



ORANGE COUNTY  
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**RE: Comments on Draft Environmental Assessment – Lower Newport Bay Maintenance Dredging Project (March 2022)**

Dear Mr. Smith:

Orange County Coastkeeper (“Coastkeeper”) appreciates the opportunity to submit these comments on the Draft Environmental Assessment (EA) with Unsigned Finding of No Significant Impact (the “Draft EA”) issued by the U.S. Army Corps of Engineers, South Pacific Division, Los Angeles District (the “USACE” or the “Corps”) for the Lower Newport Bay Maintenance Dredging (the “Project”) pursuant to the National Environmental Policy Act (“NEPA”).

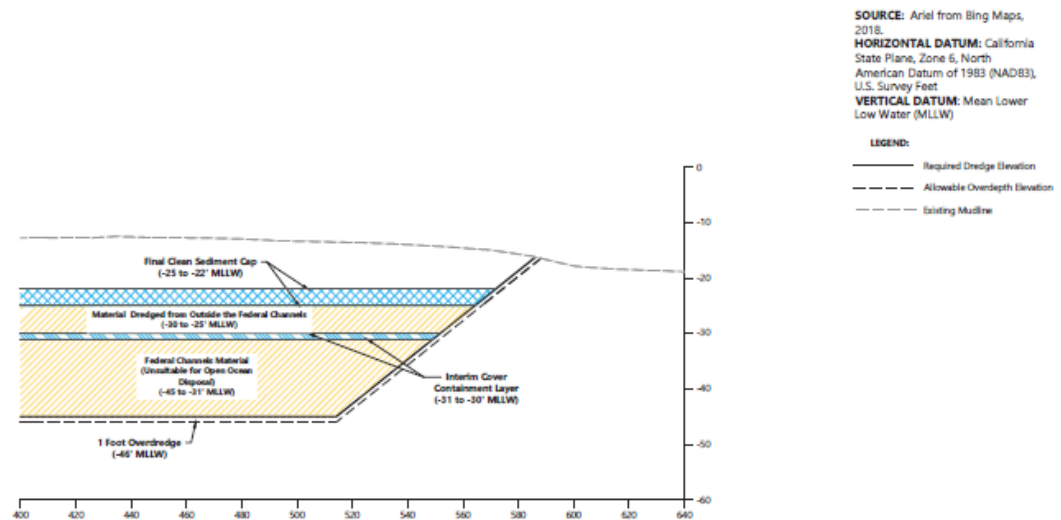
Coastkeeper is a non-profit environmental organization with the mission to protect our region’s water resources so they are swimmable, drinkable, and fishable for present and future generations. Coastkeeper represents thousands of members, including Orange County residents and strong supporters of environmental quality and public health. Coastkeeper members hike, bike, kayak, paddleboard, surf, boat, swim, birdwatch, wildlife watch, observe and restore native plants, and conduct other activities within Newport Bay, offshore Newport Beach, and within the greater Project area. In addition, Coastkeeper conducts a variety of marine habitat restoration and education projects within Newport Bay, including restoration of native eelgrass and oysters. Coastkeeper representatives are also part of the Southern California Caulerpa Action Team (“SCCAT”), which is actively responding to a *Caulerpa prolifera* infestation in Lower Newport Bay.

Coastkeeper and our members care deeply about the health of Newport Bay, which is the ancestral home of the Tongva and Juaneño Band of Mission Indians Acjachemen Nation peoples and a historic outfall of the Santa Ana River. As a living estuary, Newport Bay has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes, as do its flora and fauna.

With the Draft EA, the USACE proposes to dredge 908,000 cubic yards (cy) of sediment within Lower Newport Bay with disposal as follows:

- Approximately 7,000 cy in the Newport Beach Nearshore Placement Site;
- Approximately 793,000 cy at the LA-3 Ocean Dredged Material Disposal Site;
- Approximately 98,000 cy of “unsuitable” sediment with elevated levels of mercury and/or PCBs at a proposed Confined Aquatic Disposal facility (“CAD”) to be sited within Newport Harbor; and
- Remaining, approximate 10,000 cy to be used as an interim cap for the CAD or, if the CAD is not available at the time, placed at LA-3.

Coastkeeper is concerned that the USACE is rushing the Project along to avoid additional testing at the expense of full NEPA compliance. The Project involves dredging just under a million cubic yards of sediment within a *Caulerpa*-infected system and disposing of that sediment – which is orders of magnitude above mercury and PCB thresholds – in a yet to be fully permitted CAD to be constructed within the *Caulerpa*-infected system. Taking the assumptive leap that the CAD will be approved, the USACE plans to dispose of the unsuitable sediment in the CAD and cap it with an interim one-foot layer of clean sediment. Two years later and over a six-month period, the interim, clean layer would be topped with additional material and then covered by a final, 3-foot-thick cap – see depiction below from the City of Newport’s (the “City’s”) Environmental Impact Report for the CAD (the “CAD EIR”), Figure 2-2.



The USACE’s approach to its NEPA obligations reflected in the Draft EA fails to comply with NEPA in several respects. One, the USACE’s decision to prepare a mere Environmental Assessment coupled with a Finding of No Significant Impact (“FONSI”) is unsupportable. NEPA compliance requires that the USACE prepare a full Environmental Impact Statement (“EIS”). Given the level of toxicity, volume of sediment, uncertainty of the CAD, active *Caulerpa* infestation, presence of endangered species within the Project area, and potential for cap layer disturbance reintroducing contaminants to the marine environment, the Project would obviously have significant environmental effects or, at the very least, there are substantial questions with respect thereto. Under these circumstances, a full EIS is mandatory. *See, e.g., Ocean Advocates v. Army Corps of Eng’rs*, 402 F.3d 846 (9th Cir. 2005); *Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2004) (an EIS must be prepared if a challenger shows there are “substantial questions” whether significant effects “may” occur). Two, the Draft EA fails to analyze

several obvious environmental impacts from the Project either at all or at least not adequately. For example, it lacks an analysis anchored by current information of the risk that dredging and disposing of sediments in the Federal Channels or creating the CAD will further spread the invasive species *Caulerpa prolifera*. Three, the USACE's Draft EA improperly segments the Project to include only the dredging and disposal of sediment from the Federal Channels, which the USACE proposes would take place at the CAD. The USACE omits from the Draft EA interrelated actions which should be defined as being part of the Project, namely, the USACE's issuance of Clean Water Act ("CWA") section 404 and Marine Protection Research and Sanctuaries Act ("MPRSA") section 103 permits to the City to dredge and dispose of the sediments that the City will excavate to create the pit into which contaminated sediments will be disposed of at the CAD site. The latter is obviously interrelated to the former given that the Corps proposes to dispose of sediments dredged from the Federal Channels into the CAD. The Draft EA fails to analyze the cumulative, interrelated impacts of dredging and disposing of sediments from the Federal Channels as well as the City's dredging and disposing of sediments to construct the CAD, which the Corps will permit. Four, the Draft EA fails to analyze reasonable alternatives to the Project as proposed, including in situ remediation or land disposal of the contaminated sediments. Five, the Draft EA fails to analyze feasible means of mitigating adverse impacts of the Project.

