

**ENDORSED  
FILED  
ALAMEDA COUNTY**

**JUN 30 2015**

**CLERK OF THE SUPERIOR COURT**

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12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **IN AND FOR THE COUNTY OF ALAMEDA**

14 SAN FRANCISCO BAYKEEPER, INC.,

15 Petitioner,

16 vs.

17 CALIFORNIA REGIONAL WATER  
18 QUALITY CONTROL BOARD, SAN  
19 FRANCISCO BAY REGION, and DOES 1-25,

20 Respondents,

21 U.S. ARMY CORPS OF ENGINEERS, SAN  
22 FRANCISCO DISTRICT, and DOES 26-50,

23 Real Parties in Interest.

Case No. **RG15776089**

VERIFIED PETITION FOR WRIT OF  
MANDATE

(California Code of Civil Procedure  
§§ 1085, 1094.5; California Public  
Resources Code §§ 21167, 21168,  
21168.5)

1 **INTRODUCTION**

2 1. Petitioner San Francisco Baykeeper (“Petitioner” or “Baykeeper”) seeks a writ of  
3 mandate compelling the California Regional Water Quality Control Board, San Francisco Bay  
4 Region (“Regional Board”) to set aside its approval of a dredging program formally known as  
5 “Maintenance Dredging of the Federal Navigation Channels in San Francisco Bay, Fiscal Years  
6 2015-2024,” State Clearinghouse Number 2013022056 (the “Project”), and certification of the  
7 Final Environmental Impact Report (“FEIR”) for the Project. As described below, the Regional  
8 Board’s approval violates the substantive and procedural requirements of the California  
9 Environmental Quality Act, Public Resources Code § 21000 *et seq.* (“CEQA”), and the  
10 California Endangered Species Act, Fish & Game Code § 2050 *et seq.* (“CESA”).

11 2. The Project provides for maintenance dredging by the U.S. Army Corps of  
12 Engineers, San Francisco District (“Army Corps”) of 11 federal navigation channels in San  
13 Francisco Bay and just outside of the Golden Gate, including six channels dredged annually and  
14 five channels with non-annual dredging cycles. These 11 channels have a combined surface  
15 area of 5,699 acres, which equates to 2.22 percent of the total surface area of San Francisco Bay.  
16 The Project would involve the dredging of almost 3 million cubic yards of sediment per year  
17 over the next decade. The Army Corps has proposed to dispose approximately half of the  
18 dredged material at in-Bay disposal sites and half at the San Francisco Deep Ocean Disposal  
19 Site, located approximately 55 miles west of the Golden Gate. The Army Corps has committed  
20 to the beneficial reuse of dredged material only when it represents the least costly disposal  
21 alternative.

22 3. As approved, the Project would accelerate the loss of sediment from the San  
23 Francisco Bay ecosystem and the resulting consequences for shoreline erosion, wetland loss, sea  
24 level rise adaptation, and nutrient over enrichment. Recent research led by the United States  
25 Geological Survey (“USGS”) has shown a direct connection between dredging activities in the  
26 Bay and erosion outside of the Golden Gate, which is already experiencing the highest rates of  
27 coastal erosion in California. The dredging operations included in this Project represent more  
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1 than 70 percent of the dredging that occurs in San Francisco Bay. Despite these concerns, the  
2 FEIR for the Project failed to address, evaluate, or mitigate for these significant impacts, as  
3 required by CEQA.

4 4. In addition, recent evidence has demonstrated that the dredging operations  
5 included in this Project are having significant adverse impacts on imperiled fish species, in  
6 particular, state-listed Delta smelt and longfin smelt. As stated in the FEIR, the Army Corps has  
7 estimated that up to 29 percent of annual population abundance of Delta smelt, and 8 percent of  
8 longfin smelt, will be killed by the hydraulic dredging operations that are part of this Project.  
9 Recent population numbers for these fish have been at historic lows, putting them on the brink  
10 of extinction. However, the Regional Board inappropriately delayed the most important  
11 mitigation measure to protect these species – requiring the use of mechanical dredges rather than  
12 hydraulic dredges – for several years without any finding that such mitigation would be  
13 infeasible. Also, despite the fact that the Project will result in the illegal take of state-listed  
14 species, the Regional Board failed to conduct a formal consultation with the California  
15 Department of Fish and Wildlife or submit an application for an incidental take permit prior to  
16 issuing its final approvals for the Project, in violation of CESA.

17 **JURISDICTION AND VENUE**

18 5. Petitioner files this Verified Petition for Writ of Mandate pursuant to California  
19 Code of Civil Procedure sections 1085 and 1094.5 and California Public Resources Code  
20 sections 21167, 21168, and 21168.5. This Court has the authority to issue a writ of mandate  
21 directing the Regional Board to vacate and set aside its approval of the Project and certification  
22 of the FEIR for the Project under California Code of Civil Procedure sections 1085 and 1094.5.

23 6. Venue is proper in this Court because Respondent is a state agency based in  
24 Alameda County, and because the California Attorney General maintains an office in Alameda  
25 County. (Code Civ. Proc. §§ 393(b), 395(a), 401(1).)

26 7. Consistent with Public Resources Code sections 211167(b) and (c) and 14 Cal.  
27 Code Regs. section 15112(c)(1), Petitioner timely filed this action within 30 days of the filing  
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1 and posting of the Notice of Determination on June 1, 2015, which is included as Exhibit A to  
2 this Petition.

3 8. Pursuant to Public Resources Code section 21167.5, Petitioner provided written  
4 notice of its intention to file this action to the Respondent, and are including the notice and proof  
5 of service as Exhibit B to this Petition.

