

**July 6, 2021 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**

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List of Acronyms and Abbreviations

Acronym or Term	Meaning
2018 MOA	Memorandum of Agreement Between the Santa Monica Bay Restoration Commission and The Bay Foundation Regarding the Santa Monica Bay National Estuary Program amended in April 2018
Amendment	Proposed amendment to Memorandum of Agreement Between the Santa Monica Bay Restoration Commission and The Bay Foundation Regarding the Santa Monica Bay National Estuary Program amended in April 2018
Annual Work Plans	Santa Monica Bay National Estuary Program Annual Work Plans
CCMP	Santa Monica Bay National Estuary Program Comprehensive Conservation and Management Plan
Commission	Santa Monica Bay Restoration Commission
Commission's MOU	Memorandum of Understanding of the Santa Monica Bay Restoration Commission amended in June 2020
CPRA	California Public Records Act
Host Entity	Santa Monica Bay National Estuary Program Host Entity
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
NEP	National Estuary Program
NEP Grant	Annual federal Clean Water Act Section 320 National Estuary Program grant
State Water Board	State Water Resources Control Board
US EPA	United States Environmental Protection Agency

1 Executive Summary

The Santa Monica Bay National Estuary Program (NEP) is designated by the US Environmental Protection Agency (US EPA) under Section 320 of the Clean Water Act to promote collaborative watershed-based partnerships in order to develop and implement a Comprehensive Conservation and Management Plan (CCMP) that addresses a range of environmental problems facing Santa Monica Bay while recognizing and balancing the needs of the local community. The Santa Monica Bay NEP is comprised of two distinct entities: the Santa Monica Bay Restoration Commission (Commission) serving as the Management Conference and The Bay Foundation serving as the Santa Monica Bay NEP Host Entity (Host Entity). The Memorandum of Agreement between the Commission and The Bay Foundation regarding the Santa Monica Bay NEP (MOA) was adopted in 2012 to describe the roles and responsibilities of each entity and the relationship between the entities in furthering the goals of the Santa Monica Bay NEP. Since the adoption of the original MOA, the MOA has been amended three times to ensure the structure of the Santa Monica Bay NEP and the respective roles of each entity is updated and improved as needed to be consistent with US EPA NEP guidance. The MOA was most recently amended in April 2018 (hereafter 2018 MOA).

Consistent with US EPA NEP requirements, the CCMP is reviewed and updated every three to five years with major revisions approximately every 10 years to address new and emerging issues and changes to the NEP's governance structure, if necessary. As part of the review and update to the CCMP, the Commission approved a major amendment to the Commission's Memorandum of Understanding on June 18, 2020 (hereafter Commission's MOU), which describes the governance structure of the Commission and its individual components.¹ Commission staff and The Bay Foundation staff initiated the development of a proposed amendment to the 2018 MOA (hereafter Amendment) to ensure the relationship between the Commission and the Host Entity is consistent with the Commission's MOU and applicable US EPA guidance regarding the structure of the NEP. For clarity, this Staff Report will reference the 2018 MOA, the Amendment, and the MOA in general as appropriate.

1.1 PURPOSE OF THIS STAFF REPORT

The purpose of this Staff Report is to provide the rationale for the Amendment and explain how the changes support the Commission and The Bay Foundation's ability to further the goals of the Santa Monica Bay NEP. The Amendment includes the following major changes to the 2018 MOA:

- Outlines US EPA's role in the NEP as administrator of the program;
- Clarifies that the Santa Monica Bay NEP is comprised of the Commission as the Management Conference and The Bay Foundation as the Host Entity, which includes the NEP Director;

¹ The Commission's MOU is available on the Commission's website at https://www.smbrc.ca.gov/about_us/docs/mou.pdf.

- Adds reference to relevant guidance documents and clarifies that the purpose of the MOA is to set forth the agreement between the Commission as the Management Conference and The Bay Foundation as the Host Entity to further the goals of the Santa Monica Bay NEP;
- Outlines the respective roles and responsibilities and the collaborative relationship between the Commission and The Bay Foundation consistent with the Commission's MOU and US EPA NEP guidance, as applicable;
- Identifies the documents that The Bay Foundation agrees to provide to the Commission;
- Adds standard agreement terms and provisions regarding reservation of the Commission's and The Bay Foundation's authority and the intended beneficiaries and construction of the MOA; and
- Adds language to address execution, term, and modification of the MOA.

The development of the Amendment was informed by the Commission's MOU, the enabling legislation, and US EPA NEP guidance. Commission staff also referred to input provided during the development of the Commission's MOU.

Following this Executive Summary, Section 2 of this Staff Report summarizes the goals of the Amendment. Section 3 provides background information on the Santa Monica Bay NEP, the Commission, and The Bay Foundation and discusses the Amendment process. Section 4 describes the revisions to the 2018 MOA. Attachments of this Staff Report include supplementary information on the Santa Monica Bay NEP structure (Figures 1 and 2), US EPA's role in the NEP (Attachment 1), and proposed revisions to the MOA (Attachment 2).

2 Goals of the Amendment

The goals of the Amendment are to update and clarify the collaborative relationship between the Commission and The Bay Foundation consistent with the Commission's MOU, the enabling legislation, and US EPA NEP guidance, as applicable, in order to do the following:

1. Clarify the respective roles and responsibilities of the Commission and The Bay Foundation.
2. Ensure successful implementation of the CCMP and Santa Monica Bay NEP Annual Work Plan (Annual Work Plan).
3. Enhance the partnership between the Commission and The Bay Foundation to serve effectively as the Santa Monica Bay NEP as described in US EPA NEP guidance.
4. Effectively inform and communicate to stakeholders the role of the Santa Monica Bay NEP in the Santa Monica Bay watershed.
5. Streamline processes and improve program efficacy.

