



Making San Francisco Bay Better

April 30, 2012

Mr. John Chesnutt
Chief, Navy and Army Section
Superfund Division
U.S. Environmental Protection Agency (USEPA), Region 9
75 Hawthorne Street
San Francisco, California 94105

SUBJECT: Identification of Applicable or Relevant and Appropriate Requirements (ARARs) for Response Actions and Initiation of Coordination at Yosemite Creek Sediment Site, San Francisco, California

Dear Mr. Chesnutt:

On October 13, 2011, the San Francisco Bay Conservation and Development Commission (BCDC) received a letter requesting information on any specific natural resource related concerns regarding the contamination in Yosemite Slough, information on current and future beneficial uses of the slough, and any natural resources that may be present at the site and adjacent areas. Thank you for the opportunity to identify the Applicable or Relevant and Appropriate Requirements (ARARs) related to the projected remediation activities at the Yosemite Creek Sediment site.

The staff's comments discussed below are based on the Commission's law, the McAteer-Petris Act, the Commission's San Francisco Bay Plan (Bay Plan), the Commission's federally-approved coastal management plan for the San Francisco Bay, and the federal Coastal Zone Management Act (CZMA).

Commission Jurisdiction

For your convenience and consideration, the Commission's jurisdiction includes all tidal areas of the Bay up to the line of mean high tide (up to five feet above mean sea level or the upper edge of marsh vegetation in marshland), all areas formerly subject to tidal action that have been filled since September 17, 1965, and the shoreline band, which extends 100 feet inland from and parallel to the Bay shoreline. Under the CZMA, the Commission's jurisdiction can extend further inland for federal agency activities within or outside the coastal zone that affect any land or water use or natural resource.

Based on Figure 1 in the Notification letter, it is clear that Yosemite Creek is located within the Bay jurisdiction. Our files indicate that newly created tidal wetlands are located adjacent to the sites, which means that the Commission's jurisdiction may be up to five feet above mean sea level or the upper edge of marsh vegetation in areas within the project.

McAteer-Petris Act (California Government Code Section 66600 through 66682)

If remediation actions involve filling (or backfilling) in the Bay, wetlands, or marshland areas adjacent to the Bay, Section 66605 of the McAteer-Petris Act would be an applicable requirement. A project within the Commission's jurisdiction must be consistent with Section 66605 (a) through (g) in their entirety.

Section 66605 (a) requires that filling of San Francisco Bay and certain waterways should be authorized only when the public benefits from fill clearly exceed public detriments from the loss of the water area and should be limited to projects that are a water-oriented use (such as ports, water-related industry, airports, bridges, wildlife refuges, water-oriented recreation, and public assembly, water intake and discharge lines for desalinization plants and power generating plans requiring large amounts of water for cooling purposes) or those that include minor fill for improving shoreline appearance or public access to the Bay.

Section 66605(b) requires that fill in the Bay should be authorized only when the project has no alternative upland location.

Section 66605 (c) states that a project that proposes to place fill in the Bay must be the minimum amount of fill necessary to achieve the purpose of the project.

Section 66605 (d) requires that the nature, location and extent of any fill should minimize harmful effects to the Bay.

Section 66605(e) states fill be constructed in accordance with sound safety standards, which will afford reasonable protection to persons and property against the hazards of unstable geologic or soil conditions or of flood or storm waters.

Section 66605 (f) requires that fill be authorized when the filling would establish a permanent shoreline.

Section 66605 (g) requires that fill be authorized only to those who have valid title to the properties in question.

The complete language paraphrased herein can be found on the Commission's website at www.bcdc.ca.gov in the publications section.

San Francisco Bay Plan

The San Francisco Bay Plan is the Coastal Zone Management Plan for San Francisco Bay and its policies are applicable to projects with the Coastal Zone and those with potential to affect the Coastal Zone. Based on the project location and description, the following San Francisco Bay Plan policies are applicable requirements for the remediation project:

Water Quality Policies. The Bay Plan Water Quality Policies require water pollution to be prevented to the greatest extent feasible. Policy No. 3 requires new projects be sited, designed, constructed and maintained to prevent or minimize the discharge of pollutants in the Bay by controlling pollutant sources at the project site, using appropriate construction materials, and applying best management practices.

