 1) provide safe, reliable and efficient navigation through federal channels in the  
8 Bay in a feasible manner; 2) ensure consistency, to the maximum extent practicable, with the  
9 goals of the LTMS program as described in the 1998 LTMS Final EIS/EIR and the 2001 LTMS  
10 Management Plan; and 3) conduct dredging in a manner that adequately protects the environment,  
11 including listed species.

12 57. The EA/EIR acknowledges that, based on the 12-year review process for the LTMS  
13 completed in 2013, the LTMS agencies have "concluded that the LTMS goals remain appropriate  
14 and largely implementable, and that the program has been successfully implemented to date" and  
15 "have recommended that the basic program continue." EA/EIR at 1-5. "This continuation  
16 requires approximately 80 percent of dredged sediment to be targeted for beneficial reuse or out-  
17 of-Bay disposal and only 20 percent targeted for in-Bay disposal." *Id.*

18 58. The EA/EIR states that the Corps will "beneficially reuse dredged material to the maximum  
19 extent authorities allow." EA/EIR at ES-6, 2-19. The EA/EIR designated four in-Bay disposal  
20 sites and three ocean disposal sites, including the San Francisco Deep Ocean Disposal Site as the  
21 "Federal Standard" placement sites for the disposal of dredged material from the federal  
22 navigation channels. The EA/EIR contains no analysis or documentation in support of the Corps'  
23 designation of these in-Bay disposal sites. EA/EIR 1-33 – 1-35; 2-19 – 2-22. The EA/EIR also  
24 discusses the capacity for beneficial re-use at a number of currently permitted and future  
25 beneficial reuse sites. EA/EIR 1-35 – 1-39.

26 **Adverse Impact of Corps' Hydraulic Dredges on Endangered and Threatened Delta Smelt**  
27 **and Longfin Smelt**

1 59. The EA/EIR states that, in 2011, “there were occurrences of delta smelt and longfin smelt  
2 becoming entrained in [hydraulic] hopper dredging equipment during [Corps] maintenance  
3 dredging at certain locations,” and that entrainment of delta smelt and longfin smelt could  
4 continue to occur during hydraulic dredging events. See EA/EIR at ES-2, ES-12; 1-2; 3.6-35 –  
5 50. Fish that are entrained are also killed. Delta smelt is listed as a threatened species under the  
6 federal ESA and an endangered species under the state ESA, and longfin smelt is a candidate for  
7 listing under the federal ESA and is listed as threatened under the state ESA.

8 60. Both the federal and state ESAs prohibit governmental entities and other persons from  
9 “taking,” which includes killing, species listed as endangered or threatened under these statutes.  
10 16 U.S.C. §§ 1532(19), 1538(a)(1)(B); Cal. Fish and Game Code §§ 86, 2080. The federal ESA  
11 also prohibits the Corps from jeopardizing the continued existence of, or from adversely  
12 modifying or destroying the designated critical habitat of, a federally-listed species. 16 U.S.C. §  
13 1536(a)(2). In addition, Suisun Marsh and its channels and the Carquinez Strait are designated  
14 critical habitat for the delta smelt. 59 Fed.Reg. 65256 (Dec. 19, 1994). Accordingly, the EA/EIS  
15 evaluated as feasible alternatives two reduced hydraulic dredging alternatives to avoid or reduce  
16 entrainment impacts to and take of these fish during Corps dredging operations. EA/EIR 2-24 –  
17 2-26.

18 61. In 2013, the U.S. Army Engineer Research and Development Center prepared a modeling  
19 study of entrainment of delta smelt and longfin smelt in hydraulic dredges in the Bay based on  
20 data collected during Corps hydraulic dredging events in 2010 and 2011. The study estimated the  
21 range of take from Corps hydraulic dredging in 2011 to be 394 to 3,694 delta smelt and 3,848 to  
22 10,260 longfin smelt, depending upon the entrainment scenario modeled. Under the “high  
23 entrainment scenario” modeled in that study, up to 29% of the median annual population  
24 abundance of delta smelt, and up to 8% of the median annual population abundance of longfin  
25 smelt, are estimated to be entrained (killed) annually by Corps hydraulic dredges.

26 62. On March 14, 2014, the California Department of Fish and Wildlife (CDFW) sent a letter to  
27 Bruce Wolfe, Executive Officer of the Regional Board, in response to the Board’s request for  
28 information from CDFW regarding the significance of impacts to biological resources from the

1 Corps' dredging of the Bay's federal navigation channels. In that letter, CDFW states that the  
2 Corps' dredging as proposed without restrictions on the use of hydraulic dredges "would  
3 substantially reduce the number of" endangered and threatened fish species and cause significant  
4 cumulative impacts to those species. Accordingly, CDFW recommended a reduction in hydraulic  
5 dredging in the Bay to one channel inside the Bay per year.

#### 6 **USFWS and NMFS Biological Opinions for Corps' Bay Maintenance Dredging**

7 63. On July 31, 2014, the United States Fish and Wildlife Service (USFWS) issued an annual  
8 biological opinion regarding the impacts of the Corps' maintenance dredging on delta smelt in the  
9 Suisun Channel. The USFWS estimated that a "medium" level take of delta smelt from the  
10 Corps' hydraulic dredges would be a little over 1,000 delta smelt, but that this amount of take  
11 would not jeopardize the continued existence of the species. The USFWS imposed a number of  
12 conditions and restrictions on the timing and manner of use of the Corps' hydraulic dredges but  
13 did not otherwise restrict the Corps' use of hydraulic dredges.

14 64. On January 16, 2015, the Corps requested consultation from the USFWS for ten years of  
15 federal maintenance dredging activities in the Suisun Channel, using either a hydraulic or  
16 mechanical dredge. On March 10, 2015, the USFWS requested additional information from the  
17 Corps, and requested that the Corps reduce its request for consultation from a ten-year period to a  
18 one-year period. On March 11, 2015, the Corps amended its request, limiting it to maintenance  
19 dredging activities in Suisun Channel in 2015 using either a hydraulic or mechanical dredge. On  
20 March 15, 2015, the Corps further amended its request, limiting the equipment to use of a  
21 mechanical dredge between August 1 and November 30, 2015. On July 20, 2015, the USFWS  
22 issued a second annual biological opinion for the Corps' maintenance dredging in Suisun  
23 Channel, concluding that the estimated amount of take "will be minimal with the use of clamshell  
24 dredging equipment during the work window in this drought year."

