

**Comments Received for the Proposed Amendment to the  
SMBRC Memorandum of Understanding  
Comment Deadline: November 7, 2019**

<b>Comment Categories</b>
General Comment
Staff Report
I. Introduction
II. Mission, Goal, Objectives, Authorities, and Functions
III. Organization and Structure
III. (A) Governing Board
III. (B) Executive Committee
III. (C) Technical Advisory Committee
III. (D) Santa Monica Bay Stakeholders: Public Outreach and Involvement
III. (E) The Santa Monica Bay NEP Host Entity
III. (F) Administration
IV. Operation
V. Progress Reports
VI. Conflict of Interest and Disclosure Policy
VII. Agreement
Attachment A. United States Environmental Protection Agency's National Estuary Program Memo
Attachment B. Santa Monica Bay Restoration Commission Governing Board Members
Attachment C. The Santa Monica Bay Stakeholders
Attachment D. Dispute Resolution Procedures
Additional Attachment

**Comments Received for the Proposed Amendment to the  
SMBRC Memorandum of Understanding  
Comment Deadline: November 7, 2019**

<b>Comment No.</b>	<b>Organization / Group</b>	<b>Page Number</b>
1	<b>US EPA Region 9</b> Commenter: Erica Yelensky	3
2	<b>LA County Sanitation Districts</b> Commenter: Martha Tremblay, Naoko Munakata, Shelly Walther	7, Appendix A*
3	<b>LA County Department of Public Works</b> Commenter: Cung Nguyen	10
4	<b>LA County Department of Beaches &amp; Harbors</b> Commenter: Michael Tripp	10
5	<b>Westside Cities (City of Santa Monica)</b> Commenter: Kevin McKeown	10, Appendix B*
6	<b>Ballona Wetlands Land Trust</b> Commenter: Walter Lamb	11, Appendix C*

\* Appendices A, B, and C are available upon request.

**Comments Received for the Proposed Amendment to the  
SMBRC Memorandum of Understanding  
Comment Deadline: November 7, 2019**

<b>No.</b>	<b>Comment</b>	<b>Category</b>
<b>1</b>	<b>US EPA Region 9</b> Commenter: Erica Yelensky	
1.001	Thank you for the opportunity to provide comments on the proposed amendments to the Santa Monica Bay Restoration Commission (SMBRC) memorandum of understanding and the associated staff report. We appreciate the State Water Resources Control Board's (State Board's) commitment to supporting the Santa Monica Bay National Estuary Program (SMBNEP) and are committed to working with you to best position the NEP for future success. EPA gives substantial deference to each NEP as to how it wants to organize itself institutionally. California has concluded that the SMBRC will carry out the functions of a National Estuary Program (NEP). EPA understands that the SMBRC may be carrying out other duties under state law, but for purposes of the federal NEP (as defined in § 320 of the Clean Water Act) EPA treats the SMBRC as the NEP, including functioning as the Management Conference for any ongoing or special purpose activity required of a Management Conference.	General Comment
1.002	Given the complexity of this subject, we recommend sharing a draft revised version of the MOU and staff report at the December 2019 Governing Board meeting and not voting on a final version until February 2020.	General Comment
1.003	Please include a definition of terms and a table of contents to help guide the reader.	General Comment

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1.004	<p>Governing Board and Executive Committee Roles and Functions Based on the diagrams in the Staff Report, it appears that the Governing Board is the top decision-making body for the Commission. If that is the case, please clarify the Governing Board and Executive Committee descriptions in the MOU. Currently the MOU states that both the Executive Committee and Governing Board are “one of the key decision-making authorities of the Commission...” (see pages 6 and 8). Assuming it is true, consider changing the language to state that “the Governing Board is the key decision-making authority” (page 6) as opposed to “one of the key decision-making authorities of the Commission...”</p>	<p>III (A). Governing Board Roles and Functions,  III (B). Executive Committee Roles and Functions</p>
1.005	<p>NEP Director We suggest broadening the discussion about the NEP Director in the draft MOU. Currently the only discussion about the NEP Director is on page 13 under the Host Entity section (Section E).</p> <p>a. We suggest adding a section describing the primary roles and functions of the NEP Director in Section F under Administration, to complement the discussion about the Chief Administrative Director.</p> <p>b. We also suggest adding language addressing how the NEP Director and Chief Administrative Director will work together to support CCMP implementation and how any potential disputes will be resolved.</p>	<p>III. (E) The Santa Monica Bay NEP Host Entity,  III (F). Administration</p>
1.006	<p>The use of “may” in the following sentence is confusing: (page 13) “<i>Upon concurrence and approval by the Governing Board, the Host Entity <b>may</b> provide a NEP director who is responsible for EPA grant management and daily operation of the Host Entity, and serves as liaison and representative of the Santa Monica Bay NEP.</i>” Do you mean that, while the NEP Director currently is from the Host Entity, the NEP Director <u>could</u> come from elsewhere within the Management Conference? Please clarify.</p>	<p>III. (E) The Santa Monica Bay NEP Host Entity</p>

