

STEPHAN C. VOLKER
JOSHUA A.H. HARRIS
BRIDGET A. ROBERTS
CAITLIN S. SISLIN

STEPHAN C. VOLKER
436 14th STREET, SUITE 1300
OAKLAND, CALIFORNIA 94612
Phone 510/496-0600 ♦ Fax 510/496-1366
e-mail: svolker@volkerlaw.com

January 28, 2008

John Bradley
United States Fish and Wildlife Service
Don Edwards San Francisco Bay National
Wildlife Refuge
9500 Thornton Avenue
Newark, CA 94560

Brenda Buxton
California Coastal Conservancy
1330 Broadway, 13th Floor
Oakland, CA 94612

Yvonne Le Tellier
United States Army Corps of Engineers
1455 Market Street
San Francisco, CA 94103

John Krause
California Department of Fish and Game
P.O. Box 47
Yountville, CA 94599

Re: Comments of Citizens Committee to Complete the Refuge and Marin
Audubon Society on South Bay Salt Pond Restoration Final
Environmental Impact Statement/Report

Dear Messrs. Bradley and Kraus and Ms. Le Tellier and Buxton:

On behalf of the Citizens Committee to Complete the Refuge and the Marin Audubon Society, we submit the following comments on the South Bay Salt Pond Restoration Project Final Environmental Impact Statement/Report ("SBSPRP EIS/R" or "Final EIS/R") dated December, 2007.

INTRODUCTION

The Final EIS/R suffers from the same fatal flaws that we identified in our May 3, 2007 comments on the Draft EIS/R. Although the Final EIS/R includes two new sections (1.4.6, "Restoration in South San Francisco Bay" and 2.2.3, "Expanded Geographic Area Alternative"), these additional sections do not represent a good faith effort to rectify the deficiencies discussed in our comment on the Draft EIS/R. Instead, these two sections are apparently intended to justify the mistakenly narrow scope of alternatives that are studied and discussed in the Draft EIS/R. Both sections trivialize the need to expand the scope of the SBSP Restoration Project Area to encompass other potentially available and suitable restoration lands within the Authorized Expansion Boundary of the Refuge. Instead of evaluating the very substantial benefits and potential costs of these expansion lands for inclusion in the Project area, these new sections of the EIS/R simply repeat the tautology that it is not "practical or feasible to include these other lands within the SBSP

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Restoration Project now” because “[t]he Project proponents either do not own the land or they do not possess the right to restore the land” at present. Final EIS/R, section 2.2.3 at page 2-8.

This excuse provides no basis for failing to discuss these alternatives. The purpose of NEPA’s and CEQA’s alternatives’ requirement is to force agencies to expand their horizons and consider new approaches regardless whether they require acquisition of lands not presently held or action by agencies not within their current control or jurisdiction. The Final EIS/R should fully consider these alternatives in order to provide Congress and other decisionmakers with the information needed to decide whether to appropriate additional funds for the purpose of acquiring these lands or, alternatively, to work with other agencies that may have an interest in or ability to require the dedication of these lands for preservation and management as part of the expanded Project Area.

Your decision to dismiss these alternatives from full consideration ends the inquiry before it even begins, and deprives Congress and other key decisionmakers of the information they critically need to establish appropriate boundaries for the Project Area and to provide acquisition mechanisms to implement those expanded boundaries.

For these reasons, as explicated more fully below, we respectfully request that you revise and recirculate the Final EIS/R, giving full and fair consideration to the expanded Project Boundaries that we have urged and that you have admitted, in your additional new discussion, “could in turn improve the efficiency and success of the restoration.” Final EIS/R, § 1.4.6, page 14.

**ALTHOUGH THE FINAL EIS/R ADMITS THAT EXPANDING
THE PROJECT AREA TO ENCOMPASS ADDITIONAL LANDS
WITHIN THE AUTHORIZED EXPANSION BOUNDARY
WOULD SIGNIFICANTLY ADVANCE THE PURPOSES OF THE
PROJECT, THE FINAL EIS/R IMPERMISSIBLY FAILS TO
CONSIDER THIS EXPANSION AS AN ALTERNATIVE.**

The Final EIS/R admits, as it must, that expanding the boundaries of the Project Area to encompass additional restoration lands within the Authorized Expansion Boundary would substantially further the purposes of the Project. First, “[s]ome lands outside the SBSP Restoration Project Area are more suitable for certain types of restoration than lands within the Project Area.” Final EIS/R, § 1.4.6, page 13. For example, “some of the Mowry Ponds currently owned by the Refuge and operated by Cargill for salt production would be more suitable for tidal marsh restoration when and if they become available because they have fewer challenges” than other lands within the