25 65. On or about July 7, 2016, the Corps submitted to the USFWS a revised biological  
26 assessment and request for consultation for maintenance dredging in the Suisun Channel in 2016.  
27 As in 2015, the Corps proposed to use only mechanical dredges in the Suisun Channel between  
28 August 1 and November 30, 2016. The Corps' July 7, 2016 cover letter to the USFWS states that

1 “[o]ur revised project description is in response to discussions and email correspondence with the  
2 USFWS during May and June 2016, whereby the USFWS presented new information indicating a  
3 record low delta smelt population this year; expressed concern regarding the adverse effects of  
4 proposed [hydraulic] dredging with estimates of potential take at approximately 1,400 that  
5 equates to about 10 percent of the current population; and—in consideration of this extremely low  
6 population and potential take level—recommended that the USACE change the project  
7 description to clamshell dredging only.” On August 18, 2016 the USFWS issued its third annual  
8 biological opinion for the Corps’ maintenance dredging in Suisun Channel, again concluding that  
9 the estimated amount of take would be minimized due to the use of clamshell dredging equipment  
10 during the work window of August 1 to November 30, 2016.

11 66. On July 9 and July 20, 2015, the National Marine Fisheries Service (NMFS) issued two  
12 letters in response to the EPA’s and the Corps’ October 2014 request for re-initiation of  
13 consultation on the LTMS Program pursuant to section 7 of the federal ESA (16 U.S.C. § 1536),  
14 together which constitute NMFS’ revised programmatic biological opinion for maintenance  
15 dredging pursuant to the LTMS, including Federal Defendants’ maintenance dredging activities.  
16 The revised biological opinion generally limits maintenance dredging activities in the Bay to a  
17 “work window” of December 1 to May 31, and provides that if dredging occurs outside of this  
18 window, dredged material must be placed at a beneficial reuse site that will provide habitat  
19 benefits for fish species, such as a tidal wetland restoration site. In its April 2015 Final EA/EIR,  
20 the Corps indicated its intent to comply with this biological opinion. EA/EIR at ES-4 n. 6.

21 **Corps’ Consistency Determination for Bay Maintenance Dredging and Commission**  
22 **Conditional Concurrence in that Determination**

23 67. In February 2015, the San Francisco District of the Corps submitted to the Commission a  
24 consistency determination in connection with its proposal to conduct annual maintenance  
25 dredging of deep draft navigation channels in the Bay in fiscal years 2015 through 2024. The  
26 Corps submitted a revised consistency determination to the Commission in March and  
27 supplemental information in April 2015 following Commission staff’s request on February 18,  
28

1 2015 to reduce the period of the consistency determination to three years and for additional  
2 information (hereafter “Consistency Determinations”).

3 68. The Consistency Determinations designated seven unconfined in-Bay and ocean disposal  
4 sites as the Federal Standard placement sites, but also identified a number of currently available  
5 and future beneficial reuse sites. *See* March 2015 Consistency Determination at 20-25. However,  
6 the Consistency Determinations proposed that up to 48% of the dredged materials be disposed of  
7 in the Bay and up to 55% of the materials be disposed of at the San Francisco Deep Ocean  
8 Disposal Site. The Consistency Determinations did not commit to any specific amount of  
9 beneficial reuse. The Consistency Determinations also contained no prohibitions on the use of  
10 hydraulic dredges, which EA/EIR documented kill delta smelt, longfin smelt and other native fish  
11 species. March 2015 Consistency Determination at 28-31, 40, 48; April 2015 Consistency  
12 Determination Addendum at 33-34, 37, 43-44.

13 69. At its June 4, 2015 meeting, the Commission conditionally concurred in the Corps’  
14 Consistency Determinations. The Commission memorialized these conditions in a June 15, 2015  
15 Letter of Agreement to the Corps.<sup>2</sup> The Commission’s Letter of Agreement included a number of  
16 special conditions designed to ensure full consistency with specific, enforceable policies of the  
17 Bay Plan, including but not limited to Dredging Policies 1 and 5, Fish and Wildlife Policies 1 and  
18 2 and Water Quality Policy 2, as well as the McAteer-Petris Act. These conditions include  
19 requirements that:

20 a. Beginning in 2017, the Corps must comply with, *inter alia*, Bay Plan Dredging  
21 Policies 1 and 5 to maximize the beneficial reuse of dredged sediment as a resource by meeting  
22 the LTMS goals that a minimum of 40% of the dredged material be beneficially reused for  
23 wetland restoration and other beneficial projects and that a maximum of 20% of dredged material  
24 be disposed of in the Bay (Special Condition II.B -- hereafter the “40% beneficial reuse”  
25 condition);

26 <sup>2</sup> Pursuant to Federal Defendants’ requests in August and December of 2015 and May and  
27 June of 2016, the Commission supplemented and amended the June 15, 2015 Letter of Agreement  
28 on September 4, 2015, and February 12, May 10 and July 12, 2016. However, none of these  
amendments modified any of the Contested Conditions.

1           b.     Beginning in federal fiscal year 2017, the Corps must use a maximum of one  
2 hydraulic dredge in either the Richmond Out Harbor or Pinole Shoal channel in order to protect  
3 delta smelt and longfin smelt and their habitat as required by, *inter alia*, Bay Plan Fish and  
4 Wildlife Policies 1 and 2 (Special Condition II.J.2.a -- hereafter the “reduced hydraulic dredging”  
5 condition);

6           c.     Within three months of the Commission’s conditional concurrence in the Consistency  
7 Determinations, the Corps must develop and implement a strategy to obtain additional funds to  
8 implement the 40% beneficial reuse and reduced hydraulic dredging conditions. Beginning in  
9 July 2015, and every quarter thereafter, the Corps was required to report to the Commission and  
10 LTMS agencies on the Corps’ efforts and progress in securing additional funding to satisfy the  
11 40% beneficial reuse and reduced hydraulic dredging conditions (Special Condition II.K); and

12           d.     At least thirty days prior to commencement of any dredging episode authorized by the  
13 Commission’s conditional concurrence, the Corps must submit to the Commission’s Executive  
14 Director a water quality certification, waste discharge requirements or any other required  
15 approvals from the Regional Board, as required by Bay Plan Water Quality Policy 2. The Corps’  
16 failure to obtain such certification prior to the commencement of any dredging episode would  
17 terminate the Commission’s concurrence for that episode (Special Condition II.D).<sup>3</sup>

18     70.    On June 23, 2015, defendant Morrow signed the June 15, 2015 conditional concurrence  
19 Letter of Agreement on behalf of the Corps.

20     **Regional Board’s Section 401 Certification for Corps Bay Maintenance Dredging**

21     71.    On May 13, 2015, the Regional Board issued a CWA Section 401 Water Quality  
22 Certification for the Corps’ maintenance dredging of the federal navigation channels in San  
23 Francisco Bay from 2015 through 2019. Provision 10 of the Water Quality Certification, similar  
24 to the Commission’s special condition II.J.2.a, limits the Corps’ use of a hydraulic dredge to the  
25 Main Ship Channel (outside of the Bay) and one other in-Bay channel (either the Richmond Outer

26 \_\_\_\_\_  
27           <sup>3</sup> As noted, Special Conditions II.B, II.D, III.2.a and II.K in the Commission’s June 15,  
28 2015 conditional concurrence Letter of Agreement are collectively referred to herein as the  
“Contested Conditions.”