Tidal Marshes and Tidal Flats Policies. The Bay Plan Tidal Marsh and Tidal Flats policies require that tidal marshes and tidal flats be conserved to the fullest possible extent. Policy No. 2 requires that any proposed project be thoroughly evaluated to determine the effect of the project on tidal marshes and tidal flats, and designed to minimize, and, if feasible, avoid any harmful effects.

Fish, Other Aquatic Organisms and Wildlife Policies. The Bay Plan Fish, Other Aquatic Organisms and Wildlife policies require that any California endangered species be protected. Policy No. 1 states in part, that to assure the benefits of fish, other aquatic organisms and wildlife for future generations, to the greatest extent feasible, the Bay's tidal marshes, tidal flats, and subtidal habitat should be conserved, restored and increased. Policy No. 2 states that any

specific habitats that are needed to conserve, increase or prevent the extinction of any native species, species of threatened or endangered, species that the California Department of Fish and Game has determined are candidates for listing as endangered or threatened under the California Endangered Species Act, or any species that provides substantial public benefits, should be protected, whether in the Bay or behind dikes.

Based on Figure 1 referenced above, it appears that the proposed remediation may occur within subtidal areas throughout the project. If so, the Bay Plan Subtidal Areas policies are applicable requirements for the remediation project:

Subtidal Areas. The Bay Plan Subtidal Areas policies require any filling or dredging project within a subtidal area, the land and water below mean low tide and areas that are intricately tied to tidal flats and tidal marshes, be thoroughly evaluated to determine the local and Bay-wide effects of the project. Policy No. 2 states that subtidal areas are scarce in the Bay and have an abundance and diversity of fish, other aquatic organisms and wildlife should be conserved. Filling, changes in use, and dredging projects in these areas should therefore be allowed only if: (1) there is no feasible alternative; and (b) the project provides substantial public benefits. Policy No. 3 states that subtidal restoration projects should be designed to promote abundance and diversity of fish, other aquatic organisms and wildlife, restore rare subtidal areas, and expand open water areas in effort to make the Bay larger.

It is not clear whether or not excavation and/or dredging will be part of the remediation process at Yosemite Creek. Please provide information on the methods to remediate the project areas. Please consider that recreational users and wildlife around Candlestick Park and the new Yosemite Slough Restoration Project are potential receptors of contaminants from the proposed remediation sites. If excavation or dredging occurs within wetlands or marshlands adjacent to the Bay, the Bay Plan Dredging policies are applicable requirements for the remediation project:

Dredging. The Bay Plan Dredging policies discuss disposal of dredged material and dredging requirements. Policy No. 1 states that dredging and dredged material disposal should be conducted in an environmentally and economically sound manner.

Lastly, Figure 1 referenced above also indicates that the project areas have special designations on the Bay Plan's Bay Plan Map No. 5, attached to this letter. Therefore, the Bay Plan Map No. 5 and the related policies are applicable requirements for the remediation project:

Coastal Zone Management Act

The Coastal Zone Management Act (CZMA) was enacted in 1972 to encourage coastal states to develop comprehensive programs to manage and balance competing uses of and impacts to the coastal resources. Section 307 (16 USC § 1456), called the federal consistency provision, facilitates cooperation and coordination between federal and state coastal management agencies like the Commission. Sections 307(c)(1)(A) requires that "federal agency activities within or outside of the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved state management programs." Section 307(c)(2) requires that "any federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with the enforceable policies of approved state management programs." For purposes of this provision, the "coastal zone" consists of San Francisco Bay and its contiguous marshlands. Finally, section 307(c)(1)(C) requires a federal agency that engages in activities subject to section

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307(c)(1)(A) to submit to the Commission a consistency determination "at the earliest practicable time." Each of these CZMA requirements is an applicable requirement with respect to the subject remediation projects.¹

Thank you for providing staff with the opportunity to provide the Commission's ARARs related to any future remediation action at the Yosemite Creek site. Further information related to the remediation project may lead to the identification of additional applicable requirements. We recognize the importance of this project and would like to be active participants as stakeholders during the process. Please feel free to contact me at (415) 352-3670. I can also be reached by email at rafaelm@bcdca.gov.