Project Area such as the Alviso Ponds, which suffer from severe mercury pollution and subsidence problems. *Id.* “Another reason for the acquisition and restoration of the remaining privately owned lands within the Authorized Expansion Boundary is to spread the restoration risks over a larger geographic area making the likelihood of failure due to uncontrollable events (e.g., oilspill) less likely.” *Id.* Additionally, “[s]ome of these privately owned lands also provide opportunities to restore locally rare habitats (e.g., riparian, seasonal wetlands, former duck clubs) that are limited when considering only the lands within the Project Area.” *Id.* Furthermore, “[t]he land within the Authorized Expansion Boundary reflects the diversity of wildlife habitats that could be restored to tidal wetlands, brackish marsh, managed ponds, seasonal wetlands, vernal pools, grasslands, riparian, freshwater marshes and adjacent uplands.” *Id.*

Yet despite these obvious, irrefutable benefits of expanding the Project Area to include lands within the Authorized Expansion Boundary, the Final EIS/R refuses to include such an Alternative for active consideration and potential action by Congress and other decisionmakers. This omission violates your duties under NEPA and CEQA. An agency may not limit its consideration to only those alternatives it believes it has the authority to implement. Rather, alternatives should be wide-ranging, and may include options that require additional approvals (such as land acquisitions) or participation by others. *Sierra Club v. Lynn*, 502 F.2d 43, 62 (5th Cir. 1974); *Alaska Wilderness Recreation and Tourism Assn. v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995); *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 670 (7th Cir. 1997).

Nor may an agency dismiss an alternative from serious consideration by arguing, as the Final EIS/R does here, that consideration of lands outside the Project Area would exceed the currently narrow objectives of the Project. As the Ninth Circuit Court of Appeals explains in *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998),

[A]n agency may not define the objectives of its actions in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality.

Accord, Carmel-by-the-Sea v. United States Dept. of Transportation, 123 F.3d 1142, 1155 (9th Cir. 1997); *City of New York v. United States Dept. of Transportation*, 715 F.2d 732, 742 (2d Cir. 1983). Put another way, agencies must consider each reasonable alternative that is “not so facially implausible that it can be dismissed out of hand.” *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1288 (1st Cir. 1996).

The Ninth Circuit has repeatedly rejected agency efforts to unduly narrow the scope of alternatives where broadening their range would clearly advance the purposes of the agency's statutory mission to promote environmental protection. For example, in *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982), the Court held inadequate an EIS on future management of roadless areas because all eight of the proposed alternatives assumed that at least 37 percent of these areas should be developed. *Id.* The Court held that such a "decisional process ends its inquiry at the beginning" by limiting its consideration of so-called alternatives only to those that would achieve the 37 percent development goal, rather than exploring alternatives that would better protect the environment. *Id.* Here, your failure to consider alternatives that would expand the Project Area to encompass lands within the Authorized Expansion Boundary likewise "ends its inquiry at the beginning" by failing to consider the single most obvious means of dramatically enhancing the Project's efficacy and likelihood of success.

An agency's duty to consider an alternative is particularly compelling where, as here, the public has proposed "an alternative that is more consistent with [the agency's] basic policy objectives than the alternatives that were the subject of final consideration." *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 813 (9th Cir. 1999). Here, as in *Muckleshoot*, your agencies have a clear duty to consider at least one alternative that *further*s your statutory resource protection mandates by proposing the acquisition and restoration of *additional* salt ponds and other wetlands. Your collective failure to consider such an alternative that would clearly advance your statutory mandates violates NEPA. *Muckleshoot*, *supra* 177 F.3d at 813.

Likewise under CEQA, you have a duty to consider alternatives regardless whether they require acquisition or other action by other agencies. In *Save Round Valley Alliance v. County of Inyo* (2007) ___ Cal.App.4th ___, 2007 WL 4376023, slip op. at 21, the Court rejected the respondent Inyo County's facile rejection of an alternative (a land trade with the Bureau of Land Management) simply because it required action by a different agency. Where, as here, "an alternative is identified as at least potentially feasible, an in-depth discussion is required." *Id.*, citing *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1504-1505, fn. 5.