In addition to the Corps' failure to comply with NEPA, the Corps' approach to approval of the Project is not on track to comply with the Endangered Species Act ("ESA") or the Marine Mammal Protection Act (the "MMPA"). The Project may affect several endangered species and accordingly the Corps is obligated under ESA section 7 to consult with the National Marine Fisheries Service ("NMFS") and the U.S. Fish and Wildlife Service ("FWS") concerning the Project's potential impacts on endangered species. However, the Corps apparently is proposing to proceed with the Project without initiating this required ESA section 7 consultation. The Project may also affect marine mammals and the Corps must seek Incidental Harassment Authorization in connection with the same. As of the date of this letter, it is Coastkeeper's understanding that the Corps is missing key approvals under the Coastal Zone Management Act ("CZMA") and the CWA. The Project will affect the California coastal zone, thus requiring the Corps to obtain a certification from the California Coastal Commission that the Project is consistent with the California Coastal Management Plan ("CMP"). As of the date of this letter, the Corps has not obtained this requisite consistency determination. In addition, the Corps cannot proceed with the Project until the California Regional Water Quality Control Board, Santa Ana Region issues a CWA section 401 certification for the Project. As of the date of this letter, neither the Corps nor the City has obtained such 401 certification.

In light of the Draft EA's failures to adequately assess Project impacts, Project alternatives, and feasible mitigation for adverse Project impacts, Coastkeeper urges the Corps to pause the Project until the Corps prepares a full EIS, initiates and completes ESA section 7 consultation, obtains CZMA consistency determination concurrence from the California Coastal Commission, secures CWA section 401 certification (on its own initiative and/or via the City's initiative) and obtains all necessary MMPA permits and authorizations.

## **I. The USACE Must Prepare an Environmental Impact Statement.**

Under NEPA, the USACE must prepare an Environmental Impact Statement if the proposed project significantly affects the quality of the human environment. 42 U.S.C. § 4332(C). Council on Environmental Quality ("CEQ") regulations require agencies to analyze the potentially affected environment and degree of the effects of the action, both short and longer-term. 40 C.F.R. § 1501.3.

An Environmental Impact Statement must be prepared if a challenger shows there are “substantial questions” whether significant effects “may” occur. *E.g.*, *Ocean Advocates*, 402 F.3d at 846; *Anderson*, 371 F.3d at 488.

The Draft EA itself makes obvious that there are – at the least – substantial questions about whether the Project’s dredging and disposal activities may adversely affect the environment. Additional relevant information that must be included in the administrative record further well establishes that the Project will have, or that there are at least substantial questions whether the Project will have, the following adverse environmental impacts: (a) exacerbating the ongoing Lower Newport Bay *Caulerpa* infestation, (b) promoting bioaccumulation and biomagnification of PCBs, DDT, mercury, and other contaminants in benthic organisms inhabiting Newport Bay and ocean waters and the food chain dependent on these organisms – particularly during the two-year period where the CAD’s one-foot-thick cap will be the sole barrier, (c) interfering with feeding and other necessary behaviors of marine mammals (including marine mammals that are ESA listed) inhabiting Newport Bay and the ocean waters that the Project will affect, and (d) interfering with feeding and other necessary behaviors of other ESA protected species such as California least terns. Additional, relevant information for the administrative record includes that provided by (i) the CAD EIR, (ii) the City of Newport 2009 Marina Park Final EIR (the “Marina Park EIR”)<sup>1</sup>, (iii) the USEPA/USACE Final Environmental Impact Statement for the Site Designation of the LA-3 Ocean Dredged Material Disposal Site off Newport Bay Orange County, California (the “LA-3 EIS”), (iv) the Upper Newport Bay Ecosystem Restoration Project Post-Restoration Monitoring Program, Annual Report for Year 5 2015 (the “2015 CDFW Report”), (v) the Final Programmatic NEPA/SEPA EIS for the Puget Sound Confined Disposal Study (the “Puget Sound EIS”), and (v) various scientific studies and research papers cited throughout this letter, each of which are incorporated herein and submitted for the administrative record by reference.

As discussed further in the following section of this letter, these documents identify significant adverse impacts from the Project that the Draft EA fails to analyze at all or fails to analyze sufficiently. The existence of these likely significant adverse impacts triggers the need for an EIS that adequately analyzes these impacts.

## **II. The Draft EA fails To Analyze Sufficiently Numerous Likely Adverse Environmental Impacts of the Project.**

As CEQ NEPA regulations state, “[a]ccurate scientific analysis” ...[is] *essential* to implementing NEPA.” 40 C.F.R. §1500.1(b) (emphasis added). To comply with NEPA, the Corps must take a “hard look” at its proposed Project’s effects that includes rigorous and accurate consideration of available

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<sup>1</sup> While the Marina Park EIR contains useful information that goes beyond the very limited environmental analysis of the Draft EA, the Corps would be wrong to conclude that it can rely only on the Marina Park EIR to assess pertinent environmental questions. Notably, the California Coastal Commission called for “quantitative subtidal and biological surveys in and near the proposed [CAD] project location footprint that would describe the nature of the bottom habitat and fish and invertebrate species populations specific to the project area” “[i]n order to understand the current status of the bottom habitat where the City of Newport Beach now wants to construct the CAD.” City of Newport Beach, Final Environmental Impact Report: Lower Newport Bay Confined Aquatic Disposal (CAD) Construction Project (PA2019-020) (hereinafter, “CAD FEIR”) at 58. However, the City declined to respect the California Coastal Commission’s recommendation in this respect and instead relied upon the Marina Park EIR for a merely qualitative evaluation of biological resources in the CAD EIR. A Corps EIS for its Project should not repeat this mistake and should instead conduct the surveys recommended by the California Coastal Commission.