Respectfully,



RAFAEL MONTES, P.E.
Senior Engineer

RM/ra
Enc.

¹ It is our position that the foregoing requirements of the CZMA constitute legal obligations to which the U.S. EPA is subject with respect to the instant remediation project regardless of whether such requirements do or do not qualify as "Applicable or Relevant and Appropriate Requirements" (ARARs) under the CERCLA.

BAY PLAN POLICIES

- 1 **Gateway Shoreline Park** - Develop gateway park at Bay Bridge touchdown with gracious pedestrian and bicycle access to the Bay Bridge. Incorporate viewing, picnicking, non-motorized small boat launching and interpretation of current and historic transportation infrastructure and natural and cultural factors. Protect eelgrass beds and nearby endangered species habitats.
- 2 **Oakland Port Area** - See Seaport Plan. Redevelop Outer, Middle, and Inner Harbors for modern marine terminals. Some fill may be needed. No fill that would impair ship navigation should be allowed in any area needed for such navigation.
- 3 **Middle Harbor Shoreline Park** - Preserve industrial character of park. Preserve fishing access, picnic facilities, beach, historic features and community gathering and entertainment venues. Provide interpretation of port operations, historic and cultural factors. Provide non-motorized small boat access. Protect eelgrass beds. Provide signage regarding fish consumption advisories for anglers.
- 4 **Harbor Seal Haul-Out** - Protect harbor seal haul-out and pupping site where harbor seals rest, give birth and nurse their young. Projects allowed only if protective of harbor seals and other sensitive wildlife.
- 5 **Coast Guard Island** - If and when not needed by the Coast Guard and the island is transferred out of federal ownership or control, Coast Guard Island upland of shoreline band should be developed consistent with recreation policy 4-b. Provide continuous shoreline public access and public and commercial recreation uses.
- 6 **Robert W. Crown Memorial State Beach and Elsie Roemer Bird Sanctuary** - Preserve Elsie Roemer Bird Sanctuary public access and endangered species there. Preserve Crab Cove Visitors Center, swimming and non-motorized small boat access, accessible tide ramp and hiking and biking trails. Some fill may be needed for beach and marina protection.
- 7 Protect and provide public access to shellfish areas offshore.
- 8 **San Leandro Bay** - Valuable wildlife habitat; great recreation potential. Develop boating facilities and parks, but preserve wildlife habitat. Provide continuous public access to northeastern and southern shoreline. Some fill may be needed.
- 9 **Martin Luther King, Jr. Regional Shoreline Park** - Provide diverse wildlife compatible recreation opportunities, including picnicking, wildlife viewing, environmental education, boating, bicycling, and hiking. Preserve habitat areas and protect wildlife, including endangered species. Improve connections between park and inland neighborhoods.
- 10 **Oakland Airport** - Further expansion into the Bay only if clear need is shown by regional airport system study. Keep runway approach and takeoff areas clear of tall structures and incompatible uses. Complete Bay Trail along inland route.
- 11 **Oyster Bay Regional Shoreline** - Provide opportunities for shoreline trail access, completion of San Francisco Bay Trail gaps, wildlife observation and non-motorized small boat access. Preserve group picnic areas, vistas, multipurpose trails and rugged character of the shoreline.
- 12 **San Leandro Shoreline Park System** - Protect and provide public access to shellfish beds offshore.
- 13 **San Francisco Airport** - Further expansion into Bay only if clear need is shown by regional airport system study. Keep runway approach and takeoff areas free from tall structures and incompatible uses. Complete Bay Trail along inland route.
- 14 Protect and provide public access to shellfish areas offshore.
- 15 **Oyster Point Marina Park** - Preserve and improve marina and shoreline park. Preserve picnicking, swimming, boating, hiking, windsurfing, and fishing opportunities. Possible ferry terminal. Allow if compatible with park and marina use; serve with bus public transit to reduce traffic and parking needs. Some fill may be needed. Provide signage regarding fish consumption advisories for anglers.
- 16 Provide safe, accessible pedestrian access across freeway.
- 17 No roadway in Bay east of U.S. 101.
- 18 **U.S. 101 Causeway** - Develop scenic frontage road and turnouts for fishing and viewing. Protect shellfish beds offshore.
- 19 **Bay View Park** - Provide trail link to waterfront.
- 20 **Candlestick Point State Recreation Area** - Some fill may be needed. Preserve fishing, camping, picnicking, windsurfing, hiking and viewing opportunities. Potential water trail camping site. Provide signage regarding fish consumption advisories for anglers.
- 21 **South Basin** - Some fill may be needed in inlet west of proposed freeway.
- 22 **Hunters Point** - See Seaport Plan. Develop shoreline park and integrate with Candlestick Point State Recreation Area, consistent with San Francisco redevelopment plan. Potential water trail camping site. Some fill may be needed.