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1.007	<p>Host Entity: (page 13) “The Governing Board has the ability to assess the performance of the Host Entity to ensure effective implementation of its CCMP on an ongoing basis and can decide at any time to select a new Host Entity for the Santa Monica Bay NEP. For example, the Governing Board could determine that the current Host Entity lacks the capacity to support the Santa Monica Bay NEP’s administrative and/or financial needs and initiate a process to identify a new Host Entity.”</p> <p>a. We recommend replacing “can decide at any time to” with “has the authority to” (such that the sentence would read “The Governing Board has the ability to assess the performance of the Host Entity to ensure effective implementation of its CCMP on an ongoing basis and has the authority to select a new Host Entity...”</p> <p>b. Please consider adding language describing how the Chair would work with the host entity if issues are identified to try to first resolve those issues. Also, the Chair should consult EPA before any decisions are made, as EPA manages an annual grant to the host entity to implement the CCMP and annual workplan.</p> <p>c. The MOA should identify the process by which the host entity and Commission may sever ties.</p>	III. (E) The Santa Monica Bay NEP Host Entity
1.008	<p>(Page 10 of 15 in staff report) “<i>The roles and functions were updated to reflect the intent for the EC to take a more active role as the Management Committee of the NEP to support development and implementation of the CCMP, provide direction and oversight to Commission staff, review work products, identify potential partnerships and resources to the program, and listen to stakeholder feedback.</i>”</p> <p>a. We concur with this change in direction. To further support this, we recommend adding USEPA and the Host Entity NEP Director to the EC as ex-officio, nonvoting members.</p>	Staff Report,  III. (E) The Santa Monica Bay NEP Host Entity

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1.009	Please consider updating the Objectives of the Commission on page 2 to match the seven goals of the new CCMP Action Plan.	II. Mission, Goal, Objectives, Authorities, and Functions
1.010	We note the Dispute Resolution Procedures in Attachment D. Please consider developing a code of conduct for both board members and the public. This should be read at the beginning of each meeting.	Additional Attachment
1.011	Please consider having the Chair read a statement describing what the NEP is at the beginning of each meeting.	General Comment
1.012	Please consider making the following changes in “Functions of the Commission” (page 3). Changes are <b>highlighted and in bold</b> . #2. Oversee effective implementation of the Santa Monica Bay <b>NEP</b> CCMP. #3. Promote participation by <b>federal, state and</b> local governments, specials districts, community groups, and members of the public who are essential to implementation of Santa Monica Bay NEP watershed restoration and protection efforts. #7. Promote sound science that advances the implementation of the Santa Monica Bay <b>NEP</b> CCMP. #11. Facilitate inter-agency and inter-organizational efforts to improve the Santa Monica Bay’s water quality, <b>mitigate</b> <del>ion</del> of the impacts of climate change and sea level rise, and <b>restoration</b> <del>ion</del> of its natural and living resources, including opportunities to leverage funding.	II. Mission, Goal, Objectives, Authorities, and Functions
1.013	Stakeholders: Is the idea that there would be more time for public comment during already scheduled e.g. Governing Board meetings and not stand alone “Stakeholder” meetings?	Staff Report,  III. (D) Santa Monica Bay Stakeholders

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Comment Deadline: November 7, 2019**

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1.014	Technical Advisory Committee: Please clarify whether the TAC can provide recommendations on certain actions which may or may not require consensus/vote.	Staff Report,  III. (C) Technical Advisory Committee
1.015	Figures 2. Thank you for including these figures. a. All recommendations to the host entity and SMBRC staff should come through the Executive Committee and Governing Board. There should not be a direct line between the stakeholders and the host entity. b. The Host Entity block should include "+ NEP Director"	Staff Report
1.016	(Page 4 of 15) The Governing Board approved the 2018 CCMP Action Plan in October, not December 2018.	Staff Report
1.017	(Page 6 of 15) We recommend creating a timeline of accomplishments. It is important to celebrate the successes of the NEP.	Staff Report
1.018	(Page 6 of 15) " <i>Move the legislative history to the staff report.</i> " This change is fine but should not supersede the original intent of why the NEP was designated.	Staff Report
1.019	(Page 7 of 15) " <i>Add to key functions of the Commission</i> " This section is described well.	Staff Report
<b>2</b>	<b>LA County Sanitation Districts</b> Commenter: Martha Tremblay, Naoko Munakata, Shelly Walther	<b>See Appendix A* for redline comments and suggestions</b>  * Appendix A available upon request

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Comment Deadline: November 7, 2019**

No.	Comment	Category
2.001	Page 6, Governing Board Member Terms. This section does not clearly state that Vice-chairs are nominated and elected to serve in the Executive Committee. Are there other duties for Vice-chairs? Should there be a description of what the role involves?	III. (A) Governing Board
2.002	Page 7, Executive Committee. Revise the paragraph as follows:  “The Executive Committee consists of nine members ( <u>Chair and Vice-Chairs</u> ) and is a subset of members of the Governing Board. The Executive Committee is <u>one of the key decision-making authorities of the Commission.</u> <del>charged with overseeing the work activities of the Commission such as regular communication with staff of the Commission and developing agendas for the Commission’s regular Governing Board meetings.</del> ”	III. (B) Executive Committee
2.003	Based on other sections, it is clear that the Executive Committee does much more than develop agendas and communicate with Commission staff.	III. (B) Executive Committee
2.004	Page 8, Executive Committee Roles and Functions. The Executive Committee has a very important role yet it is not clear to me how activities are communicated to the Commission. Meeting minutes are not available until after some time so it is not possible for me to see them prior to attending a Commission meeting. I appreciated that during the last meeting, Charlie Caspary, provided a more detailed overview of what happened at the last Executive Committee Meeting and it would be good if this continues. Since the Executive Committee is a key decision making authority, it would be helpful if all Commission Board members get copies of the Executive Committee’s agendas and meeting minutes or provide detailed report of their activities.	III. (B) Executive Committee