3 Background

3.1 THE SANTA MONICA BAY NEP

Section 320 of the Clean Water Act authorizes US EPA, on its own initiative or upon nomination by a state, to designate estuaries of national significance as part of the NEP. In 1988, the State of California and US EPA established the Santa Monica Bay Restoration Project as a NEP under the provisions of Section 320 of the Clean Water Act. The Santa Monica Bay Restoration Project was among the first of 28 NEPs established nationwide to promote collaborative watershed-based partnerships to develop and implement a CCMP that addresses the range of environmental problems facing the estuary while recognizing and balancing the needs of the local community. In 1995, the Santa Monica Bay Restoration Project approved a CCMP for Santa Monica Bay, previously known as the Bay Restoration Plan. On September 15, 2002, Governor Davis signed SB 1381, which renamed and designated by reference the Commission to replace the former Santa Monica Bay Restoration Project as the Management Conference for the Santa Monica Bay NEP. Since 2006, The Bay Foundation has served as the Host Entity of the Santa Monica Bay NEP and provided the NEP Director.

3.2 THE SANTA MONICA BAY RESTORATION COMMISSION

The Commission was established by the State Legislature in 2002 (SB 1381) as a non-regulatory, state government entity. SB 1381 called for development of a MOU that ensures the coordination of state programs affecting Santa Monica Bay, delineates the authority of the Commission and its governance structure with respect to the implementation of those state programs, and prescribes the Commission's membership and governance. The original MOU was adopted and signed in 2003 and has been periodically updated since then, with the most recent amendment in June 2020.

The Commission serves as the Management Conference of the Santa Monica Bay NEP and is comprised of the Governing Board, Executive Committee, Technical Advisory Committee, Commission staff, and Santa Monica Bay Stakeholders. The Commission's membership includes elected and appointed policymaking officials from all governmental levels; environmental managers from federal, state, regional, and local agencies; local scientific and academic communities; private citizens; and representatives from public and user interest groups—business, industry, community, and environmental.

3.3 THE BAY FOUNDATION

The Bay Foundation is an Internal Revenue Code section 501(c)(3) nonprofit organization. It was initially established by the Santa Monica Bay Restoration Project in 1990 and has successfully served as the Host Entity of the Santa Monica Bay NEP and provided the NEP Director since 2006. The Bay Foundation raises and expends funds for research, educational planning, restoration efforts, and other priorities identified in the CCMP. The Bay Foundation's Board of Directors is separate from the Commission.

It is diverse, is comprised of community members and local government and agency representatives, establishes The Bay Foundation's administrative and personnel policies, and oversees the disposition of funds received by The Bay Foundation.

As the Host Entity, The Bay Foundation receives and administers the NEP Grant from US EPA and utilizes the NEP Grant as well as other sources of funding to carry out implementation of the CCMP. US EPA oversees and administers the grant agreement and evaluates the performance of the Host Entity, including conducting regular audits and oversight, as part of its funding assistance and program management responsibilities.

3.4 THE MOA AMENDMENT PROCESS

The success of the Santa Monica Bay NEP over the years can be attributed in large part to the collaboration and partnerships among participating stakeholders. The Commission-The Bay Foundation partnership plays a key role in effectively and successfully developing and implementing the CCMP and Annual Work Plans, as well as meeting programmatic, operational, and reporting obligations of the NEP. The MOA defines and documents the relationship and agreement between the Commission and The Bay Foundation. The MOA can be examined and updated periodically to maintain and strengthen the relationship.

The MOA was last amended in April 2018. Around the same time, the Commission, in collaboration with The Bay Foundation, initiated the revision of the CCMP. Following the development and adoption of the October 2018 CCMP Action Plan by the Commission's Governing Board, Commission staff in collaboration with State Water Resources Control Board (State Water Board) staff initiated a public process in June 2018 to evaluate and revise the Commission's governance structure. Based on the evaluation and stakeholder input received during the process, an amendment to the Commission's MOU was developed and approved by the Commission's Governing Board in June 2020. The following are among the major changes to the Commission's MOU:

- Clarified that the Santa Monica Bay NEP is comprised of two distinct entities: The Management Conference and the Host Entity, which includes the NEP Director;
- Clarified that the Commission serves as the Management Conference of the Santa Monica Bay NEP; and
- Described the collaborative partnership between the Commission and the Host Entity and outlined the roles and functions of the Host Entity, including the NEP Director, consistent with US EPA NEP guidance.

The Commission's MOU also includes the following statement:

The partnership between the Commission and The Bay Foundation regarding the Santa Monica Bay NEP is described in a separate Memorandum of Agreement. This MOU describes the governance structure of the Commission and its individual components. The Memorandum of Agreement is consistent with the MOU, but further describes the partnership between the Commission and The Bay Foundation as well as their respective roles and responsibilities to ensure successful implementation of the CCMP and Santa Monica Bay NEP Annual Work Plan.

(Section 4, page 14).

An amendment to the 2018 MOA is needed primarily to update the description of the roles and functions of the Commission and The Bay Foundation consistent with that of the Commission's MOU, clarify the records sharing provision, and remove language that is no longer applicable as a result of the Commission's MOU amendment and other changes since the MOA was last updated. (See Section 4 of this Staff Report for a summary of revisions to the 2018 MOA).