science and “may not rely on incorrect assumptions of data.” *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir. 2005). Moreover, “[g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification as to why more definitive information could not be provided.” *Ocean Advocates*, 402 F.3d at 862, quoting *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379 (9th Cir. 1998). Finally, the Corps “must explain the conclusions it has drawn from its chosen methodology, and the reasons it considers the underlying evidence to be reliable.” *Lands Council v. McNair*, 537 F.3d 981, 994 (9th Cir. 2008). The Draft EA fails to provide the requisite “hard look” as it fails to adequately analyze several of the potential adverse impacts of the Project at all and provides inadequate or cursory analysis of other impacts.

To begin, the Draft EA has failed to adequately analyze the potential adverse impacts of the Project on the spread of the highly invasive algae species *Caulerpa prolifera*. *Caulerpa prolifera* was first identified in Newport Bay near China Cove by a team of Coastkeeper divers in April 2021. This was the first positive identification of *Caulerpa prolifera* on the U.S. West Coast. *Caulerpa prolifera* is highly invasive and the National Oceanic and Atmospheric Administration (“NOAA”) has noted the plant’s “extreme ease of recolonizing from tiny fragments” and expressed “significant concern this species could be harmful to native species.”<sup>2</sup> Upon discovery of the *Caulerpa*, the Southern California Caulerpa Action Team (SCCAT) reactivated and developed the Newport Bay Rapid Response Eradication Plan. Eradication and survey efforts are ongoing, though short on funding. Last month, additional pieces of *Caulerpa prolifera* were discovered in Newport Bay off Collins Isle in connection with a pre-dredge survey. Thus, reflecting outdated information, the Draft EA’s statements that the *Caulerpa* infestation in Newport Bay is limited to China Cove, “outside federal channels” and “would not be directly impacted by bottom-disturbing activities associated with the proposed project” are inaccurate.<sup>3</sup>

The USACE’s proposed, modified *Caulerpa* Control Protocol requesting decreased *Caulerpa* monitoring is inappropriate and, if anything, *Caulerpa* monitoring should increase given the Collins Isle discovery. The USACE’s February 25, 2022 Memorandum for Record justified its proposed modified *Caulerpa* Control Protocol by noting the “distance from the infected site,” adding “[t]he nearest dredge location is approximately 1-1/4 miles from the infected site in China Cove.”<sup>4</sup> The March 2022 discovery of *Caulerpa* off Collins Isle means the infected site is not limited to China Cove, and *Caulerpa* is more widespread throughout Newport Bay than initially thought. Collins Isle is substantially closer to the Project’s proposed dredge locations than China Cove. The Draft EA fails to adequately analyze the impacts of reduced monitoring and underscores the risk that dredging and disposal may further spread *Caulerpa*. At a minimum, the Draft EA should be modified to include full *Caulerpa* Control Protocol and clarify that if *Caulerpa* is detected during surveying, bottom-disturbing activities will not be conducted until after the infestation has been treated and isolated in collaboration with SCCAT and all relevant state and federal agencies. If these measures are not followed, dredging and disposal activities would be particularly pernicious in spreading *Caulerpa* by potentially breaking off pieces of *Caulerpa* and spreading them to new areas where they may colonize.

Among other adverse impacts of the Project are the release of contaminated sediments into the water column caused by both disturbing and suspending contaminated sediments during dredging and disposal. The Draft EA states in conclusory fashion that “[d]redging will be controlled to keep water

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<sup>2</sup> NOAA, *Caulerpa Species on the West Coast*, <https://www.fisheries.noaa.gov/west-coast/habitat-conservation/caulerpa-species-west-coast> (last accessed April 14, 2022).

<sup>3</sup> Draft EA at 21-22 and 269. Please note that all references to the Draft EA used herein refer to PDF pagination.

<sup>4</sup> *Id.* at 269-70.

quality impacts to acceptable levels . . . [c]ontrols include modifying the dredging operation and the use of silt curtains (if warranted).”<sup>5</sup> This is manifestly inadequate analysis. Other than “slowing any or all of the processes,” the Draft EA fails to identify how dredging would be modified or controlled to minimize water quality impacts. The Draft EA fails to analyze the feasibility of employing silt curtains, much less how effective such silt curtains would be in keeping dredging operations from releasing and spreading pollutants to the water column.

Further, the Draft EA does not adequately analyze water column impacts from dumping contaminated sediments at the disposal sites, including the CAD and LA-3. As highlighted by the California Coastal Commission in their comment letter to the CAD EIR, BMPs must be identified “to ensure chemical constituents of concern do not become released into the water column after they have been released from the bottom of the barge during deposition” into the CAD.<sup>6</sup> While the City responded by identifying mitigation measures MM-HYDRO-1 (monitoring) and MM-HYDRO-2 (BMPs which “could include use a of a silt curtain during dredging and/or material placement, a floating boom to be maintained around the proposed Project area, and daily inspection of construction equipment for leaks or malfunctions”), again, the specifics are lacking as to when/how these measures will be implemented, and how effective they are expected to be.<sup>7</sup> Regarding LA-3 disposal, the Draft EA states “[a]s sediments proposed for ocean disposal have been found to be clean, contaminants would not be introduced or biologically available for consumption.”<sup>8</sup> Coastkeeper clarifies these sediments are not “clean,” per se, but rather, deemed “suitable” by the EPA for open ocean disposal.<sup>9</sup> These sediments still contain amounts of PCBs, mercury, and DDT and Coastkeeper urges the USACE to analyze the risks these contaminants could pose to the marine environment. In particular, the USACE should analyze the risks these contaminants could pose if their characteristics changed over time due to natural evolution or disturbance (for example, oxygenating sediments that might previously have been contained in an anaerobic environment and/or the likelihood of methylation).