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2.005	Page 10, TAC Roles and Responsibilities . TAC develops and adopts the State of the Bay every 5 years on their own? Who reviews the report? What is the process? Since I have been attending meetings, I have not seen a technical document or seen information on what will be included in the report. How does the Commission provide input on the State of the Bay report?	III. (C) Technical Advisory Committee
2.006	Page 10, TAC Meetings. Meeting at least once a year may not be sufficient to fulfill roles and responsibilities, especially for completing the State of the Bay report.	III. (C) Technical Advisory Committee
2.007	Page 10, TAC Quorum. It appears that there is currently no requirement for a quorum for the TAC, since the TAC is not a decision making body, yet the TAC is adopting the State of the Bay report every 5 years. How does that process work then? I suggest there should be a quorum requirement to ensure the work is supported and approved by a majority.	III. (C) Technical Advisory Committee
2.008	Page 12, Meetings and Participation. There should be a minimum of two public workshops to solicit public input from Santa Monica Bay Stakeholders group. Also, I suggest you add the following sentence at the end of this section; <u>“Structured interactive opportunities between the Stakeholders and the TAC, and between the Stakeholders and the Governing Board will be created to encourage coordination between groups in order to improve information sharing and transparency.”</u> See attached comments for additional info.	III. (D) Santa Monica Bay Stakeholders
2.009	Page 13, The Santa Monica Bay NEP Host Entity. Revise the following item as shown:  3. <u>Receive and manage the annual federal CWA Section 320 NEP Grant, and produce a report annually for the Commission on how funds were spent.</u>	III. (E) The Santa Monica Bay NEP Host Entity

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<b>3</b>	<b>LA County Department of Public Works</b> Commenter: Cung Nguyen	
3.001	Would it be possible to provide an Organization Table?	General Comment
3.002	Include/provide SB1381 as a reference document in the Appendix or as an attachment.	General Comment
<b>4</b>	<b>LA County Department of Beaches &amp; Harbors</b> Commenter: Michael Tripp	
4.001	I thought CCMP stood for Comprehensive Conservation and Management Plan.	II. Mission, Goal, Objectives, Authorities, and Functions
4.002	Isn't 502(c)(3) specifically for non-profit entities?	III (A). Governing Board Members
<b>5</b>	<b>Westside Cities (City of Santa Monica)</b> Commenter: Kevin McKeown	<b>See Appendix B* for redline comments and suggestions</b>  * Appendix B available upon request

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SMBRC Memorandum of Understanding  
Comment Deadline: November 7, 2019**

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<b>6</b>	<b>Ballona Wetlands Land Trust</b> Commenter: Walter Lamb	<b>See Appendix C* for redline comments, suggestions, and proposed questions</b>  * Appendix C available upon request
6.001	The Santa Monica Bay Restoration Commission (“Commission”) has an important public mission. As the draft MOU revision acknowledges, “[a] clear, efficient, and effective governance structure is a key element of a successful NEP.” Unfortunately, the MOU revisions proposed by staff would not meaningfully address the current lack of clarity, efficiency or effectiveness of the Commission’s governance structure. The proposed revisions are essentially a patchwork of “band-aid” type fixes for problems that require a more strategic and comprehensive solution. These comments, submitted in conjunction with the Land Trust’s alternative proposed revisions to the MOU, are designed to help the Commission adopt a governance structure that is stable, clearly understood by Commission members and public stakeholders, and consistent with the legislative intent of the Commission’s statute and with federal regulations and guidelines.	General Comment

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SMBRC Memorandum of Understanding  
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6.002	<p>MOU Revision Process Issues For many years, the Commission has avoided candid discussion of its governance structure and delayed corrective action despite clear indications that the Commission’s structure was being fundamentally altered by the private Bay Foundation without adequate Commission oversight. The Foundation has wielded undue and improper influence over the process of evaluating and revising the Commission’s governance structure, and has steered the process in a manner that favors the Foundation’s interest in preserving the governance structure that it has unilaterally imposed upon the Commission. In October of 2016, the Foundation informed the Commission Governing Board that it was removing the Commission-appointed members to its Board of Directors and would eliminate from its Bylaws the power of the Commission to make any future appointments. The Foundation falsely claimed at the time that this step was being taken to comply with state laws which the Foundation never actually identified. When a Commission Governing Board member asked what new mechanism would be put in place to ensure alignment between the Commission and Foundation, the US EPA Region 9 grant manager indicated that the upcoming process to revise the Commission’s Comprehensive Conservation and Management Plan (CCMP) would address that issue. However, in the three years since, there has been no meaningful effort to address that and other governance concerns. This is one of many examples in which the Foundation has steered the Commission away from addressing pressing governance issues. In the fall of 2018, the Foundation coordinated directly with US EPA Region 9 to secure \$15,000 (subsequently increased to \$24,000) of supplemental federal funds to hire a consultant in order to facilitate a review of the Commission’s governance structure. The Foundation hired a consultant with whom the Foundation had a long-standing relationship and then used its control over the process to change the terms of the contract, without consultation with the Commission, in order to promote the Foundation’s vision of the Santa Monica Bay National Estuary Program as having a “non-profit management conference” when, in fact, the California Legislature established the Commission to serve as the state agency management conference of the local NEP. After the facilitated evaluation process ended in April, without the key deliverable of proposed changes to the Commission’s governance structure, State Water Resources Control Board staff spent approximately four months developing</p>	General Comment
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	<p>a draft of proposed MOU revisions. This staff effort was conducted without a consensus direction from the Commission Governing Board on the most substantive structure and governance issues, such as: whether the Commission should re-establish an Executive Director position; whether the Commission should be able to receive funds from any source as envisioned by its enabling statute; whether NEP staff ought to be directly accountable to the NEP Management Conference; whether the Commission has oversight authority of the Section 320 grant funds and other NEP funds, whether the Foundation has authority to make high-level decisions about the direction of the NEP without Commission knowledge and/or approval; whether the Commission has the statutory authority to adopt policy positions relating to projects affecting the Santa Monica Bay and its watershed, even when the Commission is not the lead agency; or whether the Commission would benefit from a formal stakeholder council that provides consensus recommendations to the Commission’s Governing Board. Instead, staff appears to have selectively incorporated certain feedback, while dismissing other feedback, in order to develop its draft MOU revision proposal. Not surprisingly, these proposed revisions fail to address the very issues that have been the source of contention and litigation against the Commission for the last several years. The key to a sound governance structure is a process that allows direct and candid exchange of information and discussion of the benefits and disadvantages of various decisions, such as those mentioned above. The Land Trust respectfully requests that the Commission arrange for such a process in advance of the Governing Board meeting scheduled for December 12.</p>	