Following the approval of the Commission's MOU, Commission staff in collaboration with The Bay Foundation staff initiated the MOA amendment process in June 2020 to update and clarify the collaborative relationship between the Commission and The Bay Foundation consistent with the Commission's MOU, the enabling legislation, and US EPA NEP guidance. Commission staff took the lead in drafting the language of the Amendment with input from The Bay Foundation staff and legal counsel from both sides as well as US EPA representatives. Throughout the process, Commission staff provided regular updates on the Amendment during public meetings of the Commission's Executive Committee. The Amendment was put on hold in late 2020 pending the outcome of mediation of litigation involving the Commission (*Ballona Wetlands Land Trust v. Santa Monica Bay Restoration Commission*, Los Angeles County Superior Court, Case No. 20STCP00091). Commission staff anticipate bringing the Amendment to the Governing Board for consideration of approval at the August 19, 2021 Governing Board meeting. The Bay Foundation's Board of Directors is expected review and consider approval of the Amendment at their meeting shortly after consideration and approval by the Commission's Governing Board.

4 Summary of the Amendment

The changes to the 2018 MOA are introduced below with a brief summary of the change and discussion of the rationale for the change. The Amendment includes non-substantive changes that are not described in this Staff Report. All references below refer to topics and sections within the Amendment. References to sections of the 2018 MOA will state "Section...of the 2018 MOA". References to sections of this Staff Report will state "Section...of this Staff Report".

4.1 SECTION I. INTRODUCTION

The purpose of this section of the Amendment is to introduce the broader NEP program of the US EPA, describe the establishment and purpose of the Santa Monica Bay NEP, identify the entities comprising the Santa Monica Bay NEP, and state the purpose of the MOA. This section of the Amendment includes the following changes to the 2018 MOA:

Merged Sections I, II, III, and IV of the 2018 MOA and moved some text from Sections I, III, and IV of the 2018 MOA to Section 3 of this Staff Report. The 2018 MOA contained extensive background information on NEPs and the establishment of the Santa Monica Bay NEP and the Commission. Much of the information, especially information in this level of detail, is not necessary for the purpose of the MOA. Information that was moved to and retained in Section 3 of this Staff Report was further revised to be consistent with the Commission's MOU and applicable US EPA NEP guidance. Information regarding the Commission and its establishment is available in the Commission's MOU. Additional, more detailed information can also be found in the *Revised June 3, 2020 Draft Staff Report for the Proposed Amendment to the Commission's MOU*.²

The Amendment retains and consolidates pertinent information regarding the purpose and structure of the Santa Monica Bay NEP consistent with the Commission's MOU, the enabling legislation, and US EPA NEP guidance, as applicable. For instance, while the 2018 MOA provided an extensive legislative history, the Amendment concisely indicates that the NEP is a US EPA program established "to protect and restore the ecological integrity of estuaries of national significance" consistent with Clean Water Act Section 320 (33 U.S.C., § 1330). The Amendment also retains the statement regarding the original intent of the designation of the Santa Monica Bay NEP. However, the statement was revised with minor changes, including specific reference to Santa Monica Bay, to read as follows: "to promote collaborative watershed-based partnerships in order to develop and implement a Comprehensive Conservation and Management Plan that addresses a range of environmental problems facing Santa Monica Bay while recognizing and balancing the needs of the local community."

These revisions will help stakeholders, including the general public, understand the purpose and structure of the Santa Monica Bay NEP and creates a more effective MOA document, meeting goals 4 and 5 of the Amendment.

Added discussion of US EPA's role in the NEP. While implied throughout the 2018 MOA, the Amendment clearly outlines the role of US EPA in the Santa Monica Bay NEP in the beginning of the document. The 2018 MOA stated that US EPA performs the following functions in the NEP:

² Available on the Commission's website at https://www.smbrc.ca.gov/about_us/agendas/2020june/200603_mou_stffrpt.pdf

- Makes “grants to agencies and entities, including nonprofit private entities, to pay for activities necessary for the development and implementation of the [CCMP]” (Section I, Introduction, page 1 of the 2018 MOA);
- “Oversees the [NEP Grant] including conducting regular audits and oversight” (Section III, The Bay Foundation, page 5 of the 2018 MOA); and
- Approves the Annual Work Plans (see the agreement clauses, page 6 of the 2018 MOA).

The Amendment references US EPA’s role in providing financial and technical assistance to NEPs, which includes award and administration of the NEP Grant and review and approval of the Annual Work Plans for the NEP Grant assistance agreements. The Amendment adds that US EPA also advises and provides program management and oversight to NEPs. These functions are consistent with US EPA’s April 9, 2020 memorandum to the Chair of the Commission regarding US EPA’s role in the Santa Monica Bay NEP (see Attachment 1 of this Staff Report).

While US EPA is not a party of the MOA, US EPA designates and administers all NEPs. Clarifying the US EPA’s role in the Santa Monica Bay NEP is important to inform stakeholders of the general NEP structure and meets goal 4 of the Amendment.

Identified the entities comprising the Santa Monica Bay NEP. The purpose of the Amendment is to update and clarify the collaborative relationship between the Commission and The Bay Foundation consistent with the Commission’s MOU and applicable US EPA NEP guidance. Therefore, this section was revised to reflect the structure of the Santa Monica Bay NEP as described in the Commission’s MOU. Specifically, the Amendment states that “the Santa Monica Bay NEP is comprised of two distinct entities, “the [Commission] serving as the Management Conference and The Bay Foundation serving as the Host Entity.”