6 9. Pursuant to Public Resources Code section 21167.7 and Code of Civil Procedure  
7 section 388, Petitioner served the Attorney General with a copy of its original Petition along with  
8 a notice of its filing, which is included as Exhibit C to this Petition.

9 10. Petitioner participated in the administrative processes that culminated in the  
10 Respondent's decision to approve and certify the EIR for the Project through oral and written  
11 comments. Petitioner exhausted all of its administrative remedies prior to filing this action.

12 11. Petitioner does not have a plain, speedy, or adequate remedy at law because  
13 Petitioner and its members will be irreparably harmed by the ensuing environmental damage  
14 caused by implementation of this Project and Respondent's violations of CEQA and CESA.

15 **ELECTION TO PREPARE ADMINISTRATIVE RECORD**

16 12. Petitioner will comply with Public Resources Code section 21167.6(b)(2) by  
17 concurrently filing a notice of its election to prepare the record of administrative proceedings  
18 with this Petition.

19 **PARTIES**

20 13. Petitioner SAN FRANCISCO BAYKEEPER is a non-profit, public interest  
21 organization that is dedicated to protecting the water quality of San Francisco Bay for the  
22 benefit of its ecosystems and surrounding communities. Baykeeper's office is located at 1736  
23 Franklin Street, Suite 800, Oakland, CA 94612. Members of Baykeeper live, work, travel, and  
24 recreate in and near San Francisco Bay, its tributaries, and the Pacific Coast. These members  
25 use the waters and lands affected by the Project for recreational, educational, scientific,  
26 conservation, aesthetic, and spiritual purposes. Thus, the interests of Baykeeper and its  
27 members would be directly, adversely, and irreparably harmed by the Project, until and unless  
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1 this Court provides the relief prayed for in this Petition. Baykeeper submitted timely comments  
2 on the Draft Environmental Impact Report (“DEIR”) and the FEIR, identifying both legal and  
3 scientific inadequacies in each document.

4 14. Respondent CALIFORNIA REGIONAL WATER QUALITY CONTROL  
5 BOARD, SAN FRANCISCO BAY REGION is a state agency established by the legislature  
6 pursuant to the Porter-Cologne Water Quality Control Act of 1970 (“Porter-Cologne Act”),  
7 California Water Code section 13000 *et seq.*, to implement the policies and requirements of the  
8 Porter-Cologne Act in the San Francisco Bay Region. The Regional Board’s main office is  
9 located at 1515 Clay Street, Suite 1400, Oakland, CA 94612. The Regional Board served as the  
10 lead agency for purposes of CEQA compliance for the Project. The Regional Board voted to  
11 certify the EIR and approve the Project at its May 13, 2015 board meeting.

12 15. Petitioner does not know the true names of Respondents DOES 1-25 at this time,  
13 and accordingly names them as DOES 1-25 until such time as the true name of each party so  
14 named is discovered.

15 16. Real Party in Interest U.S. ARMY CORPS OF ENGINEERS, SAN FRANCISCO  
16 DISTRICT is a federal agency within the Department of Defense that is named as the sole  
17 Project Applicant on the Notice of Determination filed and posted with the Office of Planning  
18 and Research on June 1, 2015. The Army Corps’ office is located at 1455 Market Street, San  
19 Francisco, CA 94103. The Army Corps served as the lead agency for the Project for purposes of  
20 compliance with the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*  
21 The Army Corps issued a Finding of No Significant Impact (“FONSI”) for the Project on May  
22 29, 2015.

23 17. Petitioner does not know the true names of Real Parties in Interest DOES 26-50  
24 and accordingly names them as DOES 26-50 until such time as the true name of each party so  
25 named is discovered.

26 18. The Army Corps and DOES 26-50 are collectively referred to herein as “Real  
27 Parties” and/or “Project Applicants.”

1 **GENERAL ALLEGATIONS**

2 **Project Background**

3 19. The Project as proposed by the Army Corps involves the maintenance dredging of  
4 11 federal navigation channels in San Francisco Bay and just outside of the Golden Gate to  
5 maintain the navigability of the channels. These channels are the San Francisco Harbor - Main  
6 Ship Channel, Oakland Harbor, Richmond Harbor, Napa River Channel, Petaluma River  
7 Channel, San Rafael Creek Channel, San Pablo Bay/Mare Island Strait, Suisun Bay Channel,  
8 San Leandro Marina (Jack D. Maltester) Channel, Redwood City Harbor, and Suisun Slough  
9 Channel. The 11 channels have a combined surface area of 5,699 acres, which is 2.22 percent of  
10 the total surface area of San Francisco Bay.

11 20. For the first five years of dredging under this Project (2015-2019), the Army  
12 Corps has estimated that the maximum total dredging volume within San Francisco Bay would  
13 be 12.4 million cubic yards, and the maximum total dredging volume in the San Francisco  
14 Harbor – Main Ship Channel west of the Golden Gate would be 2.5 million cubic yards.

15 21. The dredging process involves the excavation of accumulated sediment from the  
16 channel bed, and the subsequent transportation and placement of the sediment at a designated  
17 dredged material placement site. There are two primary types of equipment that the Army  
18 Corps uses to conduct its dredging operations: hydraulic suction hopper dredges and  
19 mechanical dredges. Hydraulic suction hopper dredges use suction pumps to draw sediment and  
20 water into a draghead that is slowly pulled over the bottom of a channel. Once in the draghead,  
21 the sediment is drawn into the hopper until it reaches capacity. Then, the entire vessel travels to  
22 a disposal site where it opens the hopper and bottom dumps the sediment. Mechanical dredging  
23 usually involves bucket or clamshell dredges, which scoop material from the channel bed and  
24 place it directly into a scow for transport to a placement site. Multiple scows are often used on a  
25 project so dredging can continue while disposal is occurring.