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<p>6.003</p>	<p>Brief History of the Commission and Foundation The record shows that the Commission was created by the California Legislature to replace the Santa Monica Bay Restoration Project (“Project”) as the National Estuary Program (“NEP”) for Santa Monica Bay, and to independently perform all of the functions required of an NEP. In 1990, the Project created the Santa Monica Bay Restoration Foundation (“Foundation” – also known as “The Bay Foundation”) to assist the Project with funding to carry out the Project’s Bay Restoration Plan. From 1988 to 2005, the federal grant funds disbursed annually by US EPA, pursuant to Section 320 of the Clean Water Act (“Section 320 grant funds”), were primarily provided to the State Water Resources Control Board and used to support the Project/Commission. In or around 2005, the decision was made to route those funds instead to the Foundation, which would act as the fiscal agent of the Commission and use the funds to hire staff and to pay for other resources to the support the Commission. There is no evidence that the Commission ever intended to relinquish any of its control over the Section 320 grant funds, and there is considerable evidence to the contrary. The Commission recognized the importance of retaining control over those funds and put in place multiple safeguards for that purpose, such as giving the Commission the power to appoint a majority of the Foundation’s Board of Directors. Over time, the Foundation employees who took over the operation of the Commission, including the Commission’s Executive Director, used their positions to steadily eroded the authority of the Commission to oversee the activities of the Foundation, the Commission’s visibility in the watershed, its influence over the direction of the NEP, and the agency’s available resources. Examples of the Foundation’s unilateral diminishment of the Commission’s NEP role include:</p> <ul style="list-style-type: none"> <li>- Reducing the number of Foundation Board members that the Commission was authorized to appoint, sometime after 2008.</li> <li>- Neglecting to remind the Commission of this appointment power after it was last exercised in 2008.</li> <li>- Helping to coordinate a controversial proposal for a construction proposal in the Ballona Wetlands and executing a subsequent agreement to further explore that proposal, on behalf of the Commission, and executing a related payment agreement between the Foundation and the special interest group pursuing the project, without Commission deliberation or approval. This activity occurred between September</li> </ul>	<p>I. Introduction, General Comment</p>
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<p>2011 and December 2014. - Eliminating all Commission staff positions previously filled by Foundation employees from Commission staff web page and from the annual work plans. This occurred between 2014 and 2018. - Eliminating the remaining Commission-appointed Foundation board members in 2016 and amending the Foundation's Bylaws to eliminate that appointment power in November of that year. - Removing the Commission's name and/or logo from numerous NEP documents, such as annual reports and work plans, newsletters, web sites, press releases, etc. and either replacing the Commission's name/logo with that of the Foundation or with the generic Santa Monica Bay National Estuary Program and logo that is designed to mimic that of the Foundation. This has occurred from 2015 to the present. - Convincing the State Water Board not to fill the Commission's vacant Executive Director's position in 2017, such that the Foundation's Executive Director could continue to claim to be the Director of the Santa Mo- Assuming control of the process to evaluate the governance structure of the Commission, a state agency, to include expending roughly \$24,000 of Section 320 grant funds to hire a consultant with whom the Foundation had an existing relationship, to ensure that process validated what the consultant inaccurately described as a "non-profit management conference" model. This activity occurred between September 2018 and April 2019.nica Bay NEP. - Working with the California Coastal Conservancy in early to mid-2018 to remove the Commission Governing Board from the process of identifying and selecting projects to receive Proposition 12 funds, requiring the Land Trust to file suit to bring about a reversal of that policy. - Sponsoring legislation, without any consultation with the Commission, that would have replaced the State Water Board with the California Coastal Conservancy as the agency providing administrative support for the Commission. This occurred in 2019. The central concern we have been raising for the last five plus years is that an erosion of transparency and accountability has directly and negatively impacted the Commission, and also negatively impacted current and future restoration efforts in the Ballona Wetlands Ecological Reserve. We believe that the above changes to the Commission's governance and operation were not only ill-advised, but also in direct violation of the Commission's enabling statute and</p>	
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**Comments Received for the Proposed Amendment to the  
SMBRC Memorandum of Understanding  
Comment Deadline: November 7, 2019**

<b>No.</b>	<b>Comment</b>	<b>Category</b>
	governing Memorandum of Understanding, and we filed suit in July of this year to seek a remedy for those concerns.	