According to US EPA, the Management Conference “approves the annual workplan and any changes to the CCMP” and the Host Entity is responsible for the following:

(1) complying with terms and conditions of the assistance agreement made with [US EPA]; (2) maintaining financial records; (3) submitting progress reports and other required paperwork; (4) employing the NEP Director and staff; and (5) tracking and adhering to eligible cost requirements which include a non-Federal 50 percent match.

(Section V.C, Role of the Host Entity in Relation to its NEP Management Conference, page 16 of FY 2021-FY 2024 Clean Water Act §320 National Estuary Program Funding Guidance, October 2020).

While US EPA provides flexibility for individual NEPs to organize themselves in ways that respond to local conditions and the NEP guidance documents are not intended to be prescriptive, it is important that the structure of the Santa Monica Bay NEP and use of the terms “Management Conference” and “Host Entity” are consistent with these definitions established by US EPA.

Two areas for improvement identified in US EPA’s 2019 Program Evaluation of the Santa Monica Bay NEP were clarifying the NEP structure and communicating the NEP brand to external audiences.³ The Amendment succinctly outlines what an NEP is, the role of the Santa Monica Bay NEP in the watershed, and the Santa Monica Bay NEP’s organizational structure. Specifically, the Amendment emphasizes that the Commission and The Bay Foundation are two distinct entities working collaboratively to further the implementation of the CCMP. The Amendment briefly introduces the Commission and its components and includes a link to the Commission’s MOU, which further describes the governance structure of the Commission and its individual components. The Bay Foundation is also recognized as a private, nonprofit, non-governmental entity that serves as the Host Entity of the Santa Monica Bay NEP and is also governed by its own Board of Directors.

The revisions in this section meet goal 4 of the Amendment by more effectively and concisely communicating to stakeholders the structure of the Santa Monica Bay NEP as being made up of a collaborative public-private partnership.

Clarified the purpose of the MOA and added reference to relevant guidance documents. One of the purposes of the 2018 MOA was to “describe the roles and responsibilities of the Commission and The Bay Foundation in the development and implementation of the Bay Restoration Plan,” now referred to as the CCMP. The Amendment clarifies that, in addition to describing their respective roles and responsibilities, the MOA establishes the agreement between the Commission as the Management Conference and The Bay Foundation as the Host Entity of the Santa Monica Bay NEP “in order to further the goals of the Santa Monica Bay NEP.” This section of the Amendment also references relevant documents, including the US EPA’s Clean Water Act Section 320 NEP funding guidance and *2015 Frequently Asked Questions on the NEP Governance* to allow stakeholders to obtain more details on the NEP and US EPA’s requirements for the NEPs.

Clarifying the purpose of the MOA and identifying relevant guidance documents meets goals 4 and 5 of the Amendment by promoting transparency and ensuring that the purpose of the MOA is clear and focused.

³ US EPA’s letter regarding the 2019 Program Evaluation of the Santa Monica Bay NEP is available on the Commission’s website at https://www.smbrc.ca.gov/about_us/orientation/docs/smbnep_pe_06122019.pdf.

4.2 SECTION II. AGREEMENT

The purpose of Section II of the Amendment is to outline the respective functions that the Commission and The Bay Foundation agree to perform. This section of the Amendment includes the following changes to the 2018 MOA:

Specified that the agreement provisions (Section II) of the MOA are consistent with US EPA NEP guidance and the Commission's MOU. This specification was added to identify and state clearly the basis for the functions each party agrees to perform under the MOA, which are all intended to further the goals of the Santa Monica Bay NEP.

Revised the functions that the Commission agrees to perform under the MOA to be consistent with the Commission's MOU. As stated in the Commission's MOU, the MOA is consistent with the Commission's MOU, but further describes the partnership between the Commission and The Bay Foundation as well as their respective roles and responsibilities. Several functions of the Commission described in the Commission's MOU involve the collaborative relationship with The Bay Foundation and are included in the Amendment.

The first function of the Commission in the Amendment is related to the development and implementation of the revisions and updates to the CCMP and Annual Work Plans. The Annual Work Plan is a key product collaboratively developed by the Commission as the Management Conference and The Bay Foundation as the Host Entity. The Annual Work Plans describe the efforts the Santa Monica Bay NEP will take within a fiscal year to implement the CCMP and is required by US EPA as part of the Host Entity's assistance agreements. The Annual Work Plans also include an estimated budget for that fiscal year for the Governing Board's review and consideration of approval. Upon the Governing Board's approval, the Annual Work Plans are submitted to US EPA by The Bay Foundation as the Host Entity to apply for the NEP Grant to implement the program and funding priorities of the Santa Monica Bay NEP.

The Commission's Governing Board is also responsible for review and consideration of approval of significant changes to Annual Work Plans, and other plans or products of the Santa Monica Bay NEP, as necessary. According to US EPA NEP guidance, significant changes to Annual Work Plans include, but are not limited to elimination of roles and responsibilities of key staff positions or directing staff focused projects or activities that do not align or do not support CCMP implementation (FY 2021-FY 2024 Clean Water Act §320 NEP Funding Guidance, October 2020).