The Draft EA must adequately analyze the potential adverse impacts on marine life from bioaccumulation and biomagnification of contaminants left in the marine environment. Dredging and subsequent disposal of contaminated sediments into the CAD may release contaminants including PCBs and mercury into the water column and sediments may settle outside of the CAD footprint--thus not isolated from the environment.<sup>10</sup> Benthic organisms – which the Draft EA notes are “important food sources for fish, crabs, and other benthic organisms”<sup>11</sup> – have been shown to bioaccumulate contaminants such as PCBs and mercury in bioassay tests, creating the risk of biomagnification of these contaminants up the food chain in marine waters affected by the Project, including into the tissues of marine mammals. Such bioaccumulation poses significant health risks to marine mammals. For example, notably, recent scientific research found a positive association

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<sup>5</sup> *Id.* at 19.

<sup>6</sup> CAD FEIR at 57-58.

<sup>7</sup> *Id.* at 60-61.

<sup>8</sup> Draft EA at 20.

<sup>9</sup> *Id.* at 73-74.

<sup>10</sup> See, e.g., National Research Council, Committee on Contaminated Marine Sediments, *Contaminated Sediments in Ports and Waterways: Cleanup Strategies and Technologies*, at 12 (providing a comparative analysis of contaminated sediment clean-up strategies and noting the disadvantages of CADs include “the possible loss of contaminated sediments during placement”). Available at [https://www.csu.edu/cerc/researchreports/documents/ContaminatedSedimentsinPortsandWaterwaysCleanupStrategiesandTechnologies1997\\_001.pdf](https://www.csu.edu/cerc/researchreports/documents/ContaminatedSedimentsinPortsandWaterwaysCleanupStrategiesandTechnologies1997_001.pdf).

<sup>11</sup> Draft EA at 21.

between California sea lion blubber contaminant concentrations of DDT and PCBs among other contaminants and cancer in sea lions.<sup>12</sup> Noting “[t]he prevalence of cancer in wild California sea lions (*Zalophus californianus*) is one of the highest among mammals,” the study called for improved “[e]fforts to prevent ecosystem contamination with persistent organic pollutants,” such as PCBs, “to protect both wildlife and human health.”<sup>13</sup>

In sum, the Draft EA fails to meaningfully analyze the water column pollution impacts from the dredging and disposal operation and the effects of these impacts on area wildlife, which as noted and discussed below, includes endangered species and marine mammals.

### **III. The Corps Is Improperly Segmenting Dredging and Disposal of Federal Channel Sediments and Dredging and Disposal of Sediments Associated with Creation of the CAD Rather Than Considering This as an Integrated Project Whole.**

NEPA regulations mandate that “[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.” 40 C.F.R. § 1502.4(a). Dredging and disposal of sediments from within the Federal Channels and creation of the CAD are closely enough related such that they should be seen as a single course of action for NEPA review purposes. As noted, the Corps has proposed as its preferred alternative that contaminated sediments dredged from the Federal Channel would be disposed of in the CAD. Per the EA, the actions are so closely related such that dredging of the contaminated sediments is entirely dependent upon the availability of the CAD. Accordingly, creation of the CAD is intrinsic to the Corps carrying out the dredging and disposal project. Under NEPA regulations, the Corps must thus prepare a single EIS which analyzes the impacts of dredging and disposal of Federal Channel sediments and creation of the CAD (with the latter’s associated dredging and disposal of excavated sediments) to be a single integrated project.

Even if the Corps were not obligated to analyze dredging and disposal of Federal Channel sediments and creation of the CAD as a single project, NEPA regulations’ obligation to analyze cumulative impacts of projects would require the same analysis. NEPA regulations require the Corps to consider all direct, indirect, and cumulative environmental impacts of its proposed action. 40 CFR §§ 1502.16, 1508.8, 1508.25(c). Cumulative effects include:

[T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 CFR § 1508.7. The Corps’ NEPA analysis of cumulative impacts must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment. *Te-Moak Tribe of Western Shoshone v. U.S. Dept. of Interior*, 608 F.3d 592, 603 (9th Cir. 2010) (rejecting EA for mineral

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<sup>12</sup> *Frontiers in Marine Science, Persistent Contaminants and Herpesvirus OtHV1 Are Positively Associated With Cancer in Wild California Sea Lions (Zalophus californianus)* at 8 (“the higher the animals’ blubber contaminant concentrations, the higher the odds of cancer”).

<sup>13</sup> *Id.* at 10.

exploration that failed to include detailed analysis of impacts from nearby proposed mining operations). An analysis that complies with NEPA would include consideration of the impacts from dredging and disposing of Federal Channel sediments in conjunction with creation of the CAD, and obviously similar project with similar impacts within the same environmental area.

#### **IV. The Draft EA Fails to Evaluate a Reasonable Range of Alternatives.**

In analyzing a project under NEPA, the Corps must “study, develop, and describe appropriate alternatives to recommended courses of action.” 42 U.S.C. § 4332(E). Indeed, the development of alternatives is the “heart” of the NEPA process. 40 C.F.R. § 1502.14. “The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.” *Alaska Wilderness Recreation & Tourism v. Morrison*, 67 F.3d 723, 729 (9th Cir.1995); *Resources Ltd. v. Robertson*, 35 F. 3d 1300, 1307 (9th Cir. 1994). “[A]n agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action, and sufficient to permit a reasoned choice.” *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 (9th Cir. 1992) (internal citation and quotations omitted). Moreover, in doing so, the Corps must “rigorously explore and objectively evaluate all reasonable alternatives” to the proposed action. *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1310 (9th Cir. 1990). Even if the Corps were correct that it need only prepare an EA for the Project, it would still be obligated to complete a more rigorous alternatives analysis. *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228-1229 (9th Cir. 1988) (“[w]hile a federal agency need not consider all possible alternatives for a given action in preparing an EA, it must consider a range of alternatives that covers the full spectrum of possibilities”).

The Draft EA fails to comply with this alternatives analysis obligation as it purports to present and analyze only three alternatives, one of which is not meaningfully considered and the other two of which are not substantially different:

- Alternative 1: Proposed Project (Recommended Plan);
- Alternative 2: Ocean Disposal – where the 7,000 cy slated for disposal in the Newport Beach Nearshore Placement Site in Alternative 1 would instead go to LA-3; and
- No Action Alternative; dispelled of in two sentences.

