

# San Francisco Bay Conservation and Development Commission

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Governor's Office of Planning & Research

**NOV 22 2019**

**STATE CLEARINGHOUSE**

Jessica Nadolski  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, California 95812-2000

**SUBJECT: Comments on the Notice of Preparation for the Order for Clean Water Act Section 401 Water Quality Certification and Waste Discharge Requirements for Implementation of Large Habitat Restoration Projects Statewide**

Dear Ms. Nadolski:

On October 24, 2019, the Commission received a Notice of Preparation (NOP) for the Order for Clean Water Act Section 401 Water Quality Certification and Waste Discharge Requirements for Implementation of Large Habitat Restoration Projects Statewide Draft Environmental Impact Report (draft EIR). Thank you for the opportunity to comment.

Although the San Francisco Bay Conservation and Development Commission (Commission) has not reviewed the NOP, the following staff comments are based on the McAteer-Petris Act, the Suisun Marsh Preservation Act (Suisun Marsh Act), the Commission's *San Francisco Bay Plan* (Bay Plan), the *Suisun Marsh Protection Plan* (Suisun Marsh Plan), the Commission's federally-approved coastal management program for the San Francisco Bay, and the federal Coastal Zone Management Act (CZMA).

## **Jurisdiction**

The Bay Area and the Suisun Marsh support a substantial portion of the state's wetlands and also contain diked historic baylands that could support large restoration projects. The Commission's permit jurisdiction includes all tidal areas of the Bay up to the line of mean high tide or, in areas of tidal wetlands, the upland edge of tidal marsh up to five feet above mean sea level, including all areas formerly subject to tidal action that have been filled since September 17, 1965; and the shoreline band that extends 100 feet inland from and parallel to the Commission's Bay jurisdiction. The Commission also has jurisdiction over certain managed wetlands adjacent to the Bay, salt ponds, certain waterways, and the Suisun Marsh.

Commission permits are required for placement of fill, construction, dredging, and substantial changes in use within its jurisdiction, which includes wetland restoration projects. Permits are issued when the Commission finds proposed activities to be consistent with its laws, policies, and coastal zone management program. In addition, federal actions (including plans), permits, projects, licenses and grants affecting the Commission's coastal zone jurisdiction are subject to review by the Commission, pursuant to the federal CZMA, for their consistency with the Commission's federally-approved coastal management program for the Bay.



The Suisun Marsh Act grants the Commission regulatory authority to issue marsh development permits, which include restoration projects, in the primary management area of the Suisun Marsh, defined as water-covered areas, tidal marshes, diked wetlands, seasonal marshes, and certain lowland grasslands specified on the Marsh Plan Map. The Suisun Marsh Act also established a secondary management area composed principally of upland grasslands and cultivated lands, also specified on the Suisun Marsh Plan Map, to serve as a buffer between the primary management area and developed lands outside the Suisun Marsh. Within the secondary management area, local governments issue marsh development permits pursuant to a local protection program certified by the Commission, and these permits can be appealed to the Commission. Therefore, large restoration projects within the Commission’s jurisdiction will require approval by the Commission.

### **Programmatic Permits for Large Restoration Projects**

The proposed General Order would provide for large habitat restoration projects to be issued a 401 Water Quality Certification under a programmatic permit, which could reduce costs and timelines for habitat restoration. The Commission recognizes the need for fostering and expediting large-scale Bay restoration, particularly in light of rising sea level. If wetlands are not restored soon so that they can establish marsh vegetation before sea level rise accelerates, they may not be able to restore successfully. BCDC recently adopted an amendment to the Bay Plan to address fill for habitat projects, which is now pending administrative law review and is likely to be in place by the time a draft EIR is prepared for the General Order. This amendment includes policy revisions to allow larger volumes of fill for habitat projects and proposes amendments to the Bay Plan policies on Fish, Other Aquatic Organisms, and Wildlife; Tidal Marshes and Tidal Flats; Subtidal Areas; Dredging; and Shoreline Protection. Many of these policies explicitly address requirements for habitat restoration, enhancement, creation, and sea level rise adaptation projects within BCDC’s jurisdiction, including specific issues that are mentioned below. As part of the Bay Plan amendment process, the Commission recognized that expediting restoration also needs to ensure that projects are designed, constructed and managed properly to ensure that they will provide anticipated benefits and not result in significant unintended adverse impacts. The draft EIR should discuss the impacts addressed by these Bay Plan policies.