26 22. Several different sediment placement sites are expected to be used for the Project  
27 during the next ten years. The San Francisco Deep Ocean Disposal Site (“SF-DODS”), located  
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1 55 miles west of the Golden Gate, is authorized to receive up to 4.8 million cubic yards of  
2 dredged material per year. The Army Corps has estimated that approximately half of the  
3 sediment dredged under this Project will be placed at SF-DODS. Three other ocean placement  
4 sites (SF-8 San Francisco Bar Channel Disposal Site, SF-17 Ocean Beach Nearshore Placement  
5 Site, and Ocean Beach Demonstration Site) may be used to a limited extent.

6 23. There are four in-Bay placement sites – SF-9 Carquinez Strait Placement Site,  
7 SF-10 San Pablo Bay Placement Site, SF-11 Alcatraz Placement Site, and SF-16 Suisun Bay  
8 Placement Site – that can accept a combined 7.7 million cubic yards of sediment per year. The  
9 Army Corps has estimated that approximately half of the dredged material resulting from this  
10 Project will be placed at these in-Bay disposal sites.

11 24. Several beneficial reuse placement sites have already been approved to accept  
12 dredged sediment or are in the process of being approved. The approved sites include Cullinan  
13 Ranch, Montezuma Wetlands Restoration Project, Winter Island, Imola Avenue - Napa, and San  
14 Leandro Dredged Material Management Site, and the proposed sites are Antioch Dunes, Bel  
15 Marin Keys Addition to Hamilton Wetland Restoration Project, Edgerly Island, Ocean Beach  
16 Onshore Placement, Petaluma River Farm, Sherman Island, Shollenberger Park, South Bay Salt  
17 Ponds, and VA/Alameda. However, the Army Corps has stated that it will only place dredged  
18 material at these beneficial reuse sites if such option is comparable or lower in cost than an  
19 alternative placement location or a cost-sharing partner is supporting the beneficial reuse.

### 20 **Environmental Impacts of Maintenance Dredging**

21 25. As detailed by Baykeeper in its comments on the DEIR and FEIR, recent science  
22 has demonstrated a growing problem due to the loss of sediment from the San Francisco Bay  
23 ecosystem and the resulting implications for shoreline erosion, wetland loss, sea level rise  
24 adaptation, and nutrient over-enrichment. Specifically, decreased suspended sediment levels  
25 associated with upstream water management actions have shifted the Bay ecologically from a  
26 system where light penetration and phytoplankton abundance was limited by murky water, to  
27 one where abundant light and nutrient pollution cause excessive algal production. Sediment  
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1 reduction also reduces the Bay’s resiliency to sea level rise and threatens wetlands, intertidal  
2 mudflats, and beaches on the outer coast. Research led by USGS has shown a direct connection  
3 between activities like dredging in the Bay and the erosion of the San Francisco Bar, a large  
4 underwater sand bar near the Golden Gate, and shoreline beaches, which are experiencing the  
5 highest rate of shoreline erosion in California. Research also shows that sediment extraction  
6 rates currently exceed the total sediment inputs from all watershed sources, meaning more  
7 sediment is removed from the system than what is delivered from the Delta and local  
8 watersheds. The associated loss of fine sediment has significant consequences for primary  
9 productivity, water quality, and the formation and erosion of wetlands and intertidal mud flats  
10 crucial to ongoing extensive habitat restoration efforts. The Army Corps’ dredging operations  
11 included in this Project represent more than 70 percent of the dredging that occurs in San  
12 Francisco Bay.

13 26. Recent evidence has also demonstrated that the Army Corps’ dredging operations  
14 are having significant adverse impacts on imperiled fish species, in particular, Delta smelt and  
15 longfin smelt. The Delta smelt (*Hypomesus transpacificus*) is a small, slender fish endemic to  
16 the San Francisco Bay-Delta Estuary of California (“Bay-Delta”). Their limited range extends  
17 from Suisun Bay east to the Delta and into the lower reaches of the Sacramento and San Joaquin  
18 Rivers. Delta smelt have a one-year life span. Once the most abundant fish captured in trawl  
19 surveys conducted in the Bay-Delta, the species suffered a reduction in numbers sufficient to  
20 justify a threatened listing in 1993 under both the federal Endangered Species Act and CESA.  
21 Delta smelt experienced a further decline beginning in 2000 and was listed as endangered under  
22 CESA in 2009.

23 27. The longfin smelt (*Spirinchus thaleichthys*) is an anadromous fish found in  
24 California’s bay, estuary, and nearshore coastal environments, from San Francisco Bay north to  
25 Lake Earl, near the Oregon border. The Bay-Delta estuary supports the largest longfin smelt  
26 population in California. Longfin smelt generally live for 2-3 years, and spend their adult life in  
27 bays, estuaries, and nearshore coastal areas. In the Bay-Delta, the fish migrate into the northern  
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1 part of the estuary (Suisun Bay and the western Delta) to spawn, which occurs primarily from  
2 January through March, after which most adults die. Due to severe population declines in the  
3 Bay-Delta estuary and elsewhere in recent years, longfin smelt were listed as threatened under  
4 CESA in 2009.

5 28. As stated in the FEIR, the Army Corps has estimated that up to 29 percent of the  
6 annual population abundance of Delta smelt, and up to 8 percent of longfin smelt, will be  
7 entrained by the hydraulic dredging operations included in this Project. Recent population  
8 numbers for these fish have been at historic lows, putting them on the brink of extinction.