Plan Map 5

Bay Plan Policies and Commission Suggestions

BAY PLAN POLICIES (cont.)

- 23 **Port of San Francisco** - See Seaport Plan. Some fill may be needed.
- 24 **San Francisco Waterfront Special Area Plan** - See special area plan for detailed planning guidelines for the shoreline between the east side of the Hyde Street Pier and the south side of India Basin.
- 25 **Yerba Buena Island - South of Bay Bridge** - When no longer owned or controlled by the federal government, redevelop for recreational use. Protect harbor seal haul-out and pupping site where harbor seals rest, give birth and nurse their young. Projects allowed only if protective of harbor seals and other sensitive wildlife.
- 26 **Yerba Buena and Treasure Islands - Clipper Cove** - Expand marina and other water-oriented recreation uses, provide access to small water craft, e.g., kayaks, and swimming. Preserve beaches and eelgrass beds.
- 27 **Yerba Buena Island North of Bay Bridge** - Provide: (1) a large public open space at the center of Yerba Buena Island; (2) a large public open space on the plateau on the eastern peninsula, adjacent to and beneath the eastern span of the San Francisco-Oakland Bay Bridge; and (3) a linked system of trails near the shoreline and at the upper elevations that connect vista points and open spaces. Vista points should provide views of the Bay Bridge, San Francisco Skyline and other important Central Bay features. The remainder of the island upland of the shoreline band may be developed for other uses consistent with Bay Plan recreation policy 4-b, and with the applicable public trust provisions and statutes.
- 28 **Treasure Island** - When no longer owned or controlled by the federal government, redevelop for public use. Provide continuous public access to the Bay in a manner protective of sensitive wildlife. Provide parking and water access for users of non-motorized small boats at north end of Treasure Island. Develop a system of linked open spaces, including a large open space at the northern end of the island.
- 29 **Fisherman's Wharf** - Improve and expand commercial fishing support facilities. Enhance public access to and economic value of Fisherman's Wharf area by encouraging development of a public fish market.
- 30 **Regional Restoration Goal for Central Bay** - Protect and restore tidal marsh, seasonal wetlands, beaches, dunes and islands. Natural salt ponds should be restored on the East Bay shoreline. Shallow subtidal areas (including eelgrass beds) should be conserved and enhanced. Wherever possible tidal marsh habitats should be restored, particularly at the mouths of streams where they enter the Bay and at the upper reach of dead-end sloughs. Encourage tidal marsh restoration in urban areas. See the Baylands Ecosystem Habitat Goals report for more information.

COMMISSION SUGGESTIONS

- A Possible reuse of dredged material at former NAS Alameda.
- B Jack London Square - Expand commercial recreation facilities as needed. Provide continuous public access along Estuary to Lake Merritt Channel.
- C Brooklyn Basin - Expand commercial fishing and recreational facilities.
- D Possible scenic path, Coliseum to Bay.
- E Bay Farm Island - Undeveloped areas may be suitable for airport-related industry.
- F Possible extension of scenic drive.
- G Develop scenic drive and riding and hiking trail along waterfront from airport to Foster City.
- H Possible airport industry.



Plan Map 5

Central Bay