While a programmatic permit for large restoration projects would encourage more restoration of Bay habitats and could potentially streamline the permitting process, large restoration projects, if not properly designed, analyzed, mitigated, and managed, could potentially pose substantial risk to Bay and Suisun Marsh natural resources. The NOP states that “restoration projects must incorporate specified protection measures (as applicable), such as design guidelines or avoidance and minimization techniques, or other criteria into their project descriptions to qualify within the scope of the proposed General Order.” Based on this description, it is not clear what level of review would be required under the General Order to ensure that unintended impacts to natural resources would not occur. Recognizing this potential, it is important that the draft EIR effectively evaluate the suite of impacts that could occur if projects are permitted with expedited/less rigorous review or with less substantive mitigation requirements. The General Order should maintain an adequate review process that

will protect Bay resources and allow for appropriate mitigation of any impacts to these resources. Additionally, since the current NOP proposes the development of a generalized CEQA document, it should be acknowledged in the draft EIR that as projects are fully developed, a supplemental analysis will be necessary for project-level review.

The NOP has identified a broad list of restoration types that take place throughout the state that would be considered under the General Order, including: (1) Stream Crossing and Fish Passage Improvements; (2) Small Dam, Tide Gate, Flood Gate, and Legacy Structure Removal; (3) Bioengineered Bank Stabilization; (4) Off-Channel/Side-Channel Habitat Restoration and Enhancement; (5) Water Conservation Projects; (6) Floodplain Restoration; (7) Piling and Other In-Water Structure Removal; (8) Non-native Invasive Species Removal and Native Plant Revegetation; (9) Tidal, Subtidal, and Freshwater Wetland Establishment, Restoration, and Enhancement; and (10) Stream and Riparian Habitat Establishment, Restoration, and Enhancement. Considering this list, the staff has identified BCDC laws and policies that raise potential issues in large restoration projects that require analysis in the draft EIR. The impacts identified in laws and policies should be considered in all aspects of the draft EIR, as projects considered by the General Order may affect these issues.

### **Protection of Bay Habitats**

The proposed types of restoration projects to be considered under the General Order could include fill placement, such as the beneficial reuse of dredged sediment or placement of upland material to establish, restore, or enhance a wetland. The McAteer-Petris Act places specific restrictions on use of fill within BCDC's jurisdiction, and states in part that fill "should be authorized only when public benefits from fill clearly exceed public detriment from the loss of the water areas and should be limited to water-oriented uses"; "should be authorized only when no alternative upland location is available for such purpose"; and should "minimize harmful effects to the bay area, such as, the reduction or impairment of the volume surface area or circulation of water, water quality, fertility of marshes or fish or wildlife resources, or other conditions impacting the environment". The law also states that "the water area authorized to be filled should be the minimum necessary to achieve the purpose of the fill."

The Bay Plan contains many policies that protect against impacts to living resources and their habitats. Policies in the Fish, Other Aquatic Organisms, and Wildlife section of the Bay Plan state:

"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."

"Specific habitats that are needed to conserve, increase or prevent the extinction of any native species, species 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."

Similarly, policies in the Tidal Marshes and Tidal Flats section of the Bay Plan state:

“Tidal marshes and tidal flats should be conserved to the fullest possible extent. Filling, diking, and dredging projects that would substantially harm tidal marshes or tidal flats should be allowed only for purposes that provide substantial public benefits and only if there is no feasible alternative.”

“Any proposed fill, diking, or dredging project should 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.”