The Draft EA fails to consider known alternative methods for treating contaminated marine sediments besides disposing of them in the marine environment and capping them.<sup>14</sup> The Draft EA does not consider any terrestrial or in-situ remediation alternatives such as soil washing, electrokinetic treatment, enhanced land farming, and microbial bioremediation, even though numerous studies have shown that such treatment methods can be environmentally preferable, cost-effective means of removing contaminants such as PCBs and heavy metals from contaminated marine sediments.<sup>15</sup> Nor

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<sup>14</sup> See, e.g., Natural Resources Council, *supra* note 10.

<sup>15</sup> See, e.g., F. Dell’Anno<sup>1</sup>, E. Rastelli<sup>1</sup>, M. Tangherlini, C. Corinaldesi, C. Sansone, C. Brunet, S. Balzano, A. Ianora, L. Musco, M. Montereali and A. Dell’Anno, Highly Contaminated Marine Sediments Can Host Rare Bacterial Taxa Potentially Useful for Bioremediation, *Front. Microbial.*, 01 March 2021, <https://doi.org/10.3389/fmicb.2021.584850>; Pasciucco, F.; Pecorini, I.; Di Gregorio, S.; Pilato, F.; Iannelli, R. Recovery Strategies of Contaminated Marine Sediments: A Life Cycle Assessment. *Sustainability* 2021, 13, 8520. <https://doi.org/10.3390/su13158520>. See also Puget Sound EIS at 3 (in 1999, noting “[a]n eighth alternative, sediment treatment, was added to this final PEIS in response to increased awareness by the Study Team of recent research and development in this field and public comments”) and S-9 (“treatment has the potential to become a component of a regional management strategy for contaminated dredged material”). See also Port of San Diego, Press Release, ecoSPEARS to Deploy Clean Water Technology at Port of San Diego America’s Cup



does the Draft EA consider reduced dredging or land-based disposal of dredged sediments as an alternative. Additionally, the Draft EA does not consider any alternative locations for placement of dredged materials besides the CAD, the Newport Beach Nearshore Placement Site, or LA-3. In cursory, conclusory fashion, the Draft EA concludes that potential disposal alternatives are limited to harbor fills associated with port development (e.g., Middle Harbor Slip 1 Fill Site at the Port of Long Beach used in 2013) and that because there are no harbor fill projects available at this time, there are no such potential alternative disposal locations.<sup>16</sup> However, the Draft EA provides no explanation of the Corps' efforts to research whether alternative sediment placement locations might exist. The CAD EIR, for its part, included upland land disposal as an alternative.<sup>17</sup> Additionally, NEPA documents for other USACE dredging and confined disposal projects included an alternatives analysis of upland confined disposal, solid waste landfill disposal, decontamination of dredged material, and a hybrid, combination approach.<sup>18</sup>

Indeed, the Draft EA does not consider *any* action alternative for the contaminated sediments. In both action Alternatives 1 and 2, the unsuitable material will either go into the conceptualized CAD or “[i]f the CAD Site is unavailable to be used for this purpose, the sediments found to be unsuitable for ocean disposal, would not be dredged and would remain in place.”<sup>19</sup> Coastkeeper notes that as of the date of this letter, the City's proposed CAD has not yet received requisite permit approval from the California Coastal Commission, nor has the CAD received the requisite CWA 401 certification from the Santa Ana Regional Water Quality Control Board. With the USACE hoping to begin the Project in October 2022 and timing being “the critical factor as dredging must be initiated prior to January 2023” to avoid sediment re-testing, the USACE's reliance on the CAD as the sole action alternative is arbitrary and capricious in light of other feasible alternatives that the USACE should fully analyze in an EIS.<sup>20</sup>

The Corps' singular focus on disposal of the contaminated sediments back into the marine environment, coupled with capping the sediments, ignores recent lessons concerning the pitfalls of this approach. Recent examination of the effects of ocean disposal and attempted capping of DDT contaminated sediments in Southern California has revealed the flaws of this method, as widely reported by, for example, the Los Angeles Times.<sup>21</sup> As documented by the Los Angeles Times, an EPA spokesperson noted the EPA “suspended capping efforts” at various Southern California offshore locations where contamination presently exists and “is now reassessing its approach: ‘We are

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Harbor (Dec. 15, 2020), <https://www.portofsandiego.org/press-releases/general-press-releases/ecospears-deploy-clean-water-technology-port-san-diego> (describing two-year pilot project to deploy technology to remove PCBs from sediments in America's Cup Harbor).

<sup>16</sup> Draft EA at 15.

<sup>17</sup> CAD DEIR, Section 6.

<sup>18</sup> See, e.g., Puget Sound EIS at S-3 – S-10.

<sup>19</sup> Draft EA at 15-16.

<sup>20</sup> The Draft EA has some cursory, vague discussion of Corps' consideration of changing the footprint of the area dredged as an alternative, but mostly rules this out with the observation that “[b]ecause navigational safety requires the entire channel to be at its authorized depth, alternative dredge footprints are generally not considered.” Without explanation, the Draft EA adds, “small areas were removed from the dredge footprint for a variety of environmental concerns.” A revised Corps NEPA environmental document/EIS should include discussion of what these environmental concerns were and why they warranted alteration of the dredge footprint. This discussion could and likely will shed further light on the overall environmental impacts of the Project as to why environmental concerns warranted not dredging the areas in question would likely add to understanding of the environmental setting for the Project.