This duty to consider potentially feasible alternatives is not excused simply because alternative locations are proposed. As the CEQA Guidelines explain, the EIR "shall describe a range of reasonable alternatives to the project, *or to the location of the project*, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." *Id.*, slip op. at 20, citing CEQA Guidelines §

15126.6(a). Nor may the fact that additional funds would be required to acquire additional lands to implement the project excuse its consideration. "A potential alternative should not be excluded from consideration merely because it 'would impede to some degree the attainment of the project objectives, *or would be more costly.*'" *Id.*, slip op. at 20, citing *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1354.

Similarly, the mere fact that the project proponent does not own a potential alternative site does not relieve the reviewing agency from considering that alternative:

Even when the project proponent does not own a potential alternative site, the development of the project on the alternative site may nevertheless be feasible when the alternative site can be acquired through a land exchange with a public entity.

Id., slip op. at 21, citing *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 575; *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 745.

California courts consistently reject as deficient EIRs that fail to consider potentially feasible alternatives. An agency's "cursory rejection" of a proposed alternative "does not constitute an adequate assessment of alternatives as required under CEQA." *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134, 136.

For the foregoing reasons, the Final EIS/R's refusal to consider as a potentially feasible alternative the expansion of the Project Area boundaries as the public has urged violates your duties under NEPA and CEQA to consider a reasonable range of alternatives that could potentially advance the conservation purposes of the Project. Accordingly, you must correct and recirculate the EIS/R.

**THIS PROJECT-LEVEL EIS IS TOO NARROW
IN SCOPE TO SERVE AS A PROGRAM-LEVEL EIS**

The Draft SBSPRP EIS/R declared itself to be *both* a 50-year programmatic (or tier 1, program-level) EIS/R for the South San Francisco Bay Shoreline Study, and also a *project-level* EIS/R to support its own wetland restoration project implementation. It asserted that "[t]his EIS/R will serve as the tiering document for future phases of both the SBSP Restoration Project and the Shoreline Study." *Id.* at ES-15. The Final EIS/R jettisons the Shoreline Study component, but continues to define its *geographic range of*

alternatives narrowly at the project level as merely three "salt pond clusters" now ripe for wetland restoration (the Alviso and Ravenswood pond complexes owned by the U.S. Fish and Wildlife Service ("USFWS") and the Eden Landing pond complex owned by the California Department of Fish and Game ("CDFG")), rather than the entire south San Francisco Bay. The Final EIS/R does not assess programmatic alternatives for restoration within the geographic scope of the much larger Shoreline Study area, but instead, expressly *rejects* their consideration. *Id.*, §§ 1.4.6 and 2.2.3.

Although the Final EIS/R does make passing reference to areas outside the three project-level salt pond clusters in a general discussion of "environmental setting" and again in new section 1.4.6, it treats these areas unevenly and superficially. It fails to present a rigorous assessment of the indirect and cumulative long-term impacts of project implementation on salt pond and tidal marsh areas within the Shoreline Study boundaries that are outside the currently defined restoration project. Consequently, it provides no program-level comparison of reasonable alternatives in the 50-year horizon for salt ponds outside the project-level "pond clusters."

As a *program-level* EIS/R, the Draft originally offered to provide initial NEPA/CEQA compliance for another *project-level* EIS initially proposed by the U.S. Army Corps of Engineers ("USACE") and U.S. Fish and Wildlife Service ("USFWS"). With the California State Coastal Conservancy, they had jointly issued a Notice of Preparation for the South San Francisco Bay Shoreline Study (SSFBSS) EIS/R (January 2006 NOP).

The geographic scope of the Shoreline Study, in contrast with that of the SBSRP EIS/R, is *comprehensive, covering all the South Bay salt ponds and all areas within the approximate 100-year floodplain from Redwood Creek to Eden Landing*. The far greater geographic scope of the Shoreline Study was shown graphically in Figure ES-1 to the Draft SBSRP EIS/R.

The Final EIS/R attempts to back away from its initial, confusing conflation of separate project and programmatic proposals. But in doing so, it misses an opportunity to conduct a properly coordinated and comprehensive review. The *program-level* (tier 1) SBSRP EIS/R has a *narrower* geographic scope and *narrower* range of potential alternatives than the Shoreline Study, even though the latter was originally proposed as a project-level EIS. The geographic scopes of the program-level and project-level EIS/Rs were thus *inverted*: the (nominally) program-level, "tier-1" EIS/R had a smaller geographic focus than the project-level, "tier-2" Shoreline Study. This inversion violated both NEPA and CEQA, as we explain below.