9 29. Concern about impacts to Delta smelt and longfin smelt prompted the Regional  
10 Board, for the first time ever, to prepare an environmental impact report under CEQA for the  
11 Army Corps' maintenance dredging program, even though such operations have occurred for  
12 decades.

### 13 **The Regional Board's Environmental Review of the Project**

14 30. On February 13, 2013, the Regional Board, acting in its role as the CEQA lead  
15 agency, released a Notice of Preparation ("NOP") to alert potentially interested parties of the  
16 Project and its intention to prepare an EIR.

17 31. The Regional Board released the DEIR for the Project in December 2014 and  
18 accepted public comment until January 20, 2015. The DEIR was issued as a joint document  
19 with the Army Corps and also constituted a draft Environmental Assessment for purposes of  
20 NEPA.

21 32. The DEIR considered four alternatives for the Army Corps' maintenance dredging  
22 operations: the No Project Alternative, the Proposed Project, and two "Reduced Hopper Dredge  
23 Use Alternatives." Under the No Project Alternative, the Army Corps would conduct dredging  
24 and placement activities in accordance with previously established permit conditions and  
25 minimization measures. The Proposed Project was essentially the same as the No Project  
26 Alternative, except the Proposed Project included best management practices to reduce impacts  
27 to Delta smelt and longfin smelt. The two Reduced Hopper Dredge Use Alternatives would  
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1 limit the use of hydraulic suction hopper dredges to the San Francisco Harbor – Main Ship  
2 Channel and either the Richmond Outer Harbor or the Pinole Shoal Channel (Reduced Hopper  
3 Dredge Use Alternative 1) or to only the San Francisco Harbor – Main Ship Channel (Reduced  
4 Hopper Dredge Use Alternative 2). The DEIR stated the Reduced Hopper Dredge Use  
5 Alternatives would not be implemented until fiscal year 2017 and that the Army Corps would  
6 first have to seek “higher executive branch authority” and increased appropriations from  
7 Congress to implement such alternatives.

8 33. The primary mitigation measure relied upon in the DEIR to address species  
9 impacts are “work windows” established by the 1998 programmatic biological opinion  
10 developed for the Long Term Management Strategy for the Placement of Dredged Material in  
11 San Francisco Bay (“LTMS”). The “work windows” essentially set time periods when dredging  
12 activities may or may not occur in a specific location given the likely presence of listed species.  
13 However, with subsequent species listings, critical habitat designations, the pelagic organism  
14 decline, and the advancement of science that have occurred during the past 17 years, that 1998  
15 biological opinion is now greatly outdated. In addition, the Army Corps has shown a regular  
16 need for work window extensions that were not evaluated in the DEIR. In fact, from 2000 and  
17 2012, between 27 percent and 61 percent of all dredging projects occurring in the Bay took  
18 place outside of the established work windows.

19 34. Baykeeper and others submitted detailed comments on the DEIR expressing  
20 serious concern about, among other things, the DEIR’s inadequate disclosure, evaluation, or  
21 mitigation for impacts related to sediment depletion and listed species. Baykeeper and other  
22 also commented that the project description was inadequately defined, and that the DEIR’s  
23 analysis of environmental impacts was improperly constrained by treating the No Project  
24 Alternative and the Proposed Project as virtually the same project.

25 35. On March 20, 2015, the Regional Board issued a Tentative Order for Reissued  
26 Waste Discharge Requirements and Water Quality Certification for the Project (“Tentative  
27 Order”). The Tentative Order proposed to condition the Project on the reduction of hydraulic  
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1 suction hopper dredges in San Francisco Bay starting in 2017, and according to the Regional  
2 Board, would require the Army Corps to implement either Reduced Hopper Dredge Use  
3 Alternative 1 or 2.

4 36. On or about May 1, 2015, the Regional Board released the FEIR.

5 37. The FEIR contained only minor revisions to the DEIR and did not correct the  
6 DEIR's inadequate disclosure, evaluation, or mitigation of impacts related to sediment depletion  
7 or listed species, inadequately defined Project description, or improper discussion of Project  
8 alternatives. In particular, on the issue of sediment, the FEIR's responses to comments stated  
9 that "[s]ediment depletion was noted" on one page of the DEIR, but that the Regional Board was  
10 "not aware of any study or studies that have concluded that [the Army Corps'] maintenance  
11 dredging project significantly 'causes or contributes to the growing sediment deficit in the  
12 Bay.'"

13 38. The California Department of Fish and Wildlife ("DFW") also commented on the  
14 DEIR, stating that the DEIR failed to adequately address or mitigate impacts to listed species,  
15 and noting that adequate CEQA documentation was required for the issuance of an incidental  
16 take permit under CESA section 2081(b). In the responses to comments, the FEIR states that  
17 "California Environmental Quality Act lead agencies (in this case the Regional Water Board)  
18 must consult with the CDFW when considering the approval of proposed projects that may  
19 adversely impact state-listed threatened or endangered species."

20 39. On May 9, 2015, Baykeeper submitted comments on the FEIR to the Regional  
21 Board, reiterating previously expressed concerns about the FEIR's improperly defined No  
22 Project Alternative, the failure to adequately consider or mitigate impacts related to sediment  
23 depletion and listed species, and the Regional Board's failure to consult with or obtain an  
24 incidental take permit from DFW for the Project pursuant to CESA.

25 40. On May 13, 2015, the Regional Board issued Resolution No. R2-2015-0022  
26 certifying the FEIR for the Project. The Regional Board also issued Resolution No. R2-2015-

1 0023, adopting the reissued waste discharge requirements and water quality certification for the  
2 Project.

3 41. On May 29, 2015, the Army Corps issued its FONSI approving the Final EA and  
4 the Proposed Action/Project as the adopted Project.