1 Harbor or Pinole Shoal Channel), commencing in federal fiscal year 2017. Regional Board Order  
2 No. R2-2015-0023, pp. 22-23.

3 **Corps' Objections to Commission's Conditional Concurrence and Regional Board's Section**  
4 **401 Certification and State Agencies' Response to Objections**

5 72. In a letter dated November 10, 2015 from defendant Morrow on behalf of the Corps to  
6 Commission Executive Director Lawrence Goldzband, the Corps rescinded its June 23, 2015  
7 agreement to the Commission's June 15, 2015 conditional concurrence in the Corps' maintenance  
8 dredging program for the Bay and objected to Special Conditions II.B, II.J.2.a and II.K in the  
9 Commission's June 15, 2015 Letter of Agreement.

10 73. The Corps' November 10, 2015 objection letter states that the 40% beneficial reuse and  
11 reduced hydraulic dredging conditions (Special Conditions II.B and II.J.2.a) "exceed the  
12 constraints established by" the so-called "Federal Standard" policy governing Corps dredging  
13 projects, citing 33 C.F.R. § 336.1(c)(1). This section provides in pertinent part that: "[i]t is the  
14 Corps' policy to regulate the discharge of dredged material from its projects to assure that the  
15 dredged material disposal occurs in the least costly, environmentally acceptable manner,  
16 consistent with engineering requirements established for the project." 33 C.F.R. § 336.1(c)(1).

17 74. Federal Defendants' position is that it allegedly would cost more to comply with the 40%  
18 beneficial reuse and reduced hydraulic dredging conditions, and therefore they are legally  
19 prohibited from implementing these conditions, based on the claimed Federal Standard  
20 requirement that the Corps adopt the "least costly" alternative. However, Federal Defendants  
21 have not documented to the Commission the specific additional costs of implementing the  
22 Contested Conditions and the unavailability of funds in the Corps' budget to cover these  
23 additional costs. Rather, Federal Defendants simply assert that they are without authority to  
24 implement *any* conditions, which may increase the overall costs of dredging, on account of the  
25 "Federal Standard." Moreover, as discussed below, the Corps' proposed Federal Standard  
26 Alternative (as set forth in their Consistency Determinations) conflicts with the CZMA and other  
27 federal laws and the Corps Dredging Regulations and does not satisfy the "environmentally  
28 acceptable" requirement of the Federal Standard.

1 75. With respect to the requirement to seek additional funding in Special Condition II.K, the  
2 Corps' November 10, 2015 letter states that the Corps is not authorized to seek special additional  
3 funding for state conditions which merely implement "a state's own local preference." Rather,  
4 the letter states, the Corps is only authorized to seek additional funding in a few extreme cases,  
5 such as projects affecting national security or interstate navigation. Federal Defendants further  
6 assert that neither of these circumstances applies to Corps' maintenance dredging of the Bay.  
7 Therefore, the Corps claims to lack authority to comply with Special Condition II.K. As support  
8 for this contention, the Corps relies primarily on an October 21, 2015 internal memorandum  
9 interpreting the Federal Standard in the Corps Dredging Regulations. The letter further states that  
10 the Corps would only agree to implement Special Conditions II.B and II.J.2.a if the Commission  
11 or another state agency agreed to pay for the unspecified and undocumented increased costs of  
12 implementing these conditions.

13 76. Finally, the Corps' November 10, 2015 letter to the Commission states that "[e]ven without  
14 Special Conditions II.B, J.2.a and K, it remains [the Corps'] position that the dredging program is  
15 fully compliant with the legally enforceable action items of the Bay Plan and that [the  
16 Commission's] conditional concurrence continues to be valid."

17 77. Federal Defendants have not made any efforts to seek additional funding to implement  
18 Special Conditions II.B and II.J.2.a as required by Special Condition II.K, including but not  
19 limited to the requirements to "develop and implement" a funding strategy within three months of  
20 the Commission's July 15, 2015 Letter of Agreement and to report on a quarterly basis "to the  
21 Commission and its LTMS partners" on Federal Defendants' "efforts, progress and proposed  
22 future efforts to secure funding for" Special Conditions II.B and II.J.2.a, commencing in July  
23 2015.

24 78. In another letter dated November 10, 2015 from defendant Morrow on behalf of the Corps  
25 to Regional Board Executive Officer Bruce Wolfe, the Corps objected to the Regional Board's  
26 CWA Section 401 Water Quality Certification for the Corps' maintenance dredging of the Bay.  
27 Specifically, the Corps objects to Provision 10 of the Regional Board's Water Quality  
28 Certification that, like the Commission's Special Condition II.J.2.a, requires the Corps to reduce

1 its use of hydraulic dredges in the Bay commencing in federal fiscal year 2017 in order to protect  
2 endangered and threatened delta smelt and longfin smelt.

3 79. The Corps' letter to the Regional Board cites the same reasons for the Corps' refusal to  
4 comply with Provision 10 as it does for its refusal to comply with the Commission's Special  
5 Conditions II.J.2.a and II.K in its June 15, 2015 conditional concurrence, as specified in  
6 paragraphs 73-75 above. The Corps' November 10, 2015 letter to the Regional Board goes even  
7 further however, by stating that "in the event the [Regional] Board does not amend the 401  
8 Certification to remove Provision 10, we will have no choice but to defer dredging of the  
9 navigation channels to which this Provision applies."

10 80. The Corps' November 10, 2015 letter to the Regional Board objecting to the Regional  
11 Board's Water Quality Certification, and its accompanying refusal to comply with that  
12 certification, also constitutes a *de facto* objection to Special Condition II.D in the Commission's  
13 June 15, 2015 Letter of Agreement. This condition requires the Corps to obtain (and by  
14 implication, comply with) a valid Section 401 Water Quality Certification from the Regional  
15 Board prior to the commencement of any dredging episode.

16 81. In a detailed letter to Jeffrey Payne, the Director of OCM, and defendant Morrow dated  
17 March 10, 2016, Commission Executive Director Larry Goldzband explained why the state  
18 objected to Federal Defendants' interpretation of the CZMA and the Corps Dredging Regulations,  
19 including the "Federal Standard," and why Federal Defendants are not legally prohibited from  
20 implementing, and are required to comply with, the Contested Conditions. The Commission's  
21 March 10, 2016 letter also requested that, pursuant to the CZMA regulations, 15 C.F.R. Part 930,  
22 Subpart G, the OCM mediate the dispute.