<sup>21</sup> Rosanna Xia, Los Angeles Times, L.A.'s Coast Was Once a DDT Dumping Ground (2020) <https://www.latimes.com/projects/la-coast-ddt-dumping-ground/>.

updating our evaluation of the mechanisms of how the DDTs and PCBs in the sediment impact human health and the environment.”<sup>22</sup>

With this Project, the USACE, together with its effective partner the City, can leave “out of sight out of mind” in the past and be part of a forward-thinking, longer-term solution, foreshadowed as promising in the 1999 Puget Sound EIS.<sup>23</sup> Coastkeeper urges the USACE to work with the City to evaluate remediation options to treat and remove toxins from the contaminated sediments and help restore Newport Bay, rather than leave these sediments in the Bay. Studies have corroborated that there are a wide variety of cost-effective, less intrusive remedial options for PCBs, DDT, and mercury, including phytoremediation, biosorption, microbial bioremediation, and other green-tech solutions that could actually remove the contaminants from the marine environment, rather than just bury them.<sup>24</sup>

Further, as the interim cap is expected to be present for two years following CAD construction, the USACE and City should at least consider an alternative CAD design with a larger interim cap. The one-foot-thick interim cap is potentially within the burrowing range of some benthic fauna and subject to bioturbation, anchoring, mooring, and other potential disruptions. For example, the California Department of Fish and Wildlife (“CDFW”) expressed concerns that “vessels that anchor and moor within the CAD facility during the two-year interim period might expose contaminated sediment buried under the one-foot-deep interim layer” and recommended a thicker, greater than one-foot layer to minimize mobilization of contaminated sediments.<sup>25</sup> The Coastal Commission also questioned the interim cap layer’s potential for leakage and the EPA has documented similar disturbance concerns with subaqueous capping more generally.<sup>26</sup> The proposed CAD facility overlaps with mooring and anchorage areas and Newport Bay serves as habitat area for multitudes of benthic organisms. These features, especially taken together, raise the risk of bioturbation and other disturbances that may allow contaminated sediment to escape into the marine environment and work its way into the food chain. For example, *Saxidomus nuttalli* is a species of clam known to inhabit Newport Bay with the ability of burrowing beyond one foot deep.<sup>27</sup> *Neotrypaea californiensis* (formerly *Callianassa californiensis*), is a ghost shrimp and popular fish bait known to reside in Newport Bay that can burrow well past one foot deep.<sup>28</sup> One study of *Neotrypaea* found sifted sand for an average-sized individual “would be turned over in 240 days to a depth of thirty inches, which is the approximate limit of depth to which the animals burrow. These figures are conservative . . . and the burrowing activities are carried on mainly within the upper eighteen to twenty inches. As a consequence, this region must be entirely turned

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<sup>22</sup> *Id.* See also Marla Cone, Scientific American, The Mystery of the Vanishing DDT in the Ocean Near Los Angeles (Mar. 13, 2013), <https://www.scientificamerican.com/article/the-mystery-of-the-vanishing-ddt-in-the-ocean-near-los-angeles/>.

<sup>23</sup> See, e.g., Puget Sound EIS at S-9 – S-10.

<sup>24</sup> See *supra* note 15.

<sup>25</sup> CAD FEIR at 67-68.

<sup>26</sup> *Id.* at 58.

<sup>27</sup> 2015 CDFW Report, Appendix G; Brian S. Anderson & Rikk G. Kvitik, National Estuarine Research Reserve, NOAA Technical Memorandum, Sea Otter Predation and the Distribution of Bivalve Prey in the Elkhorn Slough National Estuarine Research Reserve (May 15, 1987) study at 12 (finding a mean burrow depth for *Saxidomus* at the studied location of 32.4 cm).

<sup>28</sup> See G.E. MacGinitie, The Natural History of *Callianassa californiensis* Dana, The American Midland Naturalist (Mar., 1934); Hiebert, T.C., *Neotrypaea californiensis*, Oregon Estuarine Invertebrates: Rudy’s Illustrated Guide to Common Species, 3<sup>rd</sup> ed., University of Oregon Libraries and Oregon Institute of Marine Biology (2015); Newport Bay Conservancy, Marine Invertebrates, available at <https://newportbay.org/wildlife/marine-life/marine-invertebrates/>.

over every few months.”<sup>29</sup> An alternative, thicker interim cap should be considered to ensure sediment containment. The USACE and City should also consider incorporating additional materials, such as an eco-friendly biochar, into the cap.<sup>30</sup> Of course, the environmental effects of any and all alternatives should be carefully and thoroughly analyzed to ensure we do not swap one clean-up task for another.

## V. The USACE Needs to Do a Section 7 ESA Consultation.

ESA section 7 requires the Corps to initiate and complete consultation with NMFS and FWS over the impacts of the Project on ESA listed species if the Project “may affect” any ESA-listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14; *see, e.g., NRDC v. Jewell*, 749 F.3d 776, 779 (9th Cir. 2014) (consultation requirement reflects “a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies”); *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1028 (9th Cir. 2012) (*en banc*) (“may affect” standard is low and triggers consultation duty without showing actual species injury). The Draft EA indicates that the Corps intends to violate its ESA section 7 obligations and to not consult with NMFS and FWS over the obvious potential of the Project to adversely impact ESA listed species. The Draft EA indicates that “the Corps determined that the recommended plan would have no effect on federally listed species or their designated critical habitat” and threatened/endangered species would be “unaffected” by the Project.<sup>31</sup> For this reason, the Corps stated it would not pursue ESA section 7 consultation.<sup>32</sup>

In making this determination, the Corps has violated its ESA section 7 consultation duties. Its conclusion of no potential impacts to ESA-listed species is plainly contrary to the factual record available to the USACE. To begin, the presence of numerous ESA-listed species in the Project area is well documented, including:

- California least tern (*Sterna antillarum browni*) – endangered
- Western snowy plover (*Charadrius alexandrinus nivosus*) – threatened
- Green sea turtle (*Chelonia mydas*) – endangered
- Leatherback sea turtle (*Dermochelys coriacea*) – endangered
- Olive ridley sea turtle (*Lepidochelys olivacea*) – endangered
- Guadalupe fur seal (*Arctocephalus townsendi*) – threatened
- Sei whale (*Balaenoptera borealis*) – endangered
- Blue whale (*Balaenoptera musculus*) – endangered
- Fin whale (*Balaenoptera physalus*) – endangered
- Gray whale (*Eschrichtius robustus*) – endangered
- Humpback whale (*Megaptera novaeangliae*) – endangered
- Killer whale (*Orcinus orca*) – endangered
- Sperm whale (*Physeter catodon*) – endangered
- False killer whale (*Pseudorca crassidens*) – endangered

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<sup>29</sup> MacGinite, *supra* note 28 at 169.

<sup>30</sup> *See supra* note 10 at 190 (describing ways to augment passive capping with contaminant-absorbing materials).

<sup>31</sup> Draft EA at 3.

<sup>32</sup> *Id.* at 12.