5 42. The Notice of Determination for the Project was filed and posted with the Office  
6 of Planning and Research on June 1, 2015.

7 43. According to DFW, no agency has submitted an application for an incidental take  
8 permit pursuant to Fish and Game Code section 2081(b), or a request for a consistency  
9 determination under Fish and Game Code section 2081.1, related to this Project.

### 10 **Requirements of CEQA**

11 44. The California Environmental Quality Act, Public Resources Code sections  
12 21000-21177, is a comprehensive statute designed to provide for the long-term protection of the  
13 environment. The California Supreme Court has held that CEQA must be interpreted “to afford  
14 the fullest possible protection to the environment within the reasonable scope of the statutory  
15 language.” (*Friends of Mammoth v. Board of Supervisors* (1972) 3 Cal.3d 247, 259.)

16 45. Under CEQA, the lead agency is required to prepare a complete and legally  
17 adequate environmental impact report (“EIR”) prior to approving any discretionary project that  
18 may have a significant adverse environmental effect. (Pub. Res. Code §§ 21100(a), 21150.)

19 46. The purpose of an EIR is to provide public agencies and the public in general with  
20 detailed information about the effects that a proposed project is likely to have on the physical  
21 environment. (Pub. Res. Code § 21061.) Such disclosure ensures that “long term protection of  
22 the environment...shall be the guiding criterion in public decisions.” (Pub. Res. Code §  
23 21001(d).)

24 47. To this end, CEQA requires that an EIR include a clear and accurate project  
25 description and that the nature and objective of a project be fully disclosed and fairly evaluated.  
26 (14 Cal. Code Regs. § 15124(b).)

1           48.     An EIR must fully disclose and analyze all of the project’s potentially significant  
2 direct, cumulative, and indirect environmental effects. (Pub. Res. Code § 21100(b)(1); 14 Cal.  
3 Code Regs. § 15064(d).) “Significant effect on the environment” is defined as “a substantial, or  
4 potentially substantial, adverse change in any of the physical conditions within the area affected  
5 by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of  
6 historic or aesthetic significance.” (14 Cal. Code Regs. § 15382.) An EIR should be prepared  
7 with a sufficient degree of analysis to provide decision-makers with information that enables  
8 them to intelligently account for a project’s environmental consequences when rendering a  
9 decision. (14 Cal. Code Regs. § 15151.)

10           49.     CEQA requires that an EIR include a reasonable range of alternatives for a  
11 proposed project that will reduce or avoid significant environmental impacts of the project, and  
12 foster informed decision-making and public participation. (14 Cal. Code Regs. § 15126.6.) An  
13 EIR must separately evaluate the “specific alternative of ‘no project’” and the environmental  
14 impacts of not approving the proposed project. (*Id.* § 15126.6(e)(1).) The no-project analysis  
15 should reflect “what would reasonably be expected to occur in the foreseeable future if the  
16 project were not approved.” (*Id.* § 15126.6(e)(2).)

17           50.     CEQA requires the lead agency to adopt feasible mitigation measures in order to  
18 substantially lessen or avoid the otherwise significant adverse environmental impacts of  
19 proposed projects. (Pub. Res. Code § 21002.) The lead agency is required to consider  
20 mitigation measures and alternatives to the project, to adopt all feasible mitigation measures  
21 and/or alternatives, to determine that proposed mitigation measures will or will not be effective  
22 in avoiding or substantially lessening the project’s significant environmental impacts, and to  
23 make an adequate statement of overriding considerations for those significant environmental  
24 impacts deemed unavoidable. (Pub. Res. Code §§ 21002(b), 21081.)

25           51.     CEQA requires that an EIR provide an “analytically complete and coherent  
26 explanation” of its conclusions. (*Vineyard Area Citizens for Responsible Growth v. City of*  
27 *Rancho Cordova* (2007) 40 Cal.4th 412, 439-40.)

1 **Requirements of CESA**

2 52. The California Endangered Species Act, Fish and Game Code sections 2050-  
3 2115.5, is designed to conserve, protect, restore, and enhance endangered or threatened species  
4 and their habitat. As stated in Fish and Game Code section 2053, “state agencies should not  
5 approve projects ... which would jeopardize the continued existence of any endangered species  
6 or threatened species or result in the destruction or adverse modification of habitat ... if there are  
7 reasonable and prudent alternatives available consistent with conserving the species or its habitat  
8 which would prevent jeopardy.”

9 53. CESA sets forth specific requirements regarding the taking of species listed as  
10 threatened or endangered. Section 2080 of the Fish and Game Code prohibits any person,  
11 including state agencies and the officials directing those agencies, from “taking” a threatened or  
12 endangered species. Section 86 of the Fish & Game Code defines “take” as to “hunt, pursue,  
13 catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill.”

14 54. Taking an endangered or threatened species may occur only with the express  
15 authorization of DFW. CESA provides for two primary procedures for obtaining permission to  
16 take a listed species, which are set forth at Sections 2081(b) and 2080.1 of the Fish & Game  
17 Code.

18 55. Section 2081(b) of the Fish & Game Code provides that DFW “may authorize, by  
19 permit, the take of endangered species, threatened species, and candidate species” where: (1)  
20 “the take is incidental to an otherwise lawful activity,” (2) “[t]he impacts of the authorized take  
21 shall be minimized and fully mitigated,” (3) the take permit is fully consistent with DFW  
22 regulations, and (4) the applicant ensures adequate funding to implement the required  
23 minimization and mitigation measures as well as to monitor compliance with and effectiveness  
24 of those measures. DFW may not issue an incidental take permit if “issuance of the permit  
25 would jeopardize the continued existence of the species.” (Fish & Game Code § 2081(c).)