23 82. By letter dated March 22, 2016, from defendant Morrow to Jeffrey Payne and Larry  
24 Goldzband, the Corps declined to participate in mediation, stating that it "is unable to mediate on  
25 the [F]ederal [S]tandard, which is a federal regulatory requirement."

26 83. In a detailed letter to defendant Morrow dated March 10, 2016, Regional Board Executive  
27 Officer Bruce Wolfe explained why Federal Defendants' interpretation of the CWA and the  
28 Corps Dredging Regulations, including the "Federal Standard," is incorrect and why Federal

1 Defendants legally are required to comply with Provision 10 in the Regional Board’s Water  
2 Quality Certification. Federal Defendants did not respond to that letter.

3  
4 **FIRST CAUSE OF ACTION**  
5 **(Violation of the CZMA and APA)**  
6 **(Against All Defendants)**

7 84. The Commission hereby re-alleges and incorporates by reference Paragraphs 1 through 83  
8 of this complaint as though these paragraphs were fully set forth herein.

9 85. The CZMA provides that “[e]ach Federal agency activity within . . . the coastal zone that  
10 affects any land or water use or natural resource of the coastal zone shall be carried out in a  
11 manner which is consistent to the maximum extent practicable with the enforceable policies of  
12 the approved State management programs.” 16 U.S.C. § 1456(c)(1)(A); *see also* 15 C.F.R. §§  
13 930.30, 930.39(c). “Federal agency activities” are all activities initiated by a federal agency  
14 (except those involving issuance of a federal license or permit to a person or the granting of  
15 federal assistance to an applicant) “when coastal effects are reasonably foreseeable.” 15 C.F.R. §  
16 930.31(a).

17 86. The CZMA regulations define “consistent to the maximum extent practicable” as “fully  
18 consistent with the enforceable policies” of the state’s costal program “unless full consistency is  
19 prohibited by existing law applicable to the Federal agency.” 15 C.F.R. § 930.32(a)(1). Federal  
20 Defendants’ maintenance dredging of federal navigation channels in the Bay is a federal agency  
21 activity that directly and indirectly affects uses of land and water and natural resources in the  
22 coastal zone. This activity therefore must be carried out in a manner which is consistent to the  
23 maximum extent practicable with the enforceable policies of the Commission Program (the San  
24 Francisco Bay Segment of California’s federally-approved state coastal program). Thus, Federal  
25 Defendants are required to submit a consistency determination to the Commission for the Corps’  
26 maintenance dredging of the federal navigation channels of the Bay. 16 U.S.C. § 1456(c)(1)(C);  
27 15 C.F.R. § 930.36(b)(1). Federal Defendants submitted to the Commission an initial consistency  
28 determination in March 2015 and a supplemental and revised consistency determination in April  
2015 for their maintenance dredging activities from 2015-2017.

1 87. Under the CZMA regulations, a state coastal agency may conditionally concur in a federal  
2 agency's consistency determination. 15 C.F.R. § 930.4(a)(1). In such circumstances, the state  
3 coastal agency "shall include in its concurrence letter the conditions which must be satisfied." *Id.*  
4 The Commission issued such a conditional concurrence letter to federal defendants on June 15,  
5 2015 and defendant Morrow signed the letter on behalf of the Corps on June 23, 2015.

6 88. The CZMA regulations provide that the federal agency must "immediately notify" the state  
7 coastal agency "if the State agency's conditions are not acceptable." 15 C.F.R. § 930.4(a)(2).  
8 Federal Defendants violated this requirement by accepting the Commission's conditions on June  
9 23, 2015, and then waiting nearly five months to notify the Commission on November 10, 2015  
10 that they are instead objecting to and refusing to comply with the Contested Conditions.

11 89. The CZMA regulations further provide that a federal agency's refusal to comply with a  
12 state coastal agency's conditional concurrence in the proposed federal agency activity shall be  
13 treated as a state agency objection to that activity. 15 C.F.R. § 930.4(b); *see also* § 930.4(a)(1).  
14 Federal Defendants' letters dated November 10, 2015 to the Commission and the Regional Board  
15 objecting to the Contested Conditions and their March 22, 2016 letter to the Commission refusing  
16 to engage in mediation constitute formal notification to the Commission that the Contested  
17 Conditions are not acceptable to Federal Defendants and that they will not comply with the  
18 Contested Conditions. As such, pursuant to 15 C.F.R. § 930.4(b), the Commission's June 15,  
19 2015 conditional concurrence Letter of Agreement must be treated as an objection to Federal  
20 Defendants' maintenance dredging of the Bay's federal navigation channels.

21 90. The CZMA regulations only permit a federal agency to proceed with a federal agency  
22 activity to which a state coastal agency has objected if it makes one of the following findings: 1)  
23 the federal agency activity "is fully consistent with the enforceable policies of the [state coastal]  
24 management program," notwithstanding the state agency's objection; or 2) full consistency "is  
25 prohibited by existing law applicable to the Federal agency and the Federal agency has clearly  
26 described, in writing, to the State agency the legal impediments to full consistency." 15 C.F.R. §  
27 930.43(d).

28

1 91. Compliance with the Contested Conditions is necessary to ensure full consistency with  
2 specific enforceable policies of the Bay Plan, including but not limited to Bay Plan Dredging  
3 Policies 1-3 and 5, Bay Plan Fish and Wildlife Policies 1 and 2, Bay Plan Subtidal Area Policy 1,  
4 Bay Plan Mitigation Policy 1 and Bay Plan Water Quality Policy 2, and the specific enforceable  
5 policies of the McAteer-Petris Act, Cal. Gov. Code §§ 66600-66605, 66663.1, 66663.2. Both the  
6 Bay Plan and McAteer-Petris Act are part of the San Francisco Bay Segment of California's  
7 federally-approved state coastal program. These enforceable policies require: 1) beneficial reuse  
8 of dredged sediment as a resource to the maximum extent practicable for wetlands restoration,  
9 shoreline resiliency and other beneficial purposes; 2) minimization of unconfined in-Bay disposal  
10 of dredged sediment; 3) avoidance of harm to listed species and their habitat; and 4) protection of  
11 Bay water quality, including designated beneficial uses. The Contested Conditions ensure  
12 compliance with these enforceable policies.

13 92. Any maintenance dredging of the federal navigation channels of the Bay that is conducted  
14 absent compliance with, or in violation of, the Contested Conditions and pursuant to Federal  
15 Defendants' Consistency Determinations (their purported Federal Standard Alternative) will not  
16 ensure that any beneficial reuse of sediment will occur and that in-Bay disposal of sediment is  
17 minimized, and will result in take of listed Bay fish species and destruction of their habitat, which  
18 are designated beneficial uses of the Bay. Maintenance dredging that is conducted absent  
19 compliance with, or in violation of, the Contested Conditions and pursuant to Federal Defendants'  
20 Federal Standard Alternative is therefore not fully consistent with the enforceable policies of the  
21 Commission Program and is unlawful.