*See, e.g.*, Draft EA (recognizing the presence of California least tern and green sea turtles), CAD EIR pages 91 and 100-104 (recognizing the presence of California least tern, western snowy plover, green sea turtles, and gray whales), and LA-3 EIS at Table 3.3-11 (recognizing the potential for occurrence at the LA-3 disposal site of sei whales, blue whales, fin whales, gray whales, humpback whales, killer whales, sperm whales, false killer whales, Guadalupe fur seal, green sea turtle, leatherback sea turtle, olive ridley sea turtle, and California least tern).<sup>33</sup>

The Draft EA itself acknowledges the Project may affect endangered species. For the California least tern, the Draft EA recognizes this species is present in the Project area and “noise associated with dredging activities may disturb fishes, seabirds, and marine mammals.”<sup>34</sup> Coastkeeper notes that in CDFW’s comment letter to the City for the CAD EIR, CDFW highlighted:

Newport Bay and the surrounding beaches provide suitable nesting and foraging habitat for California least tern (least tern). . . . The least tern is migratory and uses habitat within and adjacent to Newport Bay during the breeding season (April 1 through September 1). The DEIR addresses temporary and minimal impacts to foraging habitat for least tern resulting from suspended sediment and increased turbidity related to dredging activities. The DEIR also acknowledges that noise and operation of equipment could deter tern from resting on surrounding beaches. Although [least tern] nesting sites have primarily been documented in Upper Newport Bay, there is potential for least tern nest abandonment resulting from construction noise. Adult abandonment of active nests may lead to starvation or increased predation of chicks, a decline in breeding success, and an overall population decline.

Thus, section 7 consultation is required for the California least tern. The CAD DEIR also notes critical habitat for the threatened western snowy plover occurs along Balboa Peninsula – adjacent to the Newport Beach Nearshore Placement Site. Western snowy plover nesting season is between March 1 and September 30, with most activity occurring in May. The CAD DEIR further notes Western snowy plovers usually forage in intertidal zones, feeding on invertebrates, marine worms, and insects. The Corps should consult with the FWS, the resource agency with ESA jurisdiction over Western snowy plover, concerning potential impacts of the Project on this bird species and any necessary mitigation measures.

With respect to green sea turtles, the Draft EA itself acknowledges the potential for impacts, as it calls for preparation of a monitoring and avoidance plan, in coordination with the NMFS, “to ensure that green sea turtles are not affected” by the Project. The CAD DEIR likewise notes potential impacts on local sea turtles species, including from dredging noises, turbidity plumes, decreased prey, decreased water clarity, and potential disposal vessel traffic strikes.<sup>35</sup> While the CAD EIR found these impacts to be less than significant and the Draft EA outlines mitigation measures for lessening impacts on turtles, neither alleviates the USACE of its ESA duties. As noted, ESA section 7 creates a low

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<sup>33</sup> For additional, anecdotal documentation of endangered and marine mammal species present in the Project area, *see also* Visit Newport beach California, Things to Do: Whale Watching Newport Beach, available at <https://www.visitnewportbeach.com/things-to-do/whale-watching/>; CBS Los Angeles, Gray Whale Spotted in Newport Beach Harbor (2017) [https://youtu.be/HoYLQLEK\\_s0](https://youtu.be/HoYLQLEK_s0), and various pictures and videos of sea turtles and whale species from @NewportBeach, Instagram including gray whales and dolphins observed immediately offshore as recently as April 13, 2022.

<sup>34</sup> Draft EA at 16, 18.

<sup>35</sup> *See, e.g.* CAD DEIR pages 103-104.

threshold for consultation between an action agency such as the Corps and the wildlife agencies. It suffices if the Project “may affect” the listed species. Accordingly, the Corps must complete ESA section 7 consultation with NMFS on the Project’s potential impacts to green sea turtles and other sea turtles with similar behaviors and vulnerabilities, including leatherback and olive ridley sea turtles.<sup>36</sup>

Potential direct and indirect Project effects on endangered whale species also mandate the Corps to complete section 7 consultation with NMFS. In terms of direct impacts, studies have found that while “it can be assumed that all marine mammals are prone to noise impacts from dredging, . . . the issue might be more acute for baleen whales which communicate at very low frequencies.”<sup>37</sup> Indeed, a study focused on gray whales reported industrial activities, including dredging, most likely led to long-term changes in baleen whale distribution.<sup>38</sup> Indirect effects of dredging on endangered whales and other marine mammals may include entrainment and/or smothering of lower trophic taxa preyed on by endangered species. Indirect effects may also include disturbance of sediments and release of contaminants into the water column, making those contaminants available to marine organisms and creating a potential for bioaccumulation and/or biomagnification in higher trophic taxa that would include endangered whale and seal species. These effects need to be considered, particularly in light of the toxicity of the contaminants at issue, their known potential to bioaccumulate and biomagnify, and the multi-layered CAD design creating multiple opportunities for benthic organisms to burrow into contaminated sediments and in turn be consumed by higher trophic level predators.

## **VI. The USACE Needs to Comply With the MMPA.**

The MMPA makes it unlawful to “take” marine mammals unless authorized by an MMPA permit and further defines “take” as to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal. 16 U.S.C. § 1371(a), 1372(a). As noted in the preceding section, there are several species of marine mammals inhabiting waters that will be affected by the Project and the Project has the potential to harass these marine mammals by disrupting their behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering. See 16 U.S.C. § 1371(a)(18) (definition of marine mammal “harassment”). Accordingly, the Corps needs to acquire an MMPA permit with provisions appropriate to protecting these marine mammals to proceed with the Project -- and to then fully comply with the Permit in implementing the Project.<sup>39</sup>

The Draft EA erroneously states “[t]he only marine mammals expected in the dredging area would be California sea lions . . . and harbor seals.”<sup>40</sup> The CAD EIR and the LA-3 EIS, among other sources of information, indicates the draft EA overlooked the presence of other marine mammals that could be affected by the Project. The CAD EIR states that “[v]arious dolphin species are known to enter Lower

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<sup>36</sup> See, e.g. CAD DEIR page 103 (“Green sea turtles, hawksbill turtles, California sea lions, and harbor seals in the vicinity of the proposed Project site and dredging area during the construction period could be affected by the noise of the dredging operation, and by contact with the dredging and disposal equipment during construction. Green sea turtles, hawksbill turtles, California sea lions, harbor seals, common dolphins, Pacific white-sided dolphins, and gray whales in the vicinity of the nearshore placement area during disposal operations would potentially be disturbed by the noise and activity of the disposal tugboat and split-hull barge and by the turbidity plume from disposed sediments.”).