This threshold error in methodology impermissibly narrowed the initial scope of environmental analysis, at the very time when it should have been the broadest. The gap between the scope of the nominal "tier 1" EIS/R and the project-level Shoreline Study *excluded the majority of federally-owned salt ponds in the East Bay from programmatic review of alternatives. The excluded ponds are primarily USFWS Refuge-owned ponds outside the "pond clusters" currently proposed for restoration.* The excluded ponds also include important non-federal (privately owned or publicly owned) salt ponds and diked baylands that may become available for restoration within the 50-year planning horizon. The Final EIS/R offers no rational explanation for this nonsensical and self-defeating exclusion, as we show below.

Many of these omitted lowlands and baylands within the Shoreline Study boundary have highly important potential roles in region-wide restoration planning. Some provide unique or rare opportunities to supply the restoration program with distinct habitat types, resilience to sea-level rise, and optimal configurations for wetland habitats in relation to existing populations of sensitive species or remnant mature wetlands and terrestrial habitats. *Many potentially significant long-term (50 year) impacts of the proposed project could be lessened or avoided by including these omitted geographic areas in the program-level range of alternatives.*

Moreover, *some potentially significant long-term environmental impacts may be induced by the narrow project-level focus on discrete salt pond clusters, and elimination of the larger salt pond system from long-term programmatic planning and evaluation.* Mitigation options and alternatives that could lessen or eliminate some impacts may be found in restoration alternatives that embrace the entire South Bay salt pond complex in the 50-year horizon.

The EIS/R also *fails to compare the obvious potential advantages of restoring salt ponds outside the proposed pond clusters.* Rigorous programmatic assessment of the cost and temporal benefits (e.g., faster restoration of less subsided salt ponds) of the excluded salt ponds, and their chances of successful restoration, is essential for informed comparison of reasonable 50-year programmatic alternatives. This scoping gap *precludes a meaningful programmatic comparison between 50-year restoration plan design alternatives for the SBSRP's publicly owned salt ponds within the Shoreline Study area.* The SBSRP EIS/R fails to consider programmatic alternatives for potential 50-year restoration plan designs that could take into account all the lands included in the Shoreline Study. This defect is particularly acute for the omitted salt ponds that are within the Refuge and thus within the direct regulatory jurisdiction of the Fish and Wildlife Service. For a programmatic EIS/R, this is clearly a fatal flaw.

As we noted in our earlier comments, a repeated major factual error in the Draft EIS/R exacerbated the impact of this omission: that EIS/R repeatedly *misrepresented federally-owned salt ponds outside the currently available "pond clusters" as "Alameda County-owned,"* suggesting to EIS/R reviewers that these ponds are outside the jurisdiction of USFWS and CDFG for planning and project implementation. This error stymied meaningful and informed public comment on the greater South Bay salt pond system's integration within a 50-year restoration plan.

THE SBSRP EIS/R INVERTS THE TIERING HIERARCHY

The Final EIS/R backpedals from the Draft EIS/R's initial misstatements regarding the "tiering" use that would be made of the document, but the underlying methodological flaw remains. The SBSRP EIS/R purports to provide the initial, or "first-tier," programmatic analysis on which subsequent EIS/Rs will be based. In NEPA or CEQA parlance, tiering refers to sequential EIS/R treatment of a broad ("programmatic") plan or policy statement in which narrower subsequent site-specific actions ("projects") within the program are addressed in later, narrower environmental reviews. 40 C.F.R. § 1502.28; 14 C.C.R. § 15385. The stated NEPA/CEQA purposes of tiering are to "provide increased efficiency" and "eliminate repetitive discussions of the same issues and focus on the actual issues ripe for decision at each level of environmental review". *Id.* The regulations on tiering expressly refer to the site-specific action EIS/Rs as subsequent to the initial and broader programmatic EIS/R. The relationship is plainly hierarchical, "tiering" down from broader levels of evaluation to the narrower focus or scope of site-specific actions. A key purpose and advantage of program EIR review in the CEQA Guidelines is to "provide an occasion for a more exhaustive consideration of effects and alternatives than would be practical in an EIR on an individual action" and "allow the lead agency to consider broad policy alternatives and program-wide mitigation measure at an earlier time when the agency has greater flexibility to deal with basic problems or cumulative impacts." 14 C.C.R. § 15168(b)(1), (4).

These NEPA and CEQA regulations provide the standards for program EIS/R review of reasonable alternatives and impact assessment. The Draft EIS/R departs from these standards, as we explain below, and the Final EIS/R's continuing failure to proceed in the logical manner (from the general to the specific) prescribed by NEPA and CEQA frustrates informed public and agency review.