“Projects should be sited and designed to avoid, or if avoidance is infeasible, minimize adverse impacts on any transition zone present between tidal and upland habitats. Where a transition zone does not exist and it is feasible and ecologically appropriate, shoreline projects should be designed to provide a transition zone between tidal and upland habitats.”

Policies in the Subtidal Areas section of the Bay Plan state, in part, that “projects in subtidal areas should be designed to minimize and, if feasible, avoid any harmful effects”, and that

“[S]ubtidal areas that are scarce in the Bay or have an abundance and diversity of fish, other aquatic organisms and wildlife (e.g., eelgrass beds, sandy deep water or underwater pinnacles) should be conserved.”

The proposed types of restoration projects to be considered under the General Order, if not permitted and conditioned carefully, could potentially result in detrimental impacts to living Bay resources, including fish, wildlife, plant communities, invertebrate communities, etc; and the habitats of these organisms. For example, the removal of dams, tide gates, flood gates, and other legacy structures could increase water turbidity and have unintended adverse impacts on downstream plant communities, such as eelgrass. Additionally, wetland establishment activities in subtidal or some tidal areas could result in habitat type conversion that inadvertently eliminates or significantly reduces the numbers of certain populations of fish or wildlife (e.g. mudflat conversion to another habitat type could disrupt foraging of certain bird guilds).

To ensure that expedited permitting of restoration projects under the General Order would not adversely impact natural resources that are protected by BCDC’s policies, the draft EIR should assess impacts of the General Order to tidal marshes, tidal flats, subtidal areas, salt ponds, and managed wetlands, both in the Bay and in the Suisun Marsh, and should discuss whether the requirements of the General Order would address the impacts raised in the McAteer-Petris Act requirements related to allowable fill, BCDC’s policies addressing natural resources in the Bay Plan, and the Suisun Marsh Protection Plan. Additionally, staff recommends that the draft EIR specify much more narrowly the types of projects that can be permitted under the General Order, and the criteria for project eligibility, to minimize the possibility of projects with negative impacts on natural resources to be permitted under the General Order.

#### **Protection of Water Resources:**

BCDC’s Bay Plan policies state, in part, the following:

In the Water Quality section:



“Bay water pollution should be prevented to the greatest extent feasible. The Bay's tidal marshes, tidal flats, and water surface area and volume should be conserved and, whenever possible, restored and increased to protect and improve water quality. Fresh water inflow into the Bay should be maintained at a level adequate to protect Bay resources and beneficial uses.”

In the Water Surface Area and Volume section:

“The surface area of the Bay and the total volume of water should be kept as large as possible in order to maximize active oxygen interchange, vigorous circulation, and effective tidal action. Filling and diking that reduce surface area and water volume should therefore be allowed only for purposes providing substantial public benefits and only if there is no reasonable alternative.”

The proposed types of restoration projects to be considered under the General Order, if not permitted and conditioned carefully, could result in unintended or unavoidable detrimental impacts to the Bay and its connected water resources, including water quality, water surface area and volume, and freshwater inflow to the Bay. For example, the removal of dams, tide gates, flood gates, and other legacy structures could alter sediment loads entering the Bay at various sites, and could alter certain water quality parameters (e.g. turbidity or nutrient concentration). Additionally, sediment placement to establish tidal wetlands could result in the conversion of open water/subtidal area to tidal marsh, and thus reduce the Bay's surface area and volume.

The Commission's law and policy provides that the policies, decisions, advice, and authority of the State Board and the San Francisco Bay Regional Water Quality Control Board should be the primary basis for the Commission to carry out its water quality responsibilities for the Bay. To ensure that expedited permitting of restoration projects under the General Order would not adversely impact water resources that are protected by BCDC's policies, the draft EIR should assess impacts of projects authorized under the General Order to water quality, water surface area and volume, and freshwater inflows, both in the Bay and in the Suisun Marsh, and should discuss whether the requirements of the General Order address impacts identified in BCDC's Bay Plan and Suisun Marsh Protection Plan policies on water resources.