<sup>37</sup> Victoria L.G. Todd, et. Al., A Review of Impacts of Marine Dredging Activities on Marine Mammals, ICES Journal of Marine Science, Vol. 72, Issue 2 (2015), available at: <https://academic.oup.com/icesjms/article/72/2/328/676320?login=true>.

<sup>38</sup> *Id.*

<sup>39</sup> See, e.g., 72 Fed. Reg. 32,283 (Jun. 12, 2007) (NMFS issuing Incidental Harassment Authorization for harassment incidental to dredging within San Francisco Bay).

<sup>40</sup> Draft EA, Section 4.2.1

Newport Bay.”<sup>41</sup> The CAD EIR specifically identifies common dolphins, Pacific white-sided dolphins, and gray whales as among the additional marine mammals beside sea lions and harbor seals that inhabit ocean waters surrounding Newport Harbor and further stated the following marine mammals inhabit the LA-3 ocean disposal site: common dolphin, Pacific white-sided dolphin, California sea lion, gray whale, bottlenose dolphin, Dall’s porpoise, pilot whale, Risso’s dolphin, and Pacific harbor seal. The CAD EIR notes “general activity and noise during dredging activities typically act as a deterrent for dolphins.”<sup>42</sup> Indeed, “[a] study found the presence of bottlenose dolphins in a year round, high-shipping activity harbor declined as dredging intensity increased, making it possible to link avoidance to dredging activity versus vessel presence in generally.”<sup>43</sup> Additionally, the LA-3 EIS indicates the following marine mammal species inhabit the LA-3 ocean disposal site: sei whales, blue whales, fin whales, gray whales, humpback whales, killer whales, sperm whales, and false killer whales.<sup>44</sup> Thus, while overlooked by the Draft EA, available information indicates that an adequate environmental review under NEPA would include preparation of a full EIS that includes analysis of the presence of marine mammals, including various species of dolphins and whales, and the Project’s potential impacts on these marine mammals.

## **VII. The USACE Needs to Obtain a Coastal Zone Management Act Consistency Determination.**

The CZMA requires that “[e]ach Federal agency activity within or outside 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 applicable federally approved CMP. 16 U.S.C. § 1456(c)(1)(A). Federal agencies that “undertake any development project in the coastal zone of that state shall ensure that the project is, to the maximum extent practicable, consistent with” the applicable CMP. *Id.* § 1456(c)(2). A federal agency ensures its actions are consistent with this CMP by submitting a consistency determination to the relevant State agency at least 90 days before final approval of any action. *id.* § 1456(c)(1)(C); *see also* 15 C.F.R. § 930.36. After receipt of the consistency determination, the “State agency shall inform the Federal agency of its concurrence with or objection to the Federal agency’s consistency determination.” 15 C.F.R. § 930.41; *see generally California v. Norton*, 311 F.3d 1162, 1167 (9th Cir. 2002). If the Federal agency disagrees with the consistency determination and decides to proceed with the project, the State can file suit to halt the project as inconsistent with its CMP. *Norton*, 311 F.3d at 1171. The California Coastal Commission has developed California’s federally approved CMP and has authority under the CZMA and California Public Resources Code § 30004 to issue consistency determinations. The Draft EA states without any meaningful analysis that the Project is consistent with California’s CMP and that the Draft EA itself constitutes the Corps’ CZMA consistency determination which the Corps has or will submit to the California Coastal Commission for concurrence. Notably, however, the California Coastal Commission has not concurred with the Corps that the Draft EA constitutes an adequate CZMA consistency determination. Given the flaws identified above with the Draft EA’s truncated, incomplete analysis of environmental impacts of the Project and alternatives to the Project, the California Coastal Commission should be seen as unlikely to concur that the Draft EA serves as an adequate CZMA consistency determination. To comply with

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<sup>41</sup> CAD DEIR at 118.

<sup>42</sup> *Id.*

<sup>43</sup> *See supra* note 37.

<sup>44</sup> While the LA-3 EIS provides useful information about the presence of marine mammal species overlooked by the Draft EA, the Corps should not accept the LA-3 is the final word on what marine mammal species presently occupied the LA-3 site area. The LA-3 EIS is nearly 20 years old and the Corps should look to update the LA-3 EIS with more currently available information.

the CZMA, the Corps should prepare a revised NEPA document in the form of a full-blown EIS that addresses the shortcomings in the Draft EA identified in this comment letter. The Corps should then submit that as a revised proposed consistency determination.

### **VIII. The Draft EA Fails to Properly Evaluate Mitigation Needs.**

As a matter of law, the Draft EA must include “a specific plan to mitigate for damages to ecological resources, including terrestrial and aquatic resources, and fish and wildlife losses created” by the proposed project unless the Secretary of the Army makes a determination that the project will have “negligible” adverse impacts. 33 U.S.C. § 2283(d). Because the Draft EA fails to adequately evaluate Project impacts, it also fails to adequately evaluate the extent of mitigation of these impacts that NEPA, the CWA, the ESA, the CZMA, and the MMPA require. It is virtually inconceivable that dredging and relocating 908,000 of sediment using heavy equipment over a period of months in a *Caulerpa* infected area would not cause adverse impacts to fish and wildlife resources that must be mitigated.

### **IX. CONCLUSION**

For at least the reasons set forth in these comments, the Draft EA is legally deficient and cannot be relied upon to satisfy NEPA, ESA, CWA, CZMA or MMPA requirements for the proposed Project. Coastkeeper urges the Corps to withdraw the Draft EA and put the Project on hold at least until the Corps completes or secures (i) Section 7 ESA consultation with NMFS and FWS, (ii) a legally adequate EIS, (iii) CWA section 401 certification, (iv) a CZMA consistency determination, and (v) an MMPA permit for the Project.

If you have any questions regarding Coastkeeper’s comments, please feel free to call me at (714) 850-1965 or email me at [lauren@coastkeeper.org](mailto:lauren@coastkeeper.org).

Regards,



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