

September 22, 2016

## Justification and Explanation for Lawsuit Concerning Army Corps of Engineers' 2017 San Francisco Bay Dredging Program

**Action.** On September 22, 2016, the California Attorney General, on behalf of the San Francisco Bay Conservation and Development Commission (BCDC), filed a lawsuit in federal district court in San Francisco to compel the United States Army Corps of Engineers (Corps) to implement its 2017 San Francisco Bay dredging program in accordance with the federal Coastal Zone Management Act (CZMA). The CZMA requires the Corps' dredging program to be consistent to the maximum extent practicable with the state's federally-approved coastal zone management program, of which BCDC's San Francisco Bay Plan is a part. Instead, the Corps' 2017 dredging program as currently proposed is significantly and avoidably out of compliance with the Bay Plan, which regulates how the Bay's resources are protected.

**Background.** In June 2015, BCDC's Commissioners voted unanimously to concur with Corps' proposed "consistency determination," including a letter of agreement that contains conditions prescribing how the Corps will dredge the Bay's federal navigation channels during 2015 through 2017 in a manner consistent with the Bay Plan. On November 10, 2015, five months after the public meeting at which the Corps verbally accepted all of BCDC's conditions and after Lt. Colonel John Morrow of the Corps' San Francisco District signed BCDC's Letter of Agreement setting forth those conditions, the Corps abruptly reversed course and notified BCDC that the Corps would not comply with four of BCDC's conditions.

The four conditions with which the Corps has refused to comply are critical to ensuring that its dredging program complies with the Bay Plan's federally-accredited and enforceable policies that promote the beneficial reuse of dredged material to create and bolster marshes and wetlands, and that protect the Bay's fish and wildlife resources and water quality. The four conditions to which Corps is objecting require it to:

1. Beneficially reuse a minimum of 40% of dredged material as a resource for wetlands restoration and shoreline resiliency and dispose of no more than 20% in the Bay in an unconfined manner;
2. Reduce the use of hydraulic dredging equipment to minimize killing of endangered delta smelt and threatened longfin smelt;
3. Seek additional funding to implement the first two conditions; and,
4. Obtain a federally-required water quality certification for the Corps' dredging and disposal activities from the San Francisco Bay Regional Water Quality Control Board.

The Corps objects to these four conditions on the grounds that it is allegedly obligated under its own dredging regulations to adopt the least costly environmentally acceptable disposal alternative, known universally as the Corps' so-called "federal standard," instead of

## **Justification and Explanation for Lawsuit Concerning Army Corps of Engineers' 2017 San Francisco Bay Dredging Program**

September 22, 2016

Page 2

what it characterizes as BCDC's "local preference." BCDC believes that the Corps' interpretation of the federal standard is incorrect and does not legally prohibit the Corps from adopting a potentially more costly dredging alternative that complies with the Bay Plan's federally-enforceable policies, or from seeking additional federal funding to comply with federal and state environmental laws. Moreover, the CZMA expressly forbids federal agencies from using a lack of funding as an excuse for noncompliance with state-imposed conditions and Corps' regulations cannot trump the CZMA's statutory requirements.

**State of Play.** In a March 10, 2016 letter to the Corps, BCDC provided a detailed explanation of its disagreement with the Corps. The letter then requested that the Corps agree to a mediation process with BCDC that is offered through the federal National Oceanic and Atmospheric Administration's Office for Coastal Management – a process detailed in the CZMA's implementing regulations. Twelve days later, the Corps informed BCDC that it would not agree to participate in mediation. Since then, BCDC Commissioners and staff have discussed this impasse several times to investigate potential alternatives to litigation. As a final effort in August 2016, representatives of BCDC and the State Natural Resources Agency met in Washington, D.C. with senior Corps officials to request that the Corps reconsider its refusal to engage in mediation as an alternative to potential litigation. The Corps has not responded to that supplemental request, despite even further prompting by BCDC and the Natural Resources Agency.

Given the Corps' refusal to join in mediation, BCDC Commissioners unanimously authorized filing a Complaint for Declaratory and Injunctive Relief against the Corps in the United States District Court for the Northern District of California. The Complaint alleges that the Corps' refusal to comply with BCDC's conditions requiring beneficial use of dredged material and the protection of Bay fish species and water quality violates the CZMA, the Administrative Procedure Act, and the Corps' own dredging regulations (including the "federal standard"). The Complaint seeks a judicial determination that the CZMA and the Corps' regulations require the Corps to conduct maintenance dredging of the Bay's federal navigation channels in compliance with the four contested conditions, the CZMA, and the Corps' own regulations.

**Implications.** Dredging in the Bay during 2016 will not be affected by this lawsuit, and only 2017 operations may be affected. As a member of the BCDC-Regional Water Quality Board-EPA-Corps dredging "Long Term Management Strategy" program, BCDC fully supports dredging efforts that create and maintain ship channels to ensure a steady flow of goods into and out of the Bay Area. BCDC's lawsuit only seeks to ensure that the Corps' critical dredging program is implemented in a way that beneficially reuses dredged materials to increase wetland restoration and shoreline resiliency rather than squandering the material by disposing it at unconfined in-Bay disposal sites or at a deep ocean disposal site, and in a manner that protects native aquatic species in accordance with applicable federal and state environmental laws. These policies have been applicable to all dredgers in the Bay since LTMS began over 15 years ago.