22 93. Accordingly, Federal Defendants cannot lawfully find that conducting maintenance  
23 dredging of the federal navigation channels of the Bay absent compliance with the Contested  
24 Conditions and pursuant to their purported Federal Standard Alternative is fully consistent with  
25 the enforceable policies of the Commission Program. Federal Defendants' contrary finding in  
26 their November 10, 2015 letter to the Commission is arbitrary, capricious, an abuse of discretion  
27 and otherwise not in accordance with the CZMA and its implementing regulations. For the  
28 reasons alleged in paragraph 94 below, Federal Defendants also cannot lawfully find that they are

1 legally prohibited from being fully consistent with the Commission Program. Therefore, Federal  
2 Defendants cannot lawfully find that they are consistent to the maximum extent practicable with  
3 the Commission Program.

4 94. Federal Defendants' findings in their November 10, 2015 letters to the Commission and the  
5 Regional Board stating that they are legally prohibited from achieving full consistency with the  
6 Commission Program and from implementing the Contested Conditions on account of their  
7 increased cost also are arbitrary, capricious, an abuse of discretion and otherwise not in  
8 accordance with the CZMA and its implementing regulations for the following reasons:

9 a. The CZMA regulations state that "whenever legally permissible, Federal agencies  
10 shall consider the enforceable policies of [state coastal] management programs as requirements to  
11 be adhered to in addition to existing Federal agency statutory mandates." 15 C.F.R. §  
12 930.32(a)(2). The CZMA regulations also include requirements for federal agencies to seek  
13 additional funding to cover the cost of complying with additional state requirements imposed  
14 under the CZMA. Under the CZMA, "[t]he only circumstance where a Federal agency may rely  
15 on a lack of funding as a limitation on being fully consistent with an enforceable policy is the  
16 Presidential exemption" set forth in 16 U.S.C. § 1456(c)(1)(B). 15 C.F.R. § 930.32(a)(3). No  
17 such Presidential exemption has been applied for or obtained. Moreover, even a Presidential  
18 exemption may not be granted "on the basis of a lack of appropriations unless the President has  
19 specifically requested such appropriations as part of the budgetary process, and the Congress has  
20 failed to make available the requested appropriations." 16 U.S.C. § 1456(c)(1)(B).

21 b. The CZMA regulations further provide that:

22 Federal agencies shall not use a general claim of a lack of funding or insufficient  
23 appropriated funds or failure to include the cost of being fully consistent in Federal  
24 budget and planning processes as a basis for being consistent to the maximum extent  
25 practicable with an enforceable policy of a management program. . . . In cases where  
26 the cost of being consistent with the enforceable policies of a management program  
27 was not included in the Federal agency's budget and planning processes, the Federal  
28 agency should determine the amount of funds needed and seek additional federal  
funds.

15 C.F.R. § 930.32(a)(3).

1 c. Absent a clear statutory prohibition, Federal Defendants cannot legally rely on a  
2 federal regulatory policy and a non-binding internal guidance memorandum interpreting that  
3 regulatory policy as a justification for refusing to comply with the CZMA's clear statutory  
4 directive that each federal agency ensure that its activities are consistent with a federally-  
5 approved state coastal program to the maximum extent practicable. Federal Defendants cannot  
6 lawfully interpret the "Federal Standard," which is a federal regulatory policy, in a manner that  
7 trumps the clear statutory commands of the CZMA.

8 d. Even assuming Federal Defendants could rely on the Federal Standard policy to  
9 trump the CZMA's clear statutory command and that their interpretation of the Federal Standard  
10 is correct, there is nothing in the Corps Dredging Regulations or any other statute or regulation  
11 that requires Federal Defendants to only implement the least-cost alternative or that legally  
12 prohibits Federal Defendants from implementing a more costly alternative, as is necessary in  
13 order for Federal Defendants to lawfully conclude that such alternative is impracticable under the  
14 CZMA. 15 C.F.R. § 930.32(a).

15 e. In fact, as further alleged in paragraph 99 below, the Corps Dredging Regulations  
16 require Federal Defendants to: 1) "make all reasonable efforts to comply with" state coastal  
17 programs; 2) cooperate with the state to achieve consistency with state coastal programs; 3)  
18 accommodate the state's concerns to the extent practicable; 4) "attempt to comply with any  
19 reasonable requirement imposed by a state" pursuant to the CZMA; and 5) prepare a report to  
20 upper management seeking additional funding to meet state-imposed conditions when any  
21 disagreements between the Corps and the state cannot be resolved. 33 C.F.R. §§ 336.1(c)(10),  
22 336.2(a)(2), 337.2(a)-(b), 337.8.

23 f. Federal Defendants have not documented that the Contested Conditions will actually  
24 cost more to implement and if so, how much more. Nor have Federal Defendants established that  
25 this additional cost renders the dredging impracticable. In fact, Federal Defendants' previous  
26 statements and actions since the Corps' adoption of the LTMS ROD in 1999 indicate that Federal  
27 Defendants' compliance with the 40% beneficial reuse and reduction of hydraulic dredging  
28 conditions are feasible and otherwise practicable, and are not legally prohibited by the Federal

1 Standard or any other federal statute, regulation or policy. *See e.g.*, Final EA/EIR, pp. ES-2, ES-  
2 4, ES-6, ES-9—ES-11, 1-4 – 1-5, 1-35 – 1-39, 3.6-35 -- 50; March 2015 Consistency  
3 Determination, pp. 22-25; NMFS letters to Corps and EPA, July 9 and July 20, 2015; LTMS 12-  
4 Year Review Final Report, Apr. 2013, pp. 4, 6, 9-10, 13; Regional Board letter to Corps, Mar. 10,  
5 2016 at p. 2 n.3; Corps letter to USFWS, July 7, 2016.

6 g. In sum, Federal Defendants cannot lawfully find that they are legally prohibited by  
7 any existing law or regulation from complying with the Contested Conditions (Special Conditions  
8 II.B, II.D, II.J.2.a and II.K) in the Commission's June 15, 2015 conditional concurrence Letter of  
9 Agreement. Federal Defendants are legally required to implement these conditions by the CZMA  
10 and its implementing regulations, as well as the Corps Dredging Regulations, as further alleged in  
11 paragraphs 99 and 100 below. Accordingly, for all of the foregoing reasons, Federal Defendants'  
12 conclusion that they are legally prohibited from complying with the Contested Conditions is  
13 arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

14 95. Unless Federal Defendants are required to conduct maintenance dredging and manage  
15 dredged material in compliance with the Contested Conditions and are enjoined from conducting  
16 dredging under their purported Federal Standard Alternative as set forth in their Consistency  
17 Determinations, the Commission will be irreparably injured and harmed in that dredging absent  
18 compliance with the Contested Conditions and pursuant to the purported Federal Standard  
19 Alternative will irreparably harm and injure the land and water uses and natural resources of the  
20 Bay, in contravention of the enforceable policies of the Commission Program and the  
21 requirements of the CZMA and its implementing regulations.

