

**August 17, 2021 Supplement to the Revised Staff Report for the
PROPOSED AMENDMENT TO THE
MEMORANDUM OF AGREEMENT
BETWEEN THE SANTA MONICA BAY RESTORATION COMMISSION
AND THE BAY FOUNDATION REGARDING THE
SANTA MONICA BAY NATIONAL ESTUARY PROGRAM**

The purpose of this supplement to the Staff Report for the Proposed Amendment of the Memorandum of Agreement (MOA Amendment) between the Santa Monica Bay Restoration Commission (Commission) and The Bay Foundation (TBF) regarding the Santa Monica Bay National Estuary Program (NEP) is to elaborate on the efforts of Commission staff to obtain documents from TBF under the records sharing provision in the 2018 MOA and the revision to the records sharing provision in the proposed MOA Amendment.

Background

In 2017, the Commission entered into a settlement agreement with the Ballona Wetlands Land Trust (BWLTL) to resolve pending litigation. One of the provisions of the settlement agreement was that the Commission “will work with TBF to amend the MOA to ensure that records created or used by [the Commission] or TBF pursuant to implementation of the Bay Restoration Plan or Annual Work Plans are treated as public records and subject to disclosure as may be required by law.”

In carrying out this provision of the settlement agreement, the Commission worked with TBF to amend the MOA. In 2018, the Commission and TBF adopted an amended MOA which includes the following provision, “The Commission and [TBF] also recognize and agree to ensure that records created or used by the Commission or [TBF] pursuant to implementation of the Bay Restoration Plan or Annual Work Plans are treated as public records and subject to disclosure as may be required by law.”

Efforts by the Commission to Obtain Records

Since adopting the 2018 MOA, the Commission has consistently made efforts to obtain records from TBF pursuant to the terms of the MOA. When receiving a California Public Records Act (CPRA) request with a scope that may implicate records in the exclusive possession of TBF, the process the Commission uses in an attempt to obtain records is generally as follows:

- Forward the request to TBF staff via email and/or convey the request orally;
- Request that TBF provide records consistent with the records sharing provision of the MOA;

- Give TBF a reasonable amount of time to respond, and if sufficient time elapses, provide a reminder to TBF; and
- Forward any records provided by TBF to the CPRA requestor.

Although the Commission has consistently attempted to fulfill its obligation under the settlement and abide by the terms of the MOA, TBF has provided only a limited number of records to the Commission. This has led to a number of exchanges between the Commission and TBF in which the Commission made requests for records that were generally refused by TBF.

An example of this dynamic relates to requests for TBF's application to US EPA for the annual federal Clean Water Act Section 320 NEP grant (NEP Grant) and the grant agreement. In October 2019, BWLT submitted a CPRA request to the Commission seeking the NEP Grant application and agreement for 2020. Commission staff forwarded this request to TBF. After a number of inquiries by Commission staff, TBF eventually provided a redacted copy of the NEP Grant application in December 2019 but indicated that there was no grant agreement. BWLT subsequently sued the Commission under the CPRA seeking an unredacted copy of the NEP Grant application and the grant agreement.

In October 2020, BWLT submitted a CPRA request seeking the 2021 NEP Grant application and grant agreement. Commission staff forwarded the request to TBF and made follow-up requests for the records, but TBF did not provide any records. BWLT incorporated this claim into its litigation against the Commission under the CPRA.

In an effort to reach consensus on the nature of the records sharing provision in the 2018 MOA, the Commission and TBF met in or around Fall of 2018 and later held a conference call in December 2019. These meetings were devoted to discussing the records sharing provision and which documents TBF would agree to share under the provision. Despite best efforts by Commission staff, these meetings did not result in an agreement by TBF to provide any records.

Revision of MOA

Following a significant revision to the Commission's Memorandum of Understanding (MOU) in 2020, Commission staff reached out to TBF to revise the MOA. As part of the MOA revision process, TBF explained in a June 2021 letter its view that the records sharing provision "requires the sharing of documents to the extent required by California law." (Attachment 2 of the revised Staff Report, page 21.) Further, TBF explained that it "has limited resources that are intended to carry out its mission and the work of the Comprehensive Conservation and Management Plan -- not to be occupied with record searches. It is not appropriate for The Bay Foundation to be called upon to provide records as is required of a public entity under the California Public Records Act (PRA).

As such, The Bay Foundation has refused to supply documents in response to PRA requests to the Commission from the public.”

In its letter, TBF indicated that the “records sharing provision in the 2018 MOA has proved unworkable because The Bay Foundation and the Commission do not share a common understanding of its meaning” and proposed revising the provision to specify a list of records to be shared. In an effort to establish a workable agreement and a clearly understandable records sharing provision and expand the scope of records shared by TBF, staff from the Commission and TBF staff worked together to revise the MOA records sharing provision to specify a list of records to be shared, as indicated in the proposed draft MOA Amendment.

Commission staff have carried out the efforts described above with input from the Chair of the Governing Board and Executive Committee members and alternates. The Executive Committee had the opportunity to review and comment on the proposed revision of the records sharing provision in connection with its July 2021 meeting. The Governing Board is scheduled to consider approval of the MOA Amendment at its August 2021 meeting.