In addition to the development and approval of the Annual Work Plans and revisions and updates to the CCMP, the Amendment also added two other important and pertinent functions that the Commission agrees to perform, as identified in the Commission's MOU. These functions include providing opportunities to receive input from The Bay Foundation, including the NEP Director, and consulting with The Bay Foundation on the identification of the NEP Director. At its June 18, 2020 meeting, the Governing Board approved Resolution 20-03 of the Commission, which concurred with The Bay Foundation's selection of the NEP Director of the Santa Monica Bay NEP.

Revised the functions that The Bay Foundation agrees to perform under the MOA to be consistent with the general functions of The Bay Foundation described in the Commission’s MOU in accordance with applicable US EPA NEP guidance.

Similar to the functions of the Commission included in the Amendment as discussed above, functions of The Bay Foundation described in the Commission’s MOU are included and further described in the Amendment. These functions are all pertinent to the roles of The Bay Foundation serving as Host Entity of the Santa Monica Bay NEP and consistent with applicable US EPA NEP guidance. Functions 1, 2, and 5 of The Bay Foundation reflect the collaborative working relationship of The Bay Foundation with the Commission, especially in development and implementation of the Annual Work Plans and revisions and updates to the CCMP as discussed above. Function 3 reiterates and further describes the role of The Bay Foundation as applicant and recipient of the NEP Grant in compliance with terms and conditions of the assistance agreement with US EPA and consistent with the Santa Monica Bay NEP Annual Work Plans.

Function 4 is consistent with US EPA NEP guidance, which states:

As part of CCMP implementation, each NEP works to ensure its long-term financial sustainability by pursuing leveraging opportunities; i.e., financial or in-kind resources provided above and beyond the Federal funding provided under the [NEP Grant].

(Section IV.B, Leveraged Resources, page 12 of FY 2021-FY 2024 Clean Water Act § 320 NEP Funding Guidance, October 2020).

Function 6 incorporates the role of The Bay Foundation as the Host Entity in identifying, in consultation with the Commission’s Governing Board, a staff member of The Bay Foundation to serve as NEP Director , as well as the main functions of the NEP Director (functions 6.a-6.d).

These revisions help clarify the respective roles and responsibilities of the Commission and The Bay Foundation, making the MOA consistent with the Commission’s MOU and applicable US EPA NEP guidance, and demonstrating the collaborative nature of the Santa Monica Bay NEP, meeting goals 1 and 3 of the Amendment.

Revised the records sharing provision. The records sharing provision in the 2018 MOA was adopted in connection with a November 2017 settlement that the Commission entered into with the Ballona Wetlands Land Trust. The settlement agreement provided that the Commission “will work with [The Bay Foundation] to amend the MOA to ensure that records created or used by the [Commission] or [The Bay Foundation] pursuant to implementation of the Bay Restoration Plan [now referred to as the CCMP] or Annual Work Plans are treated as public records and subject to disclosure as may be required by law.

The Commission has diligently and in good faith worked with The Bay Foundation in an attempt to fulfill this settlement agreement term, including by forwarding requests received by the Commission under the California Public Records Act (CPRA) and requesting that The Bay Foundation provide copies of records that are in the exclusive possession of The Bay Foundation consistent with the 2018 MOA. In the years since the adoption of the 2018 MOA, the Commission has received and forwarded numerous requests for records under the CPRA, but there has not been agreement between the Commission and The Bay Foundation on the meaning of the 2018 MOA records sharing provision and which records The Bay Foundation should provide to the Commission. In a June 24, 2021 letter from The Bay Foundation to the Commission (Attachment 2 of this Staff Report), The Bay Foundation states 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 its’ view that “the records sharing provision of the 2018 MOA requires the sharing of documents to the extent required by California law.”

In an effort to adopt a records sharing provision with a clear meaning that is shared by both parties, the Commission and The Bay Foundation have agreed that The Bay Foundation will provide the final versions of the following records to the Commission:

- US EPA NEP Grant application;
- US EPA notification of approval of the US EPA NEP Grant application;
- Santa Monica Bay NEP Semi-annual and Annual Reports; and
- NEP Program Evaluation package.

This provision does not expand the scope of records, if any, in the exclusive possession of The Bay Foundation that are deemed controlled, under the CPRA and related case law, by the Commission.

Removed section regarding other partners of the Santa Monica Bay NEP. The 2018 MOA was revised to remove discussion of the Commission’s role in approving funding priorities for grant programs allocated to the Commission as this is outside the scope of the MOA and is addressed in the Commission’s MOU.

Consistent with US EPA NEP guidance regarding the Management Conference, the Commission’s membership is diverse and includes elected and appointed policymaking officials from all governmental levels; environmental managers from federal, state, regional, and local agencies; local scientific and academic communities; private citizens; and representatives from public and user interest groups—business, industry, community, and environmental. In addition to receiving and managing the NEP Grant, The Bay Foundation also partners with and leverages resources, including funds, from other entities to further the implementation CCMP. While these partners advance the goals of the Santa Monica Bay NEP, they are not entities of the Santa Monica Bay NEP and are not signatories of the MOA. Therefore, the Amendment does not include the “Other Partners” section of the 2018 MOA.

4.3 SECTION III-V – RESERVATION OF AUTHORITY, NO THIRD-PARTY BENEFICIARIES, AND CONSTRUCTION

Added standard terms and provisions (Sections III-V) to the Amendment. The purpose of Sections III-V of the Amendment is to outline standard agreement provisions regarding reservation of the Commission’s and The Bay Foundation’s authority and the intended beneficiaries and construction of the MOA. The 2018 MOA did not clearly articulate several terms that are common provisions in an agreement such as an MOA, including whether the MOA benefits third parties or is invalid if a provision of the MOA is determined invalid. These standard agreement provisions were added as described below in order to further clarify the authority of the Commission and The Bay Foundation and the intended application of the MOA.