22 96. In addition, the Commission will be irreparably injured and harmed because its ability to  
23 carry out the enforceable policies of the Commission Program with respect to Federal  
24 Defendants' maintenance dredging activities will be seriously undermined and impaired, contrary  
25 to the requirements of the CZMA and its implementing regulations. The Commission has no  
26 adequate remedy at law for the injury and harm Federal Defendants will cause, and only the  
27 Court's exercise of its equitable powers can require Federal Defendants to conduct maintenance  
28 dredging and manage dredged material in compliance with the Contested Conditions.

1 97. An actual controversy exists between the Commission and Federal Defendants in that the  
2 Commission contends that the CZMA and its implementing regulations require Federal  
3 Defendants to comply with the Contested Conditions, whereas Federal Defendants contend that  
4 the Corps Dredging Regulations legally prohibit such compliance. A judicial declaration of the  
5 rights and obligations of the parties accordingly is appropriate in this case pursuant to 28 U.S.C. §  
6 2201(a). The Commission is entitled to a declaration that the CZMA and its implementing  
7 regulations and the Corps Dredging Regulations require Federal Defendants to comply with the  
8 Contested Conditions, and that Federal Defendants cannot conduct maintenance dredging and  
9 manage dredged material in the Bay absent compliance with these conditions and under their  
10 purported Federal Standard Alternative.

11 **SECOND CAUSE OF ACTION**  
12 **(Violation of 33 C.F.R. Parts 335-338 and APA)**  
13 **(Against All Defendants)**

14 98. The Commission hereby re-alleges and incorporates by reference Paragraphs 1 through 97  
15 of this complaint as though these paragraphs were fully set forth herein.

16 99. Federal Defendants' decision that they are legally prohibited from complying with the  
17 Contested Conditions and that they can only legally dredge in accordance with their Consistency  
18 Determinations (their purported Federal Standard Alternative) is arbitrary, capricious, an abuse of  
19 discretion and otherwise not in accordance with the Corps Dredging Regulations, 33 C.F.R. Parts  
20 335-338, for the following reasons:

21 a. The Federal Standard in the Corps Dredging Regulations upon which Federal  
22 Defendants rely is not limited to cost considerations, but also requires their maintenance dredging  
23 activities and management of dredged material to be conducted in an "environmentally acceptable  
24 manner." *See* 33 C.F.R. §§ 335.4, 336.1(c)(1). In order for the dredging to be deemed  
25 "environmentally acceptable," it must meet the federal criteria for discharge of dredged and fill  
26 material under the CWA section 404(b)(1) Guidelines and any additional requirements imposed  
27 pursuant to the CZMA, section 401 of the CWA, the ESA and other applicable federal  
28 environmental laws. 33 C.F.R. §§ 335.2, 335.7, 336.1(a), (b)(4), (b)(8)-(9), (c)(1)-(11).

1           b.     The Contested Conditions are designed to ensure that Federal Defendants’  
2 maintenance dredging of the federal navigation channels of the Bay is done in an  
3 “environmentally acceptable manner” that meets the CWA Section 404(b)(1) Guidelines and  
4 applicable Commission Program policies that are federally enforceable under the CZMA.  
5 Specifically, the Contested Conditions ensure that dredged sediment is reused for wetlands  
6 restoration, shoreline resiliency and other beneficial reuse projects in and around the Bay; that  
7 dredging does not result in the take of federally- and state-listed endangered and threatened fish  
8 species; and that dredging protects water quality, including designated beneficial uses, in the  
9 Basin Plan, as required by the CWA Section 404(b)(1) Guidelines and enforceable policies of the  
10 Commission Program.

11           c.     Federal Defendants’ decision to conduct maintenance dredging absent compliance  
12 with the Contested Conditions and pursuant to their Consistency Determinations (their purported  
13 Federal Standard Alternative) does not constitute an environmentally acceptable alternative  
14 within the meaning of the Corps Dredging Regulations. Such dredging by definition constitutes a  
15 violation of the CWA Section 404(b)(1) Guidelines, as further described and alleged in paragraph  
16 100 below, as well as of the enforceable policies of the state’s coastal program, as described and  
17 alleged in paragraphs 91-94 above, and consequently cannot satisfy the Federal Standard’s  
18 “environmentally acceptable” requirement.

19           d.     The Corps Dredging Regulations also require Federal Defendants to “provide to the  
20 state information addressing why the alternative which represents the Federal Standard is  
21 environmentally acceptable.” 33 C.F.R. § 337.2(b). Federal Defendants have not documented  
22 that their purported Federal Standard Alternative meets the “environmentally acceptable”  
23 criterion of the Corps Dredging Regulations, nor have they documented that their designated  
24 “Federal Standard placement sites” for each deep draft federal navigational channel in the Bay in  
25 fact constitutes an appropriate “environmentally acceptable” “Federal Standard” disposal site  
26 under the Corps Dredging Regulations. Federal Defendants’ EA/EIR and Finding of No  
27 Significant Impact for the EA/EIR do not satisfy the requirement in the Corps Dredging  
28

1 Regulations that Federal Defendants demonstrate that their proposed Federal Standard Alternative  
2 is “environmentally acceptable” within the meaning of the Corps Dredging Regulations.

3 e. In fact, Federal Defendants’ purported Federal Standard Alternative is not an  
4 “environmentally acceptable” alternative authorized by the Corps Dredging Regulations because  
5 it does not meet the requirements of either the CWA Section 404(b)(1) Guidelines or the CZMA,  
6 as further alleged in paragraphs 91-94 above and paragraph 100 below.

7 f. The Corps Dredging Regulations expressly require Federal Defendants to comply  
8 with the CZMA’s requirement to ensure that their dredging activities comply with the enforceable  
9 policies of the state’s coastal program to the maximum extent practicable, and to obtain and  
10 comply with a CWA Section 401 water quality certification for discharges of dredged or fill  
11 material into waters of the United States. 33 C.F.R. § 336.1(a); *see also* 33 C.F.R. § 336.1(b)(8)-  
12 (9), (c)(1)-(3), (10). These regulations also require Federal Defendants to: 1) “make all  
13 reasonable efforts to comply with” federally-approved state coastal programs and state water  
14 quality standards; 2) “cooperate to the maximum extent practicable with state agencies” to  
15 achieve consistency with state coastal programs and prevent violation of state water quality  
16 standards; 3) “attempt to comply with any reasonable requirement imposed by a state” pursuant to  
17 the CZMA and CWA section 401; and 4) “accommodate the state’s concerns to the extent  
18 practicable.” 33 C.F.R. §§ 336.1(c)(10), 336.2(a)(2), 337.2(a)-(b). Federal Defendants’ refusal to  
19 comply with the Contested Conditions, and decision to adopt their purported Federal Standard  
20 Alternative instead, violates these requirements.