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SMBRC Memorandum of Understanding  
Comment Deadline: November 7, 2019**

6.004	<p>Management Conference We support the proposed inclusion in the MOU of the Commission’s role as the Management Conference of the Santa Monica Bay National Estuary Program. However, to eliminate lingering confusion, the MOU should finally acknowledge that the Santa Monica Bay National Estuary Program is simply the generic term for the Commission. In other words, the Commission, and before it the Santa Monica Bay Restoration Project, were expressly created to serve as the National Estuary Program for Santa Monica Bay. The revised MOU should also include as an attachment the various regulatory references to the Management Conference. More explanation is also needed as to why the NEP equivalent roles of the Governing Board and Executive Committee (as Management Committee and Policy Committee, respectively) have been flipped since previous presentations on this topic. Swapping these NEP roles without a clear acknowledgement that they are being swapped, and without a more detailed explanation as to why, will create further confusion on the part of Governing Board members and the public. It is our view that the Executive Committee was not designed to serve either a Management Committee or Policy Committee role, but was created by resolution in 2005 to be a smaller subset of the Governing Board to increase efficiency by preparing agendas for Governing Board meetings and reviewing and discussing various topics and staff recommendations in advance of those meetings. Over the last several years, however, the Executive Committee has exercised authority that it has never been granted. The Executive Committee meets in closed session, presumably to receive briefings from, and provide direction to, the Commission’s legal counsel. The Governing Board, however, has never met in closed session to participate in any of the Commission’s decisions regarding how to respond to litigation against the Commission. If it is the desire of the Commission to have separate management and policy committees that match the NEP template, then more thought will have to go into how these committees are designed. Simply assigning these NEP labels is not enough. For instance, policy committees are described in the US EPA guidance as having a particular composition that is different from the Commission’s Governing Board. It is also worth noting that there is no requirement for the Commission’s structure to exactly match the generic NEP template. The revised MOU should also finally put to rest the ongoing confusion as to whether the Foundation is one of the entities</p>	<p>III. (A) Governing Board,  III. (B) Executive Committee,  III. (E) The Santa Monica Bay NEP Host Entity,  Additional Attachment</p>
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	<p>comprising the Management Conference. The Foundation has an ex officio, nonvoting seat on the Commission Governing Board. It is not a component entity of the Management Conference, any more so than the many other entities which have voting or non-voting seats on the Governing Board. The Commission would be doing a substantial disservice to itself and to the public by allowing the delineation between the Commission and Foundation to remain blurred in a newly adopted MOU. Conversely, using the revised MOU to clarify these roles will help protect the Commission from legal liability, will return control the NEP to state, and will allow the Commission and Foundation to focus more effectively on their various roles. That is not the case currently, as the proposed revisions continue to suggest that the Foundation is an entity within the NEP Management Conference structure.</p>	

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6.005	<p>Host Entity The use of the term “Host Entity” throughout the draft MOU revision document is confusing and seems to ignore and/or misunderstand US EPA guidelines on the role of host entities, and also how host entities work in practice at different NEPs. Host entities are not defined in statute or regulation. They are entities designated by an NEP management conference to receive and administer Section 320 grant funds on behalf of that NEP, typically for the purpose of providing administrative support for the NEP in the form of staff, office space, supplies and equipment. Not every NEP has a host entity [“Several NEPs are independent organizations that do not have a host entity and therefore directly administer the federal assistance agreements. An independent NEP can be structured as a Not for Profit organization, an independent agency within a state or local government, or other organizational structure” – NEP FAQ], and many host entities, such as universities and state agencies, have much broader responsibilities than their roles hosting a local NEP. The Commission is the only NEP with a public agency management conference that is said to be hosted by a private entity. While there is nothing inherently wrong with the Commission having a unique structure, this particular uniqueness creates a specific governance challenge that none of the other NEPs have had to address, and which the Commission itself has repeatedly neglected to address in a coherent manner. What is the proper and legal way for a private entity to hire staff to support an NEP Management Conference that is a public agency? How should this be structured in a way that doesn’t run afoul of the Commission’s enabling statute, of state transparency laws, or of federal regulations and guidelines? Those questions raise a more basic question. Given that this NEP was hosted by the State Water Board from 1988 to at least 20081, why has there been no discussion about the reasons for that change, and whether the benefits of a private-host entity / public management conference model outweigh the disadvantages. Should the Santa Monica Bay NEP return to a public host entity, should it move to a private management conference model (like Morro Bay), or should it devise a better way to navigate its current unique structure? If the latter, it is important to understand that the Commission never intended to abdicate its control over the Section 320 grant funds when it first decided to allocate them to the Foundation, initially via the Santa Monica Bay Restoration Authority and then directly. To the contrary, the record shows that the Commission intended for the</p>	<p>III. (E) The Santa Monica Bay NEP Host Entity</p>
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**Comments Received for the Proposed Amendment to the  
SMBRC Memorandum of Understanding  
Comment Deadline: November 7, 2019**

<p>Foundation to receive the Section 320 funds as its fiscal agent, with the Commission appointing the majority of the Foundation’s board, and with Foundation employees serving as Commission staff, bringing them within public transparency statutes and under the oversight authority of the Commission. This was the arrangement that was formalized in the 2012 Memorandum of Agreement between the Commission and Foundation, a document that was reviewed by State Water Board legal counsel and staff, US EPA, the Commission Governing Board and Executive Committee, and the Foundation. The narrative that this formal agreement was inaccurately worded simply lacks credibility, and the Commission will be doing itself a disservice by clinging to that false narrative, which was conceived in 2014 by Foundation employees for the sole purpose of allowing the Foundation to keep certain NEP records confidential from the Commission and the public. The result is that the current structure cannot reasonably be argued to maintain the NEP’s “credibility as a largely autonomous entity independent of any particular agency, stakeholder, or interest group.” [NEP FAQ] The Commission has become wholly dependent on the Bay Foundation, is no longer able to independently perform its statutory duties, and has impermissibly abdicated discretionary powers to the Foundation. If the Bay Foundation adhered to the NEP guidelines for the role host entities, it would simply provide employees to the Commission to serve independently at the Commission’s direction. It would not attempt to influence NEP policy beyond sharing the Foundation’s perspective via its non-voting seat on the Commission’s Governing Board. (“While the host entity is accountable for the NEP personnel and administers the §320 assistance agreement, the [management conference] provides the overall policy direction for the NEP.” – NEP FAQ) We are glad that the draft revision finally acknowledges that the Commission has the power to determine what entity or entities receives the Section 320 grant funds and that the grant recipients administer these funds “on behalf of the Commission.” This was long recognized to be the case until Foundation employees serving as Commission staff began striking this language from staff reports for approval of annual work plans in 2015. However, the MOU should also make clear that the Commission can set whatever criteria it deems appropriate for entities to receive Section 320 grant funds, as long as the Commission’s eligibility criteria doesn’t conflict with federal eligibility criteria. Specifically, the Commission has the authority to: determine that</p>	
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**Comments Received for the Proposed Amendment to the  
SMBRC Memorandum of Understanding  
Comment Deadline: November 7, 2019**