THE SBSPRP EIS/R FAILS TO CONSIDER A REASONABLE RANGE OF ALTERNATIVES

The range of alternatives an EIS/R must evaluate includes “all reasonable alternatives” from the perspective of the project’s purpose and the broad goals of NEPA/CEQA. “Forty Most Asked Questions” concerning CEQ’s NEPA Regulations, 46 Fed. Reg. 18026 (March 23, 1981) as amended 51 Fed. Reg. 15618 (April 25, 1986). In making this case-by-case determination, agencies are expected to narrow an initially wide spectrum of different alternatives to a manageable number of representative ones (1b, 2a). According to the CEQ, “reasonable alternatives” include “those that are practical or feasible from the technical and economic standpoint and using common sense, *rather than simply desirable from the standpoint of the applicant.*” *Id.* The scope of alternatives cannot be based merely on “whether the proponent or applicant likes *or is itself capable of carrying out a particular alternative.*” *Id.* at 2a; emphasis added. The CEQ distinguishes between the “agency’s preferred alternative” (the one the agency proposes to implement) from NEPA’s “environmentally preferable alternative,” in order to alert Congress to alternative projects with greater environmental benefits. *Id.* at 4a, 4b, 4c, 6a, 6b.

The foregoing point highlights the significance of the geographic “scope gap” between the final SBSPRP EIS/R and the suspended SSFBSS EIS/R. As the governing CEQ policy guidance (Question/Answer 2b) explains,

An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, *because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA’s goals and policies.* Section 1500.1(a). [emphasis added]

Id., emphasis added. *Accord, Environmental Defense Fund v. Corps of Engineers* (5th Cir. 1974) 492 F.2d 1123, 1135 (an agency may not restrict the range of alternatives considered to those that the agency can adopt or put into effect or that are within the agency’s regulatory control).

The rule under CEQA is the same: alternatives may not be rejected for consideration “merely because” they are beyond an agency’s authority. Bass, et al., *CEQA Deskbook* (2nd ed. 1999) p. 112; *Citizens of Goleta Valley v. Board of Supervisors*, *supra*, 52 Cal.3d at 575 fn. 7.

The SBSPRP EIS/R violates this guidance because it fails to provide a program-level EIS/R evaluation of the entire South Bay, including all current and potential federally-owned salt ponds, for purposes of long-term planning of integrated flood control and wetland restoration projects. It contravenes NEPA's and CEQA's clear command that an EIS should evaluate all reasonable alternatives even if they are beyond those that are immediately available, or within the existing authority or funding, of a lead agency, if environmentally preferable and otherwise "reasonable" alternatives exist beyond those bureaucratic constraints. *The purpose of evaluating such alternatives is to alert Congress and other decision-makers to modify their authorizations or funding to improve environmental results when it is in the public interest to do so.* This is a fundamental function of the EIS/R, especially a programmatic EIS/R.

**THE SBSPRP EIS/R SUFFERS FROM A SIGNIFICANT GAP
IN ITS GEOGRAPHIC RANGE OF ALTERNATIVES.**

The SBSPRP EIS/R states that it is "both a Programmatic EIS/R covering the 50-year long term plan as well as a Project-level EIS/R...[for]...implementation of Phase 1." Final EIS/R Cover Sheet; Draft EIS/R at ES-15; 1-1; 1-4. Originally, there were two (joint) federal lead agencies for NEPA review, the U.S. Fish and Wildlife Service (USFWS) and the U.S. Army Corps of Engineers (USACE). Apparently in misguided response to our concerns about the conflicting scope of the projects under review, USACE reclassified its role as a "cooperating" rather than "lead" agency, and withdrew the South San Francisco Bay Shoreline Study as a directly related project. These agencies had been simultaneously preparing a flood control feasibility study and future project for the South Bay known as the South San Francisco Bay Shoreline Study. This study will recommend and implement one or more multi-purpose flood damage reduction projects with ecosystem restoration and public access components. Draft EIS/R 1-1. The Draft SBSPRP EIS stated that the two projects have "similar objectives and geographic scope," and that "[b]ecause the two projects [SBSPRP and SSFBSS] are closely interconnected the shoreline study EIS/R will *tier from* this SBSP Restoration Project EIS/R" *Id.*, emphasis added.