21 g. Like the CZMA regulations, the Corps Dredging Regulations also include  
22 requirements for Federal Defendants to seek additional funding to cover the cost of complying  
23 with additional state requirements imposed under the CZMA. For example, in the event that “the  
24 state agency imposes conditions or requirements” which in Federal Defendants’ opinion “exceed  
25 those needed to meet the Federal Standard,” and Federal Defendants conclude that these  
26 requirements “cannot reasonably be accommodated,” then Federal Defendants may temporarily  
27 defer dredging and prepare a report to upper management. 33 C.F.R. § 337.2(b). The report may  
28 be prepared in any situation where the state objects to a consistency determination. 33 C.F.R. §

1 337.8(a)(6). The report must include, *inter alia*, the economic need for the dredging, the  
2 estimated costs of the state agency requirements which exceed those necessary to meet the  
3 Federal Standard, and other information necessary to assist in a determination “whether to further  
4 defer the dredging and seek Congressional appropriations for the added expense.” 33 C.F.R. §  
5 337.8(b); *see also* 33 C.F.R. § 336.1(b)(9)(v).

6 h. Contrary to the statements in Federal Defendants’ November 10, 2015 letters to the  
7 Commission and Regional Board and their October 21, 2015 internal memorandum, these  
8 provisions are not limited to situations affecting national security or interstate navigation. Even if  
9 they were so limited, dredging of the federal navigation channels of the Bay clearly affects  
10 interstate navigation, and therefore any dispute involving the conditions necessary for dredging of  
11 the federal navigation channels of the Bay triggers the requirement in the Corps Dredging  
12 Regulations to prepare the report to upper management and seek additional funding. *See* April  
13 2015 Consistency Determination Addendum at 24-26. In sum, Federal Defendants’ own  
14 regulations do not allow them to simply refuse to comply with state conditions that are alleged to  
15 cost more than Federal Defendants’ claimed Federal Standard Alternative. Rather, Federal  
16 Defendants must prepare a report to upper management documenting and seeking additional  
17 funding for the claimed additional costs.

18 i. Contrary to the statements in Federal Defendants’ November 10, 2015 letters to the  
19 Commission and Regional Board and their October 21, 2015 internal memorandum, the Corps  
20 Dredging Regulations do not allow Federal Defendants to shift to the Commission or any other  
21 state entity the incremental cost, if any, of state-imposed conditions, which are authorized by  
22 federal law, related to the method or manner of dredging or to the location of disposal areas.  
23 Rather the regulations only permit such cost-shifting as to additional state monitoring or testing  
24 requirements. 33 C.F.R. § 337.2(b)(1).

25 j. With regard to the location of disposal areas, the Corps Dredging Regulations simply  
26 provide that “the added Federal cost of providing these disposal areas will affect the priority of  
27 performing dredging on that project” and that the additional costs “may cause the project to  
28 become economically unjustified.” 33 C.F.R. § 337.2(b)(2); *see also* 33 U.S.C. § 2211(b)(1)

1 (providing that the federal share of the costs of operating and maintaining a federal harbor  
2 navigation project is 100%). Furthermore, these provisions only apply if additional federal funds  
3 are not obtained pursuant to the report procedure set forth in section 337.8 of the regulations, as  
4 alleged above.

5 k. For all the foregoing reasons, Federal Defendants' interpretation of the Federal  
6 Standard, as reflected in their November 10, 2015 letters to the Commission and the Regional  
7 Board and October 21, 2015 internal memorandum, and their consequent refusal to comply with  
8 the Contested Conditions, blatantly misinterprets and conflicts with the plain language, structure  
9 and intent of the Corps Dredging Regulations and conflicts with several federal statutes, including  
10 the CZMA. Therefore, Federal Defendants' current interpretation is not entitled to any deference  
11 and is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the law.

12 100. Federal Defendants' decision that maintenance dredging of the Bay's federal navigational  
13 channels pursuant to their Consistency Determinations and absent compliance with the Contested  
14 Conditions is the only alternative that meets the Federal Standard is also arbitrary, capricious, an  
15 abuse of discretion and otherwise not in accordance with the law because their purported Federal  
16 Standard Alternative does not meet the stringent federal criteria for discharge of dredged and fill  
17 material under the CWA Section 404(b)(1) Guidelines, as required by the Corps Dredging  
18 Regulations (33 C.F.R. §§ 335.2, 335.7, 336.1(a), (b)(4), (c)(1)-(2)), for the following reasons:

19 a. Federal Defendants' Federal Standard Alternative violates the discharge prohibitions  
20 of the Section 404(b)(1) Guidelines, which *inter alia*, prohibit discharges that jeopardize the  
21 continued existence of any species listed as endangered or threatened under the federal ESA, or  
22 which significantly adversely affect the aquatic ecosystem or fish, shellfish and wildlife and their  
23 various life stages. 40 C.F.R. §§ 230.10(b)(3), (c)(2)-(3), 230.12(a)(3)(ii). The Section 404(b)(1)  
24 Guidelines specifically state that "no discharge of dredged or fill material shall be permitted  
25 unless appropriate and practicable steps have been taken which will minimize potential adverse  
26 impacts of the discharge on aquatic ecosystem." 40 C.F.R. § 230.10(d); *see also* §  
27 230.12(a)(3)(iii). The Section 404(b)(1) Guidelines also prohibit discharges that are not in  
28 compliance with a state's federally-approved water quality standards. 40 C.F.R. 230.10(b)(1).

1           b.     The Basin Plan’s federally-approved water quality standards require protection of  
2     federally- and state-listed endangered and threatened fish species and other fish species native to  
3     the Bay and their habitat. Dredging with a hydraulic dredge, which Federal Defendants admit  
4     kills federally- and state- listed Delta smelt and longfin smelt, violates these discharge  
5     prohibitions of the Section 404(b)(1) Guidelines.