<b>No.</b>	<b>Comment</b>	<b>Category</b>
	<p>grant recipients should meet the Commission’s standards of transparency by ensuring public access to records and meetings regarding the NEP; and to prohibit the grant recipient from exercising the discretionary authority granted to the Commission as the Management Conference of the NEP. In our proposed revisions, we have eliminated references to a “host entity” and instead made more general references to Section 320 grant recipients. [(1) The Commission (2005), US EPA (2006), and the Foundation (1990) have each suggested different time-periods for when the Foundation purportedly became the host entity of the NEP. We believe that none of these assertions is accurate because the NEP (including all Foundation employees filling Commission staff positions) was clearly hosted by the State Water Board at least until 2008, when some Foundation employees relocated to the campus of Loyola Marymount University.]</p>	

**Comments Received for the Proposed Amendment to the  
SMBRC Memorandum of Understanding  
Comment Deadline: November 7, 2019**

6.006	<p>Executive Director of the Commission The Commission, and the Project before it, appears to have had an Executive Director from 1988 to 2017, when Tom Ford resigned that position pursuant to a settlement agreement between the Foundation and Land Trust. At no time did the Land Trust seek the resignation of Mr. Ford. The Land Trust notified the Commission in May of 2016 of its position that the Foundation was legally required to hold open meetings under the Bagley-Keene Open Meeting Act. At the time, the Commission was allocating various public funds to the Foundation and also had the power to appoint Commission members to the Foundation’s board. As noted above, the Foundation responded to this argument by removing the remaining Commission-appointed members of its board, and eliminating the Commission’s power to appoint new members. We challenged the legitimacy of this action and also pointed out to the Foundation that, even if the change to its Bylaws was legal, it would still be subject to the Bagley-Keene Act because the Commission had delegated to the Foundation the authority to hire and employ the Commission’s Executive Director. At that point, we entered into confidential settlement discussions that the Foundation is preventing us from sharing with you. If we were able to freely discuss those negotiations, it would put to rest some false narratives about why Mr. Ford resigned his Commission position. (For additional context, please see non-confidential correspondence between the Land Trust and Foundation’s legal counsel regarding this issue). More importantly, Mr. Ford’s resignation was a separate matter from the subsequent decision not to fill the Executive Director position, but to instead terminate that Commission position altogether. The Commission Governing Board was informed of this decision after the fact, but had no say in the decision. At the April 2017 meeting at which Mr. Ford announced his pending resignation, the Governing Board also approved the FY 2018 Annual Work Plan that showed the Commission continuing to have an Executive Director position, with the holder of that position “to be determined”. In the months and years after it was announced in June of 2017 that the Commission’s Executive Director position would be terminated and replaced with a position of Chief Administrative Director, it has become ever more clear that this change was not merely a human resources technicality, but an orchestrated effort to shift any executive functions of the Commission to the Foundation. This change, among others, has diminished the Commission in a way that is</p>	<p>III. (E) The Santa Monica Bay NEP Host Entity</p>
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**Comments Received for the Proposed Amendment to the  
SMBRC Memorandum of Understanding  
Comment Deadline: November 7, 2019**

<b>No.</b>	<b>Comment</b>	<b>Category</b>
	<p>fundamentally inconsistent with the legislative intent in creating the Commission. Additionally, the Executive Director position is funded largely by the Section 320 grant funds, as were many other staff positions of the Commission previously filled by Foundation employees. For the Foundation to terminate these Commission positions while continuing to claim control of those funds is highly problematic. The Work Plan staff activities that were unquestionably Commission activities (i.e. preparing for Commission meetings, Form 700 coordination, public records, Commission press releases, etc.) make clear that the staff capacity of the Commission has been diminished by the Foundation, without any deliberation by the Commission. This is not a mundane issue of who has what official title. It is central to the fundamental identify of the NEP that the NEP Director and staff also be the director and staff of the state agency that was expressly created to be the NEP for Santa Monica Bay. This is a basic principle of organizational management and also a legal requirement that we are seeking to enforce because it impacts our conservation mission. When the Director of the NEP feels empowered to keep information from the Management Conference of that NEP, which in this case is a state agency, that means the public is always the last to know where this public NEP is headed, often after the NEP is already well down a particular path. Our proposed MOU revisions note that the Commission can request that the State Water Board provide the Commission with an Executive Director (and also make other staffing requests within resource constraints) but that the Commission can also enter into a grant agreement with a third party (essentially the annual work plans) to provide an Executive Director and other staff, as long as that position remains fully accountable to the Commission. This is also precisely what is required by federal NEP guidelines.</p>	

**Comments Received for the Proposed Amendment to the  
SMBRC Memorandum of Understanding  
Comment Deadline: November 7, 2019**