The NOP for the SSFBSS EIS/R (January 2006) stated that "[i]t will function as a project-level EIS/EIR under that programmatic EIS/EIR [the SBSPRP EIR] and will be issued subsequently to that programmatic document. But the Draft SBSPRP EIS/R did not reveal its narrow geographic scope of *project* alternatives, and corresponding *omission of programmatic alternatives* matching the geographic scope of the SSFBSS, until the March 2007 release of the Draft EIS/R. Thus, agencies and the public were not made aware of the gap between the geographic coverage of the Program and Project EIS/Rs until publication of the Draft SBSPRP EIS/R. Indeed, following the publication

of the SSFBSS EIS/R Notice of Preparation, agencies and the public had reason to expect that the programmatic geographic coverage of the SBSRP EIS/R would include the entire South Bay salt pond complex.

The Shoreline Study Interim Feasibility Study Boundaries were shown in Figures ES-1, 1-3 and 1-5 of the Draft SBSRP EIS/R. These figures also delineated the "SBSP Restoration boundary" (pond clusters proposed for wetland restoration). Specific geographic areas comprising the gap between the (nominally) "programmatic" SBSRP EIS/R and the SSFBSS EIS/R can be inferred from these figures. They include the following areas that may be important sites for planning long-term wetland restoration and flood control alternatives:

- All Newark system ponds (N-numbered ponds) south of Alameda Creek Flood Control Channel to the Hetch Hetchy aqueduct;
- All Mowry system ponds (M-numbered ponds) south of Hetch Hetchy aqueduct to Mud Slough;
- All Newark crystallizer beds (both within the Refuge and on private lands);
- All Redwood City crystallizer beds and bittern ponds; and
- Other diked baylands and many undeveloped low-lying areas adjacent to historic tidal marshes, including Patterson Ranch, derelict waterfowl hunting club lands.

The significant extent of the N- and M-numbered ponds that are excluded from the SBSRP's "restoration boundary," and the significantly greater geographic area of the Shoreline Study boundary, are shown in Figures ES-1 and 1-3 to the Draft EIS/R.

Neither the Draft nor the Final SBSRP EIS/R offers a logical explanation for omission of the N and M ponds, crystallizers, and other baylands relevant to programmatic comparison of long-term restoration and planning alternatives. Indeed, there is no explanation at all for the utter lack of programmatic planning alternatives: the alternatives analysis focuses exclusively on the areas *within* the currently proposed (project, site-specific) pond restoration clusters. This omission appears to be *either* an arbitrary executive agency decision or an error of Draft EIS/R preparation and review.

The EIS/R and particularly its alternatives analysis thus fail to provide any programmatic guidance. Its range of alternatives is identical with the narrow project-level EIS/R functions, and even at this level it neglects to meaningfully consider other

alternatives that are clearly within federal jurisdiction. The absence of the stated tiering relationship of the SBSRP and SSFBSS EIS/Rs and the narrow project coverage of the SBSRP EIS/R begs explanation, but the EIS/R provides none.

THE DRAFT SBSRP EIS/R MISREPRESENTED THE OWNERSHIP OF AFFECTED LANDS

As noted in our previous comments, the Draft SBSRP EIS/R affirmatively and systematically misrepresented facts of fee-title ownership of salt ponds in the areas comprising the geographic gaps between the SBSRP and SSFBSS boundaries. For example, the discussion in that document's Section 1.4.3 of "Salt Ponds Acquisition" covers only the California purchase of "land and salt production rights" culminating in 2003, and makes no reference at all to the 1979 fee-title acquisition of all the other salt ponds within the Refuge with industrial/mineral rights retained by the private solar salt industry (Leslie Salt/Cargill). These profound mistakes in the Draft EIS/R require its recirculation. CEQA Guidelines § 15088.5 directs that recirculation is required where "[t]he draft EIR was so fundamentally and basically inadequate and conclusory that meaningful public review and comment were precluded." That is the case here, as we explain below.

To make matters worse, the Draft EIS/R stated that the salt ponds that lie north of the Alviso Ponds and south of the Alameda Flood Control Channel are "comprised of *Alameda County-owned salt ponds*." *Id.* 1-23; emphasis added. This error was repeated graphically in Figure 1-5, and compounded by the Draft EIS/R's misdescription of "Cargill Ponds" as owned by "Alameda County." These misstatements were nowhere corrected or contradicted in the Draft EIS/R, even in sections (such as on Salt Pond Acquisition) where the joint lead agency, the Refuge, would be expected to describe and delineate its own lands.