Outlined the Commission’s reservation of authority. Section III was added to ensure it is clear that the MOA is a guiding document that outlines how the Commission and The Bay Foundation may carry out their respective roles and responsibilities consistent with their respective legal obligations. The 2018 MOA recognized that the provisions of the agreement “do not limit [the Commission’s or The Bay Foundation’s] ability to carry out other duties or activities that advance the purposes of [the MOA]” (page 6 of the 2018 MOA). The Amendment now clarifies that the MOA does not limit or expand the Commission’s or The Bay Foundation’s legal authority and that the MOA is not a regulation, but merely an outline of the collaborative relationship between the Commission and The Bay Foundation to further the goals of the Santa Monica Bay NEP. Provision #2 of this section was retained, with minor revisions, from Section II of the 2018 MOA, which stated that the MOA “does not alter existing law, nor does it place additional roles or responsibilities on either the Commission or [The Bay Foundation] than each already maintains under existing law” (page 3 of the 2018 MOA).

The addition of this section meets goal 1 of the Amendment by further clarifying the respective roles and responsibilities of the Commission and The Bay Foundation as required by existing laws.

Outlined the intended beneficiaries of the MOA. Section IV was added to clarify that only the Commission and The Bay Foundation are intended beneficiaries of the MOA and that third parties cannot enforce provisions of the MOA. While implied in the 2018 MOA, the Amendment now makes this explicit. The addition of this section meets goal 5 of the Amendment by clearly identifying the primary parties that are intended to directly benefit from the MOA to improve the efficacy of program operation.

Described potential invalid provisions of the MOA. Section V was added to clarify that, if there is any determination that a provision of the MOA is invalid, it does not invalidate any other provision of the MOA or the MOA in its entirety. The addition of this section meets goals 2, 3, and 5 of the Amendment by ensuring that the Commission and The Bay Foundation can continuously carry out their respective roles and responsibilities if a provision of the MOA is deemed invalid.

4.4 SECTION VI – EXECUTION, TERM, AND MODIFICATION

Added provisions addressing execution, term, and modification of the MOA (Section VI) to the Amendment. The purpose of this section of the Amendment is to outline the execution, term, and modification of the MOA. The 2018 MOA did not specify how the Commission or The Bay Foundation may execute or terminate the MOA. New language was added as described below to correct this deficiency.

Described the execution of the MOA. Language was added to clarify that the Amendment represents the entire agreement between the Commission and The Bay Foundation and merges and supersedes any prior written or oral representations, discussions, understandings, or agreements by, between, or among the Commission and The Bay Foundation. The Amendment specifies that the signatories may execute the MOA in counterparts, meaning that the Commission and The Bay Foundation may sign separate copies of the agreement. This standard agreement provision is useful if the signatories will not be physically present at the signing and therefore there would be no single document that contains all the signatures of the signing parties. Language was also added to indicate that the MOA becomes effective upon the date of final signature of the signatories. The addition of this provision meets goal 5 of the Amendment by clarifying the approval process and improving the efficiency in the timely execution of the agreement between the signatories.

Identified the MOA termination process. The Amendment added language to establish the process for terminating the MOA. The Amendment clarifies the mechanism for the Commission, as the Management Conference, and The Bay Foundation, as the Host Entity of the Santa Monica Bay NEP, to part ways and indicates that either party could initiate this at any time. Specifically, Section VI.4 of the Amendment states that the MOA will remain in effect until modified by the mutual consent of the Commission and The Bay Foundation or until terminated by the Commission or The Bay Foundation. A 90-day advance written notice to the other party is needed to terminate the MOA. This notice requirement helps ensure adequate time for the Commission to collaborate with US EPA on identification and selection of a new Host Entity.

This revision meets goal 1 of the Amendment by clearly stating the expectations of the Commission and The Bay Foundation should either party choose to terminate the MOA. This revision also helps to ensure the continued functioning of the Santa Monica Bay NEP by allowing any termination of the MOA to be addressed in a timely manner, meeting goal 2 of the Amendment.