26 56. Section 2080.1 of the Fish & Game Code authorizes DFW to permit taking of a  
27 threatened or endangered species by determining that an incidental take statement or permit  
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1 issued by the United States Fish & Wildlife Service (“FWS”) or the National Marine Fisheries  
2 Service (“NMFS”) pursuant to the federal Endangered Species Act is consistent with the  
3 requirements of CESA. The DFW Director’s authority to make such a consistency  
4 determination is conditioned on several procedural steps. These include the receipt of a notice  
5 from the person claiming to have obtained an incidental take statement or permit under the  
6 federal ESA as well as a copy of the statement or permit. (Fish & Game Code § 2080.1(a)(1)-  
7 (2).) The DFW Director must then publish a notice of receipt of such statement or permit in the  
8 California Regulatory Notice Register. (*Id.* § 2080.1(b).) The DFW Director then has thirty  
9 days to determine whether or not the incidental take statement or permit is consistent with  
10 CESA, including the minimization and full mitigation requirements of Fish & Game Code  
11 section 2081(b). (*Id.* § 2080.1(c).)

### **FIRST CAUSE OF ACTION**

#### **(Violations of the California Environmental Quality Act)**

##### **Failure to Analyze Direct and Indirect Impacts**

15 57. Petitioner realleges, as if fully set forth herein, each and every allegation  
16 contained in the preceding paragraphs.

17 58. The Regional Board violated CEQA, prejudicially abused its discretion, failed to  
18 proceed in a manner required by law, and failed to support its findings and conclusions with  
19 analysis and facts by certifying the EIR and approving the Project without meaningfully  
20 describing or disclosing the significance of the Project’s direct and indirect impacts to, among  
21 other things, Bay sediment and resulting implications for shoreline erosion, wetland loss, sea  
22 level rise adaptation, and nutrient over-enrichment, or direct and indirect impacts to listed  
23 species, including Delta smelt and longfin smelt.

##### **Failure to Analyze Cumulative Impacts**

25 59. Petitioner realleges, as if fully set forth herein, each and every allegation  
26 contained in the preceding paragraphs.

27 60. The Regional Board violated CEQA, prejudicially abused its discretion, failed to  
28

1 proceed in a manner required by law, and failed to support its findings and conclusions with  
2 analysis and facts by certifying the EIR and approving the Project after failing to provide a  
3 complete and legally adequate discussion of the Project's cumulative impacts to Bay sediment  
4 and resulting implications for shoreline erosion, wetland loss, sea level rise adaptation, and  
5 nutrient over-enrichment, including but not limited to, failing to analyze or disclose the  
6 cumulative physical environmental impacts of closely related past, present, and reasonably  
7 foreseeable future projects when considered in conjunction with the environmental effects of the  
8 Project.

9 **Failure to Mitigate Significant Project Impacts**

10 61. Petitioner realleges, as if fully set forth herein, each and every allegation  
11 contained in the preceding paragraphs.

12 62. The Regional Board violated CEQA, prejudicially abused its discretion, failed to  
13 proceed in a manner required by law, and failed to support its findings and conclusions with  
14 analysis and facts by certifying the FEIR and approving the Project without adopting adequate  
15 mitigation measures for the Project's significant direct, indirect, and cumulative impacts to,  
16 among other things, Bay sediment and resulting implications for shoreline erosion, wetland loss,  
17 sea level rise adaptation, and nutrient over-enrichment, or impacts to listed species, including  
18 Delta smelt and longfin smelt.

19 63. The Regional Board further failed to ensure that mitigation measures imposed to  
20 avoid significant effects to listed species are fully enforceable through permit conditions,  
21 agreement, or other measures, and failed to adopt a reporting or monitoring program for the  
22 changes made to the Project or conditions of Project approval to mitigate or avoid significant  
23 effects on listed species.

24 **Failure to Properly Define the No Project Alternative**

25 64. Petitioner realleges, as if fully set forth herein, each and every allegation  
26 contained in the preceding paragraphs.

27 65. The Regional Board violated CEQA, prejudicially abused its discretion, failed to  
28



1 proceed in a manner required by law, and failed to support its findings and conclusions with  
2 analysis and facts by certifying the EIR and approving the Project by improperly defining the  
3 “No Project Alternative” as the continuation of “current maintenance dredging practices for the  
4 projects it maintains in San Francisco Bay.”

5 66. This unlawful approach resulted in a severely circumscribed analysis of  
6 environmental impacts. By comparing two very similar projects (*i.e.*, the continuation of the  
7 current dredging program and the proposed Project), the FEIR concluded, for almost all issues,  
8 that there were “no environmental impacts” from the proposed Project, including impacts related  
9 to Bay sediment and resulting consequences for shoreline erosion, wetland loss, sea level rise  
10 adaptation, and nutrient over-enrichment.

11 **SECOND CAUSE OF ACTION**

12 **(Violations of the California Endangered Species Act)**

13 67. Petitioner realleges, as if fully set forth herein, each and every allegation  
14 contained in the preceding paragraphs.

15 68. The Regional Board violated CESA, prejudicially abused its discretion, and failed  
16 to proceed in a manner required by law by certifying the EIR and approving the Project, which  
17 will result in the illegal take of state-listed Delta smelt and longfin smelt, without procuring an  
18 incidental take permit from the California Department of Fish and Wildlife or a consistency  
19 determination that otherwise authorizes such takings. As a result, the illegal take that results  
20 from the Project will not be minimized and fully mitigated, and there is no assurance that there  
21 is adequate funding to implement the required minimization and mitigation measures as well as  
22 to monitor compliance with and effectiveness of those measures, in violation of CESA.