6.007	<p>Other NEP Staff: Consistent with the above comments, all NEP staff must be fully accountable to the NEP Management Conference. This is not just a basic management principal, but also necessary for adherence to state legislative intent and federal guidance. From 1988 to roughly 2005, all NEP staff were hired by the Project/Commission using state funds or Section 320 grant funds. Sometimes these funds were routed through other entities, such as the Southern California Coastal Water Research Project (SCCWRP) who handled the administrative functions of hiring and paying certain staff. From about 2005 to 2014, the Section 320 grant funds went to the Foundation to hire staff for Commission. These Foundation employees, along with assigned State Water Board employees, were routinely acknowledged to be Commission staff. In 2014, in response to our filing of a public records act request, the majority of Foundation employees, including those whose records we were seeking, were removed from the list of Commission staff, and the generic term “SMBNEP staff” began to be used to describe State Water Board and Foundation employees that were performing NEP staff functions list in the annual work plans. The remainder of Foundation employees were removed from the list of Commission employees in 2018. With the currently proposed MOU revisions, the term “Host Entity” seems to have been used to refer to Foundation employees serving as NEP staff. For the reasons noted above, this usage is inconsistent with federal guidance. The simplest approach would be to return to the former governance model, in which Foundation employees hired to serve the NEP are acknowledged to be Commission staff, since the Commission is the NEP. Whatever labels are used, it is important to make clear in the MOU that all SMBNEP staff perform their NEP duties at the direction of the Commission, which is the NEP Management Conference, not the Foundation. Another important aspect of this oversight relationship is that it applies not just to Section 320 grant funded activity, but to all NEP work. The Bay Foundation has entered into numerous grant agreements to perform work on projects in the NEP work plan, and many of those grants are included as matching funds for the Section 320 grant. By definition, the Commission, as the NEP Management Conference, has the right to oversee and direct the Foundation’s role in those projects. For example, the Commission had the authority to prohibit Foundation employees from entering into a payment agreement with the Annenberg Foundation, used as matching funds for the</p>	III. (F) Administration
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**Comments Received for the Proposed Amendment to the  
SMBRC Memorandum of Understanding  
Comment Deadline: November 7, 2019**

<b>No.</b>	<b>Comment</b>	<b>Category</b>
	<p>purposes of the Section 320 grant, to perform work related to the Ballona Wetlands Restoration Project, including coordination activities related to Annenberg’s own proposed project, which was highly controversial and never discussed with the Governing Board. Thus, NEP staff must keep the Governing Board informed of its funding agreements at all stages in order to allow the Governing Board to provide direction to NEP staff regarding the nature of the work it is committing to perform on behalf of the NEP. It is important to note that this does not apply to the staff of other entities that perform work on projects listed in the work plan but which operate independently of the NEP.</p>	

**Comments Received for the Proposed Amendment to the  
SMBRC Memorandum of Understanding  
Comment Deadline: November 7, 2019**

<b>No.</b>	<b>Comment</b>	<b>Category</b>
6.008	<p>Stakeholder Advisory Function The proposed MOU revisions would eliminate the Watershed Advisory Council (“WAC”) and create a vaguely defined public forum called the Santa Monica Bay Stakeholders. It is unclear from the draft MOU revision and accompanying staff report how this new forum would function any differently from the WAC or how the new forum would resolve any of the problems identified with the WAC. Stakeholders of the Ballona Wetlands will still want to discuss that project and make consensus recommendations to the Governing Board regarding that project. In order to address the concerns of some WAC members that a focus on the Ballona Wetlands was preventing discussion of other issues, the Land Trust and other stakeholder groups have proposed the formation of work groups, something that is clearly provided for in the current MOU. Nonetheless, the requests to form work groups have been repeatedly ignore or rejected. The proposed MOU revisions do not explain how members of the new SMB Stakeholders group would form work groups, how those work groups would be supported by the Commission, or the process for developing consensus recommendations for consideration by the Governing Board. Work groups would make the Commission more efficient by allowing more complex issues to be discussed in greater detail among a smaller group, which can then make non-binding consensus recommendations to the Executive Committee and/or Governing Board. Our proposed MOU revisions attempt to address the concerns raised by members of the Commission and members of the public with regard to the operation of the WAC. It also establishes guidelines for the creation of work groups, given the ambiguity in the current MOU and in the revision proposed by staff.</p>	III. (D) Santa Monica Bay Stakeholders

**Comments Received for the Proposed Amendment to the  
SMBRC Memorandum of Understanding  
Comment Deadline: November 7, 2019**

<b>No.</b>	<b>Comment</b>	<b>Category</b>
6.009	<p>Finance and Budget One of the listed authorities of the Commission is to “[r]equest and receive federal, state, local, and private funds from any source, and expend those moneys for the restoration and enhancement of Santa Monica Bay and its watershed.” However, the record shows that the Commission has never solicited any source of funds for the Commission, but that it has solicited numerous public agencies and other entities for donations to be made to the Foundation. The financial arrangements of the Commission are a central aspect of the Commission’s governance structure and should be clarified. In Section IV of the draft, reference is made to the Santa Monica Bay Restoration Account, which was terminated due to inactivity in 2012. In 2018, six years after the termination of this statutorily created account, the Land Trust provided Department of Finance documentation to the Commission showing that the account had been created and subsequently terminated. Inexplicably, however, the Commission’s legal counsel continued to assert, as recently as the October 2019 Governing Board meeting, that this account had never been established. This is one of many examples in which the Commission seems willing to ignore factual documentation in favor of convenient but false narratives on a range of issues. The Commission should now deliberate and make an independent determination as to whether it would be in the public interest to re-establish this account and to utilize it in the manner in which the Legislature intended. The list of functions for both the Governing Board and Executive Committee include: “Approve program and funding priorities, resource and funding allocations, budgets, expenditures, and the use of funds appropriated to, or received directly by the Commission for activities or projects.” This paragraph could be worded to more clearly indicate whether the clause “received directly by the Commission” applies to the whole paragraph or just to the “use of funds”. We believe the Commission has legal oversight authority over funds not directly received as well as any funds directly received by the Commission.</p>	IV. Operation