#### **Restoration Project Design and Evaluation:**

Restoration projects within BCDC's jurisdiction that are permitted via the General Order will require sufficiently detailed project design and evaluation, particularly if a proposed project has the potential to adversely impact Bay resources. The Bay Plan lists specific design and evaluation criteria for restoration projects in the Tidal Marshes and Tidal Flats, Subtidal Areas, Salt Ponds, and Managed Wetlands sections of the Bay Plan. The draft EIR should discuss whether the project design and evaluation required by the General Order would provide the necessary specificity to identify and address impacts raised in large restoration projects, as specified in the relevant Bay Plan policies.

### **Local Setting and Site Suitability**

In the Bay, specific local settings are highly variable, and for projects to be successful and minimize impacts, it is important that projects are appropriate to the local context. The Baylands Ecosystem Habitat Goals Update (2015) has highlighted areas that are suitable for restoration, and the importance of designing projects to re-connect natural sediment and hydrology to enhance project sustainability into the future. Additionally, the 2019 Adaptation Atlas highlights the importance of placing natural features in areas where they can be sustained and are appropriate for the site’s natural context. Several of BCDC’s recently adopted Bay Plan policies reflect the importance of considering local setting in project siting and design. A general review as suggested under the General Order does not appear to have the ability to analyze this issue. To ensure that expedited permitting of restoration projects under the General Order would not impact natural resources that are protected by BCDC’s policies, the draft EIR should assess whether and how projects would fit within local setting and how this would be analyzed through the General Order.

### **Dredging**

Projects allowed by General Order may entail the use of dredged sediment to raise the elevation of subsided land, construct necessary berms or levees, construct transition zones, or implement other sea level rise adaptation measures; and could entail dredging for tidal channel creation or enhancement. BCDC’s dredging policies regulate the use of dredged sediment for restoration, as well as dredging for these purposes, within the Commission’s jurisdiction. The Bay Plan Dredging Policies state, in part, that:

“Dredging should be authorized when the Commission can find: (a) the applicant has demonstrated that the dredging is needed to serve a water-oriented use or other important public purpose, such as navigational safety; (b) the materials to be dredged meet the water quality requirements of the San Francisco Bay Regional Water Quality Control Board; (c) important fisheries and Bay natural resources would be protected through seasonal restrictions established by the California Department of Fish and Game, the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service, or through other appropriate measures; (d) the siting and design of the project will result in the minimum dredging volume necessary for the project; and (e) the materials would be disposed of in accordance with Policy 3”; and

“A project that uses dredged material to create, restore, or enhance Bay or certain waterway natural resources should be approved only if:

1. The Commission, based on detailed site specific studies, appropriate to the size and potential impacts of the project, that include, but are not limited to, site morphology and physical conditions, biological considerations, the potential for fostering invasive species, dredged material stability, and engineering aspects of the project, determines all of the following:
  - a. the project would provide, in relationship to the project size, substantial net improvement in habitat for Bay species;

- b. no feasible alternatives to the fill exist to achieve the project purpose with fewer adverse impacts to Bay resources;
- c. the amount of dredged material to be used would be the minimum amount necessary to achieve the purpose of the project;
- d. beneficial uses and water quality of the Bay would be protected; and
- e. there is a high probability that the project would be successful and not result in unmitigated environmental harm...”

The draft EIR should discuss whether the requirements of the General Order would address impacts identified in BCDC’s Bay Plan policies on acceptable dredging activities.

### **Climate Change**

Restoration projects within BCDC’s jurisdiction that are permitted via the General Order will be required to adhere to BCDC’s climate change policies. An applicable policy in the Bay Plan states, in part, that most projects “within areas that a risk assessment determines are vulnerable to future shoreline flooding that threatens public safety...should be designed to be resilient to a mid-century sea level rise projection. If it is likely the project will remain in place longer than mid-century, an adaptive management plan should be developed to address the long-term impacts that will arise based on a risk assessment using the best available science-based projection for sea level rise at the end of the century.” The draft EIR should discuss whether the General Order would consider sea level rise. Additionally, the draft EIR should consider how climate change may alter the way that allowable restoration projects will impact Bay and marsh natural resources (e.g. how might changing precipitation patterns and sea level rise impact the projects that would be allowed through the General Order).