23 69. The Regional Board’s failure to fulfill its duties under CESA continues to this  
24 day. Unless compelled by this Court to fulfill these duties required by law, the Regional Board  
25 will continue to fail and refuse to do so. Hence, no further administrative remedies are available  
26 to Petitioner in regard to this claim.

1 **THIRD CAUSE OF ACTION**

2 **(Declaratory Relief)**

3 70. Petitioner realleges, as if fully set forth herein, each and every allegation  
4 contained in the preceding paragraphs.

5 71. Petitioner contends that the Regional Board's decision to approve the Project and  
6 certify the FEIR was unlawful. The Regional Board disputes these contentions.

7 72. An actual controversy has arisen and now exists between Petitioner and the  
8 Regional Board regarding their respective rights and duties. A judicial determination and  
9 declaration of the parties' respective rights and duties, including a declaration of whether the  
10 Regional Board's decisions violate the law, is necessary and appropriate.

11 **FOURTH CAUSE OF ACTION**

12 **(Injunctive Relief)**

13 73. Petitioner realleges, as if fully set forth herein, each and every allegation  
14 contained in the preceding paragraphs.

15 74. Unless Petitioner is granted injunctive relief, it will suffer irreparable harm, in that  
16 the implementation of the Project will result in severe adverse impacts to the interests of  
17 Petitioner, its members and supporters, and the environment.

18 75. Petitioner lacks an adequate remedy at law because monetary damages cannot be  
19 ascertained and Petitioner and its members and supporters cannot be compensated for the  
20 environmental degradation caused by the actions of the Regional Board complained of herein.

21 **PRAYER FOR RELIEF**

22 WHEREFORE, Petitioner prays for the following relief:

23 1. A writ of mandate or peremptory writ ordering Respondent to set aside its  
24 approvals in furtherance of the Project, including certification of the FEIR and approval of the  
25 Project, unless and until the Project is brought into full compliance with CEQA and CESA;

1           2.       A permanent injunction enjoining Respondent from implementing the Project  
2 unless and until the FEIR and approval of the Project is brought into full compliance with  
3 CEQA and CESA;

4           3.       A declaratory judgment that Respondent violated CEQA and CESA in approving  
5 the Project;

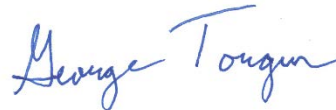
6           4.       Costs incurred herein, including reasonable attorneys' fees and expert witness  
7 costs, related to this proceeding; and,

8           5.       All such other equitable or legal relief that the Court considers just and proper.  
9

10  
11 DATED: June 30, 2015

Respectfully Submitted,

SAN FRANCISCO BAYKEEPER



\_\_\_\_\_  
George Torgun  
Attorney for Petitioner

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**VERIFICATION**

I, Ian Wren, am Staff Scientist at San Francisco Baykeeper, the Petitioner in this action, and am authorized to make this verification pursuant to California Code of Civil Procedure section 446.

I have read the Verified Petition for Writ of Mandate and know its contents. All facts alleged in the Petition are true of my own personal knowledge, or based upon my information and belief, which I believe to be true. I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

Executed in the City of Oakland, California, this 30<sup>th</sup> day of June, 2015.



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Ian Wren for Petitioner  
SAN FRANCISCO BAYKEEPER

# Exhibit A

**Notice of Determination**

**Appendix D**

**To:**

Office of Planning and Research  
 U.S. Mail: \_\_\_\_\_ Street Address: \_\_\_\_\_  
 P.O. Box 3044 1400 Tenth St., Rm 113  
 Sacramento, CA 95812-3044 Sacramento, CA 95814

County Clerk  
 County of: \_\_\_\_\_  
 Address: \_\_\_\_\_  
 \_\_\_\_\_

**From:**

Public Agency: CA Regional Water Quality Control Board  
 Address: 1515 Clay Street, Suite 1400  
 Oakland, CA 94612  
 Contact: Elizabeth Christian  
 Phone: (510) 622-2335

Lead Agency (if different from above): \_\_\_\_\_  
 Address: \_\_\_\_\_  
 Contact: \_\_\_\_\_  
 Phone: \_\_\_\_\_

**SUBJECT: Filing of Notice of Determination in compliance with Section 21108 or 21152 of the Public Resources Code.**

State Clearinghouse Number (if submitted to State Clearinghouse): 2013022056

Project Title: Maintenance Dredging of the Federal Navigation Channels in San Francisco Bay Fiscal Years 2015 - 2019

Project Applicant: U.S. Army Corps of Engineers, San Francisco District (USACE)

Project Location (include county): Greater Bay Area - 11 Counties

**Project Description:**

The Regional Water Board has issued a Clean Water Act Section 401 water quality certification/Waste Discharge Requirements (Order) for USACE's continued maintenance dredging operations in San Francisco Bay for the period of 2015-2019. To avoid in-Bay fish entrainment, the Order requires a reduction in the use of hydraulic hopper dredging equipment in 2017. A statement of overriding consideration was adopted for the two-year period when fish species may be impacted. After this period, the project impacts are less-than significant. Mitigation measures to avoid, minimize and mitigate fish entrainment are required during the initial two-year phase-out period.

This is to advise that the CA Regional Water Quality Control Board has approved the above  
 Lead Agency or  Responsible Agency)

described project on May 13, 2015 and has made the following determinations regarding the above  
 (date)  
 described project.

1. The project  will  will not] have a significant effect on the environment.
2.  An Environmental Impact Report was prepared for this project pursuant to the provisions of CEQA.  
 A Negative Declaration was prepared for this project pursuant to the provisions of CEQA.
3. Mitigation measures  were  were not] made a condition of the approval of the project.
4. A mitigation reporting or monitoring plan  was  was not] adopted for this project.
5. A statement of Overriding Considerations  was  was not] adopted for this project.
6. Findings  were  were not] made pursuant to the provisions of CEQA.