As we explained previously, the "Alameda County" ponds are the same Newark (N) and Mowry (M) ponds that were omitted in the Draft EIS/R's alternatives analysis (program or project level). They are in fact owned by the Refuge; industrial production and mineral rights are retained by Cargill. This fact of Refuge ownership is not only obscured to agency and public readers, it is confused by counterfactual graphics and text that have the effect of discouraging their evaluation as restoration alternatives. This is important because the Draft EIS/R averred that "[t]he Corps has not identified where any of the preliminary actions presented above would occur Shoreline Study alternatives will be determined through the Corps's [*sic*] plan formulation process as part of future Interim Feasibility Studies." *Id.* 1-23. This critical error in identifying pond ownership may thus bias public comments addressing (and thus affecting) the programmatic EIS/R's

control of future project site selection for subsequent restoration plans within the Refuge over 50 years, where contemporary industrial salt-making rights may or may not be asserted in the future.

The questionable legal and economic viability of the industrial salt-making/mineral rights in the long-term is a key aspect of the 50-year planning horizon for the N, M, and R salt ponds, but this issue was not addressed in the Draft EIS/R. The Draft SBSRP EIS/R refers to the Interim Stewardship Plan (ISP) EIS, and the ISP's objective to "cease salt concentrating processes within the ponds." But the Draft EIS/R says nothing of the "independent utility" of salt production within the Refuge-owned/industrial operated N and M ponds, not even in its discussion of the Cargill Operations. *Id.*, section 1.4.2. Instead, it merely states that "Cargill will continue to operate the Newark Ponds and Newark and Redwood City processing plants," without regard to whether the entire cumbersome process of bay water intake, evaporation/concentration ponds, brine, pickle, and crystallization is even feasible in the long-term (50 year planning horizon). The Draft EIS/R does not even identify whether new bay intake (initial stage new brine production) is in progress in Refuge ponds, or whether current production is merely moving previously formed brines through late concentration and production stages.

This issue is highly relevant to long-term and even near-term planning of restoration and flood control design. The Draft EIS/R failed to address whether salt production may continue indefinitely in reconfigured N and M ponds disconnected from the rest of the system, or whether the economic viability or industrial productivity of the reduced, isolated salt ponds is impaired in the long-term. This information is essential to a reasoned assessment of long-term programmatic alternatives covering Refuge-owned salt ponds.

For the "Ravenswood Ponds" (Redwood City), the Draft SBSRP EIS/R referred only to USFWS ownership of ponds, and omitted reference to privately-owned (Cargill) crystallizers that are plainly shown within the Ravenswood Pond boundary in Figure 1-5, and distinguished from Refuge-owned (red-lined) ponds in Figure 1-3. *Id.* 1-21.

On the whole, these errors of omission and affirmative errors of fact injected profound confusion into the geographic scope of program-level and project-level evaluation of alternatives in the Draft SBSRP EIS. Because they thwarted informed public review and comment, recirculation is required.

**THE SBSPRP'S INVERTED GEOGRAPHIC SCOPE OF THE PROJECT-
AND PROGRAM-LEVEL COMPARISONS OF ALTERNATIVES
CREATES CRITICAL GAPS AND ERRORS IN ENVIRONMENTAL REVIEW**

The Final EIS/R attempts to trivialize the “cart before the horse” methodology that stymied public review of the Draft EIS/R. The effort fails. The Draft EIS/R’s inversion of the tiering concept was fundamentally confusing, and requires recirculation of the Draft EIS/R. The omission of large geographic areas (primarily Refuge ponds) from the SBSPRP EIS/R’s comparison of alternatives at the programmatic level may result in significant potential adverse impacts that could be avoided or minimized with alternative configurations of long-term wetland restoration projects within the Shoreline Study boundaries. The EIS/R recognizes potential conflicts between shorebird and waterfowl habitats (including federally-listed western snowy plovers and California least terns, which nest on emergent hypersaline flats of dry salt pond beds) and tidal marsh restoration. The EIS/R also recognizes the potential to mitigate these impacts to pond-dependent shorebirds and waterfowl by modifying the depth, duration, and seasonal timing of pond flooding.

But these potential conflicts and mitigations are never related to the ponds – and management options – outside the SBSPRP’s three pond clusters. Many of the operational constraints for pond management, and also tidal restoration, relate to pond bed elevation, and efficiency of drainage. The large contiguous acreages of salt ponds (and crystallizers, a type of pond) in the N, M, and R complexes are among the least subsided in the South Bay, and occur adjacent to some of the largest existing breeding populations of federally-listed wetland birds. In contrast, many or most of the Alviso (A) ponds are deeply subsided, requiring long periods of sedimentation and relatively larger volumes of sediment to develop tidal marsh, or relatively greater operation effort to drain to shallow managed pond depths.