### **Public Access**

Projects within BCDC’s jurisdiction that are permitted via the General Order and use fill for habitat restoration will also require public access. BCDC’s public access policies state, in part, that:

“A proposed fill project should increase public access to the Bay to the maximum extent feasible, in accordance with the policies for Public Access to the Bay”;

“Public access to some natural areas should be provided to permit study and enjoyment of these areas. However, some wildlife are sensitive to human intrusion. For this reason, projects in such areas should be carefully evaluated in consultation with appropriate agencies to determine the appropriate location and type of access to be provided”; and

“Public access should be integrated early in the planning and design of Bay habitat restoration projects to maximize public access opportunities and to avoid significant adverse effects on wildlife.”

The draft EIR should discuss whether the requirements of the General Order would be consistent and compatible with BCDC's Bay Plan policies on Public Access.

### **Mitigation**

Projects that would be permitted under the General Order could potentially have adverse impacts on natural resources that require mitigation under BCDC's Bay Plan policies. BCDC's Bay Plan states that "[p]rojects should be designed to avoid adverse environmental impacts to Bay natural resources such as to water surface area, volume, or circulation and to plants, fish, other aquatic organisms and wildlife habitat, subtidal areas, or tidal marshes or tidal flats. Whenever adverse impacts cannot be avoided, they should be minimized to the greatest extent practicable. Finally, measures to compensate for unavoidable adverse impacts to the natural resources of the Bay should be required. Mitigation is not a substitute for meeting the other requirements of the McAteer-Petris Act." The draft EIR should discuss whether the General Order would identify and address the need for mitigation for project impacts when appropriate. Additionally, the General Order should recognize that projects will require thorough evaluation to determine whether mitigation is necessary for project impacts.

### **Cumulative Impacts**

In allowing large amounts and/or areas of restoration work under a programmatic permit, it is important to consider the cumulative impacts of the authorized projects. While BCDC does not have specific policies or laws on cumulative impacts, the combined effects of multiple restoration projects should not negatively impact Bay resources. In particular, impacts addressed in the Bay Plan that should be considered carefully in the context of multiple projects include invasive species, sediment movement, tidal hydrology, and changes to the Bay's bathymetry. For example, if multiple projects reconfigure hydrology, it is important to consider resulting changes to sediment budget and water flows, which could have implications for ecosystems Bay-wide. Additionally, invasive species control strategies or introduction potential at one site could affect other projects throughout the Bay. Bay Plan policies state, in part, that any tidal marsh or tidal flat restoration project should be designed and analyzed to account for "(b) the impact of the project on the Bay's sediment budget..." and "(e) potential invasive species introduction, spread, and control...". Similarly, "[a]ny proposed filling or dredging project in a subtidal area should be thoroughly evaluated to determine the local and Bay-wide effects of the project on: (a) the possible introduction or spread of invasive species; (b) tidal hydrology and sediment movement;...and (e) the Bay's bathymetry. Projects in subtidal areas should be designed to minimize and, if feasible, avoid any harmful effects." The draft EIR should analyze the cumulative impacts of programmatic permitting of the types of restoration projects to be addressed through the General Order.

The San Francisco Bay Plan and Suisun Marsh Protection Plan encourage the restoration of Bay habitats, and Commission staff supports efforts to streamline permitting processes. However, Commission staff believes it is important to recognize that large restoration projects can have significant impacts to Bay resources. The Commission staff believes that the adoption of a



General Order for large restoration projects should be carefully considered to ensure that these impacts are acknowledged and addressed. Thank you for the opportunity to comment on this NOP. If you have any questions regarding this letter or the Commission's policies, please contact me at (415) 352-3626 or [megan.hall@bcdc.ca.gov](mailto:megan.hall@bcdc.ca.gov).

Sincerely,



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