This is to certify that the final EIR with comments and responses and record of project approval, or the negative Declaration, is available to the General Public at:

[http://www.waterboards.ca.gov/sanfranciscobay/water\\_issues/programs/dredging/Fed Nav Channels\\_FEAEIR\\_Apr14](http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/dredging/Fed Nav Channels_FEAEIR_Apr14)

Signature (Public Agency): *Paul J. Walker* Title: Executive Officer

Date: May 20, 2015 Date Received for filing at OPR: \_\_\_\_\_

# Exhibit B

1 George Torgun (Bar No. 222085)  
Erica Maharg (Bar No. 279396)  
2 SAN FRANCISCO BAYKEEPER  
1736 Franklin Street, Suite 800  
3 Oakland, California 94612  
Telephone: (510) 735-9700  
4 Facsimile: (510) 735-9160  
5 Email: george@baykeeper.org  
Email: erica@baykeeper.org

6 Attorneys for Petitioner  
7 SAN FRANCISCO BAYKEEPER

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **IN AND FOR THE COUNTY OF ALAMEDA**

10  
11 SAN FRANCISCO BAYKEEPER, INC.,

12 Petitioner,

13 vs.

14 CALIFORNIA REGIONAL WATER  
15 QUALITY CONTROL BOARD, SAN  
FRANCISCO BAY REGION, and DOES 1-25,

16 Respondents,

17 U.S. ARMY CORPS OF ENGINEERS, SAN  
18 FRANCISCO DISTRICT, and DOES 26-50,

19 Real Parties in Interest.  
20

Case No.

NOTICE OF COMMENCEMENT OF  
CEQA ACTION

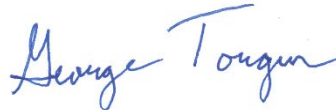
(California Code of Civil Procedure  
§§ 1085, 1094.5; California Public  
Resources Code §§ 21167, 21168,  
21168.5)



1 TO THE RESPONDENT CALIFORNIA REGIONAL WATER QUALITY CONTROL  
2 BOARD, SAN FRANCISCO BAY REGION:

3 Please take notice, pursuant to Public Resources Code section 21167.5, that on June 30,  
4 2015, Petitioner San Francisco Baykeeper intends to commence an action for writ of mandate to  
5 review and set aside Respondent's approval of Maintenance Dredging of the Federal Navigation  
6 Channels in San Francisco Bay, Fiscal Years 2015-2024, State Clearinghouse Number  
7 2013022056 (the "Project"), and certification of the Final Environmental Impact Report  
8 ("FEIR") for the Project. This action is based on Respondent's failure to comply with the  
9 California Environmental Quality Action, Public Resources Code section 21000 *et seq.*, and the  
10 California Endangered Species Act, Fish and Game Code section 2050 *et seq.*, when approving  
11 the Project and adopting the FEIR.

12  
13 DATED: June 30, 2015



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14 GEORGE TORGUN  
15 Attorney for Petitioner  
16 SAN FRANCISCO BAYKEEPER

**PROOF OF SERVICE**

I am a resident of the State of California, over the age of eighteen years, and not a party to the action. My business address is 1736 Franklin Street, Suite 800, Oakland, CA 94612.

On June 30, 2015, I served the following document(s), **NOTICE OF COMMENCEMENT OF CEQA ACTION**, on the following parties or attorney for parties, as shown below:

Bruce Wolfe  
Executive Officer  
California Regional Water Quality Control Board, San Francisco Bay Region  
1515 Clay St  
Suite 1400  
Oakland, CA 94612

**BY EMAIL:** I caused each such document to be sent by email to the following persons or their representative listed above.

**BY FACSIMILE:** I caused each such document to be sent by facsimile to the following persons or their representative listed above.

**BY FIRST CLASS MAIL:** I am readily familiar with this business's practice of collecting and processing correspondence for mailing with the U.S. Postal Service. On the date written above, following ordinary business practices, I delivered to the U.S. Postal Service the attached document in a sealed envelope, with postage fully prepaid, addressed as shown above.

I declare under the penalty of perjury that the foregoing is true and correct and that this declaration was executed at Oakland, California on June 30, 2015.



\_\_\_\_\_  
Nicole C. Sasaki

# Exhibit C

June 30, 2015


Hon. Kamala Harris  
Attorney General  
State of California Office of the Attorney General  
1300 I Street, 11th Floor  
Sacramento, CA 95814

**Re: *San Francisco Baykeeper v. California Regional Water Quality Control Board,  
San Francisco Bay Region***

Dear Attorney General Harris:

Pursuant to section 388 of the Civil Code of Procedure and section 21167.7 of the Public Resources Code, I am furnishing your office with a copy of the Verified Petition for Writ of Mandate filed on June 30, 2015 in the above-referenced case. The Petition challenges the California Regional Water Quality Control Board, San Francisco Bay Region's approval of a dredging program formally known as "Maintenance Dredging of the Federal Navigation Channels in San Francisco Bay, Fiscal Years 2015-2024," State Clearinghouse Number 2013022056 (the "Project"), and certification of the Final Environmental Impact Report for the Project. The lawsuit is based on violations of the California Environmental Quality Act, Public Resources Code § 21000 *et seq.*, and the California Endangered Species Act, Fish & Game Code § 2050 *et seq.* If necessary, any subsequent supplemental or amended pleadings will be forwarded. Please let us know if you have any questions regarding this matter.

Sincerely,



George Torgun  
Managing Attorney  
San Francisco Baykeeper