Alternative long-term programmatic configurations of managed salt pond and tidal marsh across the entire South Bay could take better advantage of existing pond topography, elevation, and configuration, compared with the current project acreage dominated by Alviso ponds. Adding crystallizers to long-term restoration plans may reduce long-term conflicts between habitat restoration requirements to recover salt flat-dependent birds (snowy plover, least tern) and tidal marsh species.

Unfortunately, both the Draft and the Final EIS/Rs fail to disclose and discuss these essential points regarding the potential use of lands outside the three pond clusters to mitigate ecologic harm. This omission stymies informed public review and agency decision-making.

**THE SCOPE OF THE SBSPRP EIS/R MUST BE BROADENED
TO ADDRESS PROBABLE OR FORESEEABLE FUTURE PROJECTS**

Because the Shoreline Study is intended to generate future projects, these must be treated as “probable future projects” or “reasonably foreseeable future actions” for assessing cumulative impacts under CEQA (14 C.C.R. § 15130) and NEPA (40 C.F.R. § 1508.7). A “future project” may be “probable” even though it may not be built; the criterion for “probable future project” is whether it is foreseeable at the time of EIS/R preparation. Adequate assessment of cumulative impacts could not be feasible without assessing at a programmatic level the potential future configuration of salt ponds and diked baylands within the *entire* Shoreline Study area.

Because the Final EIS/R fails to provide this essential assessment, it must be revised.

**THE LEAD AGENCIES FOR THE SBSPRP SHOULD CORRECT
THE EIS’S IMPROPER TIERING, SCOPE, OWNERSHIP DESCRIPTIONS
AND GEOGRAPHIC COVERAGE**

For the reasons discussed above, the SBSPRP EIS/R “is so inadequate as to preclude meaningful analysis.” Its profound errors and omissions have (1) arbitrarily eliminated most program-level assessment of alternatives and impacts, (2) confused the public about the proper tiering functions of the SBSPRP EIS/R, and (3) misled the public about the nature and ownership of federal lands within the study area. We urge your adoption of the first of the following remedies:

Reverse the tiering relationship of the SBSPRP and SSFBSS EISs. The SSFBSS has a much larger geographic scope, a longer time-line, and far broader purposes. It is therefore better suited to serve as the programmatic EIS. Yet it will emerge subsequent to the SBSPRP. The SBSPRP “tail” would then wag the SSFBSS “dog.” The geographic and temporal deficiencies of the project-level SBSPRP alternatives analysis could not be adequately addressed in a supplemental draft EIS/R, or even in a recirculated (new) draft EIS/R (40 C.F.R. § 1502.9(a)-(c)). If the SBSPRP laudably attempts to reverse its programmatic relationship to the SSFBSS EIS/R, it will require notice in the Federal Register, and re-scoping of the Shoreline Study EIS/R to partially compensate for the deficient (absent) program-level comparison of alternatives of the SBSPRP EIS within the Shoreline Study boundaries.

Other, far less acceptable options include the following:

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Recirculate the Draft EIS/R, maintaining tiering relationships. Recirculate the current SBSPRP EIS/R with enough meaningful discussion of program-level alternatives within the full geographic scope of the SSFBSS to partially mitigate the gaps with the SSFBSS EIS/R.

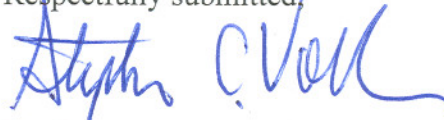
Suspend the Draft EIS/R and issue a supplemental program-level SBSPRP EIS/R focusing on long-term, area-wide alternatives, impacts, and mitigation. This approach would attempt to correct the deficient program-level EIS/R content through a separate, supplemental document. The EIS/Rs (draft and supplemental) could proceed to final after comments on the supplemental document that adequately addresses program-level issues.

CONCLUSION

For the reasons set forth above, the Final SBSPRP EIS/R has failed to rectify the Draft EIS/R's fatal flaws. The only proper remedy is to withdraw the document and prepare a programmatic EIS/R for the South San Francisco Bay Shoreline Study first, and subsequently tier from that document a project-level EIS/R for the SBSPRP.

Thank you for considering our comments on this important matter.

Respectfully submitted,



Stephan C. Volker
Attorney for Citizens Committee to
Complete the Refuge and
Marin Audubon Society

SCV:taf