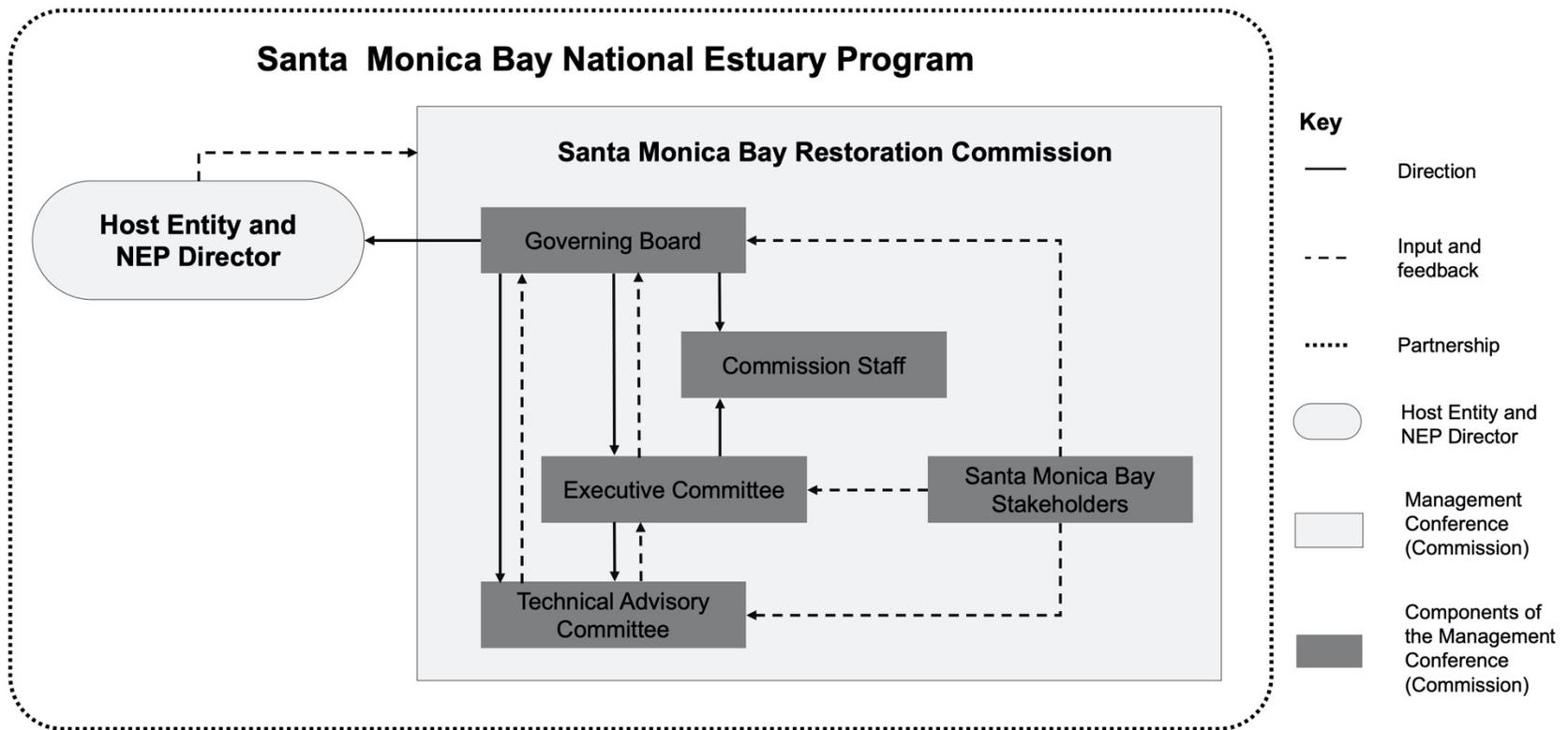


FIGURE 2. Santa Monica Bay NEP Entities and Interrelationships

The Santa Monica Bay NEP is a partnership comprised of the Commission as the Management Conference and The Bay Foundation as the Host Entity providing the NEP Director. Details of the roles and functions of the components of the Commission are available in the Commission’s MOU.

ATTACHMENT 1: US EPA's April 9, 2020 Memorandum to the Chair of the Commission regarding US EPA's Role in the Santa Monica Bay NEP

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ATTACHMENT 1



**UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105**

April 9, 2020

Charles Caspary, Chair

Santa Monica Bay Restoration Commission Governing Board
320 West 4th Street,
Suite 200

Los Angeles, CA 90013

RE: EPA's Role in the Santa Monica Bay National Estuary Program (SMBNEP)

Dear Chair Caspary:

During recent conversations about the structure of the SMBNEP, EPA was asked to summarize its role in the SMBNEP. This letter describes the primary functions of EPA within the structure of the locally driven National Estuary Program (NEP) partnership in the Santa Monica Bay. EPA's role can best be described in terms of three separate, but related, activities.

I. Advisory Role for the Management Conference

EPA's National Estuary Program provides flexibility for individual programs to organize themselves in ways that respond to local conditions: "...[(E)ach NEP is uniquely structured, organized, and governed by its partners....[EPA guidance documents are]not intended to be prescriptive."¹ The Management Conference is the governing entity for each NEP. It charts the direction of the NEP and makes decisions on NEP priorities and programs. It serves as the forum to identify issues and to develop, update, and implement a NEP's Comprehensive Conservation and Management Plan (CCMP).

Since its inception in 1988, the structure of the SMBNEP Management Conference has undergone several organizational changes. Notably, in 2002, the State of California established the Santa Monica Bay Restoration Commission (Commission)² as the vehicle to run the Management Conference for the SMBNEP. The Commission's membership, committee structure, and decision-making processes are

¹ Frequently Asked Questions on National Estuary Program (NEP) Governance (FAQS), EPA, February 19, 2015, at page 1. Available at https://www.smbrc.ca.gov/about_us/orientation/docs/usepa_nep_governance_faq.pdf.

² Cal.Pub.Resources Code Sections 30988(d), 30988.2.

outlined in the Santa Monica Bay Restoration Commission Memorandum of Understanding (Commission MOU), which was originally approved in 2003 and most recently amended on February 20, 2014.³ While EPA is not a signatory to the Commission MOU, EPA Region 9's Regional Administrator or his/her delegate serves as a nonvoting, ex-officio member of the Commission's Governing Board advising on matters related to EPA policy, funding and technical assistance, as well as providing programmatic guidance, direction and oversight.