6           c.     The Section 404(b)(1) Guidelines further prohibit discharges “if there is a practicable  
7     alternative to the proposed discharge which would have [a] less adverse impact on the aquatic  
8     ecosystem.” 40 C.F.R. § 230.10(a); *see also* § 230.12(a)(3)(i). “An alternative is practicable if it  
9     is available and capable of being done after taking into consideration cost, existing technology  
10    and logistics in light of overall project purposes.” 40 C.F.R. § 230.10(a)(2). The analysis of  
11    alternatives in a document prepared under the National Environmental Policy Act “will in most  
12    cases provide the information for the evaluation of alternatives” required under the Guidelines.  
13    40 C.F.R. § 230.10(a)(4). Finally, if a federally-approved coastal program or other planning  
14    process, such as the LTMS, has “identified and evaluated” practicable alternatives, “such  
15    evaluation shall be considered” by the federal agency “as part of the consideration of alternatives  
16    under the Guidelines.” 40 C.F.R. § 230.10(a)(5).

17          d.     The Contested Conditions constitute a less environmentally damaging “practicable  
18    alternatives” under the foregoing provisions of the Section 404(b)(1) Guidelines, which Federal  
19    Defendants are required to implement. Federal Defendants’ EA/EIR for maintenance dredging of  
20    the Bay’s federal navigation channels evaluated two reduced hydraulic dredging alternatives as  
21    feasible alternatives, Federal Defendants committed to comply with any hydraulic dredging  
22    restrictions and beneficial reuse requirements imposed by NMFS in its reinitiated programmatic  
23    biological opinion for the LTMS and by the USFWS in its annual biological opinions for 2015  
24    and 2016, and Federal Defendants previously committed to the minimum 40% beneficial reuse  
25    and maximum 20% in-Bay disposal goals in the LTMS and again in the 12-year report on  
26    implementation of the LTMS. The Commission’s reduced hydraulic dredging and 40% beneficial  
27    reuse conditions also constitute practicable alternatives because they are designed to meet the  
28    enforceable policies of the Commission Program as well as the LTMS Program. Dredging

1 conducted absent compliance with the contested conditions and according to Federal Defendants'  
2 Federal Standard Alternative therefore violates the requirement in the Section 404(b)(1)  
3 Guidelines that Federal Defendants implement less environmentally damaging practicable  
4 alternatives to their proposed discharge.

5 e. For all the foregoing reasons, federal defendants' purported Federal Standard  
6 Alternative violates the requirement of the Corps Dredging Regulations that the Federal Standard  
7 alternative comply with the CWA Section 404(b)(1) Guidelines and is therefore arbitrary,  
8 capricious, an abuse of discretion and otherwise not in accordance with the law.

9 101. Unless Federal Defendants are required to conduct maintenance dredging and manage  
10 dredged material in compliance with the Contested Conditions and are enjoined from conducting  
11 dredging under their purported Federal Standard Alternative as set forth in their Consistency  
12 Determinations, the Commission will be irreparably injured and harmed in that dredging absent  
13 compliance with the Contested Conditions and pursuant to the purported Federal Standard  
14 Alternative will irreparably harm and injure the land and water uses, fish and wildlife and other  
15 natural resources and water quality of the Bay, contrary to the requirements of the Corps  
16 Dredging Regulations.

17 102. In addition, the Commission will be irreparably injured and harmed because its ability to  
18 carry out its mission and duties to protect the land and water uses, fish and wildlife and other  
19 natural resources and water quality of the Bay with respect to Federal Defendants' maintenance  
20 dredging activities will be seriously undermined and impaired, contrary to the requirements of the  
21 Corps Dredging Regulations. The Commission has no adequate remedy at law for the injury and  
22 harm Federal Defendants will cause, and only the Court's exercise of its equitable powers can  
23 require Federal Defendants to conduct maintenance dredging and manage dredged material in  
24 compliance with the Contested Conditions.

25 103. An actual controversy exists between the Commission and Federal Defendants in that the  
26 Commission contends that the Corps Dredging Regulations require Federal Defendants to comply  
27 with the Contested Conditions, whereas Federal Defendants contend that these regulations legally  
28 prohibit such compliance. A judicial declaration of the rights and obligations of the parties

1 accordingly is appropriate in this case pursuant to 28 U.S.C. § 2201(a). The Commission is  
2 entitled to a declaration that the Corps Dredging Regulations require Federal Defendants to  
3 comply with the Contested Conditions, and that Federal Defendants cannot conduct maintenance  
4 dredging and manage dredged material in the Bay absent compliance with these conditions and  
5 under their purported Federal Standard Alternative.

6 **PRAYER FOR RELIEF**

7 Wherefore, plaintiff prays for judgment against Federal Defendants as follows:

8 A. For a declaration that the CZMA and its implementing regulations and the Corps  
9 Dredging Regulations require Federal Defendants to conduct maintenance dredging of the federal  
10 navigation channels of the Bay and manage associated dredged material in compliance with the  
11 Contested Conditions and prohibit Federal Defendants from conducting such dredging pursuant to  
12 their purported Federal Standard Alternative;

13 B. For a declaration that Federal Defendants' purported Federal Standard Alternative  
14 and associated refusal to comply with the Contested Conditions violates the CZMA and its  
15 implementing regulations and the Corps Dredging Regulations and is arbitrary, capricious, an  
16 abuse of discretion, and otherwise not in accordance with the law;

17 C. For a declaration that Federal Defendants' interpretation of the Federal Standard in  
18 the Corps Dredging Regulations, as set forth in their November 10, 2015 letters to the  
19 Commission and the Regional Board and the Corps' October 21, 2015 internal guidance  
20 memorandum, violates the CZMA and its implementing regulations and the Corps Dredging  
21 Regulations and is arbitrary, capricious, an abuse of discretion and otherwise not in accordance  
22 with the law.

23 D. For temporary, preliminary and permanent injunctive relief requiring Federal  
24 Defendants and any persons acting on their behalf to conduct maintenance dredging of the federal  
25 navigation channels of the Bay and manage associated dredged material in compliance with the  
26 Contested Conditions, and prohibiting Federal Defendants from conducting maintenance  
27 dredging and managing associated dredged material pursuant to their purported Federal Standard  
28 Alternative;

1 E. For an order, declaration, and judgment that Federal Defendants' Federal Standard  
2 Alternative for maintenance dredging of the federal navigation channels of the Bay must be an  
3 alternative that complies with the San Francisco Bay segment of California's federally-approved  
4 state coastal program, the CZMA and its implementing regulations, the Corps Dredging  
5 Regulations, and other applicable laws.

6 F. For costs of suit incurred, including reasonable attorneys' fees; and

7 G. For such other relief as the court deems just and proper.

8 Dated: September 22, 2016

Respectfully submitted,

9 KAMALA D. HARRIS  
10 Attorney General of California

11  
12 /s/  
TARA L. MUELLER  
13 Deputy Attorney General  
14 *Attorneys for Plaintiff San Francisco Bay  
Conservation & Development Commission*

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