**Comments Received for the Proposed Amendment to the  
SMBRC Memorandum of Understanding  
Comment Deadline: November 7, 2019**

<b>No.</b>	<b>Comment</b>	<b>Category</b>
6.010	<p>Improper Delegation of Discretionary Authority It is a well established principle of law that public agencies cannot delegate away the discretionary authority vested in them by statute. The Governing Board is the ultimate decision-making body of the Commission. To further the Commission’s public mission, the Governing Board can certainly approve the formation of partnerships and delegate ministerial duties to staff, to other committees within the Commission, or to partners, such as the Bay Foundation. However, the Governing Board cannot delegate away its ultimate decision-making authority. For instance, the Governing Board could delegate to the Executive Committee or to another committee the task of working with legal counsel to respond to various litigation or other legal issues, as long as final decision-making authority stays with the Governing Board. However, the Executive Committee can’t simply take that authority from the Governing Board, and it can’t bypass the Governing Board by making binding decisions for the Commission without consulting with, and getting final approval from, the Governing Board. Likewise, the Commission can receive staff services from external entities. But those external entities cannot simply take it upon themselves to restructure the Commission or to determine the direction of the NEP without the participation of the Governing Board. The Foundation’s decision to create a partnership, called the Coastal Research Institute (“CRI”), with Loyola Marymount University (“LMU”) to “to further the goals of Santa Monica Bay National Estuary Program” is the type of decision that required Governing Board participation and approval, especially given that multiple Foundation employees serving as NEP staff are separately compensated by LMU as faculty and/or for their work on CRI, and given that LMU has taken controversial positions on issues directly impacting the Santa Monica Bay watershed (e.g. support for proposed construction project in the Ballona Wetlands Ecological Reserve, real estate partnership with Playa Vista, etc.). Even if the MOU is revised to expressly grant certain discretionary authority to entities other than the Governing Board, the MOU likely run counter to the legislative intent of the enabling statute, which clearly envisioned discretionary decision-making for the NEP to reside with a single governing body consisting of “federal, state, and local public agency officials.”</p>	General Comment

**Comments Received for the Proposed Amendment to the  
SMBRC Memorandum of Understanding  
Comment Deadline: November 7, 2019**

<b>No.</b>	<b>Comment</b>	<b>Category</b>
6.011	<p>Legal Analysis of Commission's Authority, Orientation, FAQ The Commission's interpretation of its own enabling statute should not be a secret from the Commission members or from the general public. For the last three years, many questions have been raised by Governing Board members about the authority of the Commission, but those questions have either gone unanswered or been answered in private. This has resulted in continued confusion by Governing Board members as to the extent and limits of their authority. It is notable that at no time during this structure and governance re-evaluation process has the Governing Board been provided with any written legal analysis of the scope of the Commission's authority. Such an analysis should be provided prior to the December 12 meeting. Additionally, an FAQ should be developed and distributed to provide answers to basic questions about the Commission. Attached to these comments is a proposed FAQ document that could be a starting point for eliminating unnecessary confusion about the structure, governance and authority of the Commission as the NEP Management Conference.</p>	General Comment

**Comments Received for the Proposed Amendment to the  
SMBRC Memorandum of Understanding  
Comment Deadline: November 7, 2019**

<b>No.</b>	<b>Comment</b>	<b>Category</b>
6.012	<p>Role of US EPA HQ and Region 9 One of the factors contributing to the Commission’s inability to correct clear deficiencies in its governance structure has been the willingness of US EPA staff to ignore or gloss over those deficiencies. For instance, US EPA’s published guidelines regarding the role of NEP host entities could not be more clear that the NEP Director and NEP staff are accountable to the NEP management conference and should not be perceived as serving the interests of any third party, to include the host entity. The purpose of this guidance is self-evident – to prevent NEP policies and management decisions from being determined outside of the management conference structure. Yet US EPA staff from both HQ and Region 9 have decided to ignore this guidance altogether, and allow the Bay Foundation, as the purported host entity of the Santa Monica Bay National Estuary Program, to essentially co-opt the entire program and treat the management conference as a ceremonial advisory body that sometimes ratifies decisions after they have already been made. The willingness of US EPA to allow the Foundation to ignore EPA’s guidelines regarding NEP management does not make those transgressions legitimate. While the NEP framework is designed to provide flexibility to local NEPs, it was not intended to allow external partners to co-opt the program and diminish the role of the management conference. This is an issue that we intend to address at the federal level, if not resolved cooperatively as part of this process, via administrative and/or legal action. Our proposed MOU revisions removes the memorandum provided by US EPA because it’s selective reference to certain facts, at the exclusion of others, paints a very misleading picture and raises more questions than it answers.</p>	Attachment A
6.013	<p>The Santa Monica Bay Restoration Commission, following the direction of the Bay Foundation rather than acting independently as required by statute, has squandered several years in which it could have been addressing these basic issues of structure and governance. It is long past time for the Commission to finally give these issues the attention they deserve and to work with public stakeholders to get this National Estuary Program on a sound structural footing for the years to come.</p>	General Comment