II. Funding and technical assistance

EPA's primary roles for the SMBNEP include processing and providing oversight of Federal grant funding for NEP operations, providing support for and oversight of NEP planning through the development and implementation of a Comprehensive Conservation and Management Plan (CCMP), providing support for project planning and implementation, conducting program evaluation and tracking, and providing technical/advisory assistance to the Management Conference of the NEP.

EPA provides Federal funding for SMBNEP operations and engages in program planning, implementation, and evaluation through an annual assistance agreement with the designated "host entity." The host entity serves as an administrative, financial, and operational manager of an NEP. The host entity is responsible for certain fiduciary responsibilities as the recipient of the grant funding, including: (1) complying with terms and conditions of the assistance agreement made with EPA; (2) maintaining financial records; (3) submitting progress reports and other required paperwork; (4) employing the NEP Director and program staff, and (5) tracking and adhering to eligible cost requirements which include a non-Federal 50 percent match. Funding awarded to the host entity is intended to be used for those purposes and activities approved through the consensus of the Management Conference, and consistent with the CCMP and Section 320.

The Bay Foundation (Foundation) has been the host entity for the SMBNEP since 2006.⁴ As such, the Foundation "administers the EPA assistance agreement that supports the activities and projects of the NEP."⁵ EPA reviews and approves annual grant workplans for these assistance agreements. EPA also develops funding and CCMP guidance for all NEPs; these funding guidance documents convey EPA guidance on EPA priorities, annual work plans and reporting requirements, CCMP

³ Available at https://www.smbrc.ca.gov/about_us/docs/mou.pdf. Update pending (April 2020).

⁴ The relationship between the Commission and Foundation was established and described in the Memorandum of Agreement Between the Santa Monica Bay Restoration Commission and The Bay Foundation Regarding the Santa Monica Bay National Estuary Program, first signed in 2012 and most recently amended June 15, 2017. The parties are working on an amendment to the Memorandum of Agreement. This Memorandum of Agreement makes clear that the activities of the Foundation in implementing the SMBNEP are subject to the direction of the Commission.

⁵ FAQs, at page 2.

updates and revisions, and major assistance agreement policies.⁶

EPA's role in funding is described in its entirety in the annual assistance agreement between EPA and The Bay Foundation. These annual assistance agreements must meet the general administrative requirements for federal grants pursuant to 2 CFR Parts 200, and 1500, and must also comply with special provisions for NEPs included in 40 CFR 35.9000 *et seq.*

EPA Region 9 administers the assistance agreement.

III. Program management and oversight

EPA's engagement with the Santa Monica Bay NEP takes several forms. First, EPA reviews and approves revisions or updates to the Comprehensive Conservation and Management Plan (CCMP) that are submitted by the Management Conference. EPA also conducts periodic Program Evaluations of the SMBNEP. The Program Evaluation (PE) involves, at a minimum, a 5-year progress report submitted by the NEP, a site visit by the PE review team, and the development of an evaluation letter with a corresponding rating, summary of findings, and recommendations by the PE review team. It currently occurs on a 5-year cycle. The most recent PE for the SMBNEP was completed in 2019. In addition to the more formal CCMP and PE activities, EPA also collects information annually on the NEP's habitat protection and financial leveraging accomplishments via the NEPORT reporting process.

EPA also plays a role with regard to NEP management, working with the SMBNEP Director, program staff, and Management Conference. Program management activities include: collaboration on SMBNEP projects, consultation on national NEP policy and program issues (in collaboration with the Association of National Estuary Programs, of which SMBNEP is a member), information sharing and communication of SMBNEP project outcomes and accomplishments, and providing cross-NEP mentoring and support as part of the national NEP community of practice.

The Santa Monica NEP structure is unique. EPA appreciates the State's ongoing proactive efforts to clarify roles and responsibilities between the Commission as the Management Conference and The Bay Foundation as Host Entity. We all share mutual objectives to protect and restore the invaluable Santa Monica Bay Estuary. We offer one suggestion to help further clarify roles and responsibilities: that the NEP Director (currently the Executive Director of The Bay Foundation) be given an ex-officio, non-voting seat on both the Governing Board and Executive Committee to help advise Commission activities.

We hope these clarifications on EPA's roles and responsibilities are helpful. We look forward to our continued work together to protect and restore the treasured resources of the Santa Monica Bay Estuary.

⁶ FY 2017-2019 Clean Water Act Section 320 National Estuary Funding Guidance, EPA, Updated April 7, 2017, at page 13. Update pending (April 2020).

If you have further questions, please contact Erica Yelensky at yelensky.eric@epa.gov or 415-972-3021.

Sincerely,

David Smith

David Smith
Assistant Director
Water Division (WTR-3)

ATTACHMENT 2: The Bay Foundation's June 24, 2021 Memorandum to the Chief Administrative Director of the Commission regarding the Proposed Revision of the MOA

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June 24, 2021

VIA EMAIL ONLY

Guangyu.Wang@waterboards.ca.gov

Dr. Guangyu Wang
Chief Administrative Director
Santa Monica Bay Restoration Commission
320 West 4th Street, Suite 200
Los Angeles, CA 90013

Re: Proposed Revision of the Memorandum of Agreement

Dear Dr. Wang:

As you are aware, the Santa Monica Bay Restoration Commission (Commission) and The Bay Foundation are engaged in a broad revision of the 2018 Memorandum of Agreement (MOA). As previously discussed, The Bay Foundation would like to amend the records sharing provision of the MOA.

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. Since the 2018 MOA was adopted, the Commission has forwarded a number of requests it received under the California Public Records Act (PRA), asking The Bay Foundation to provide records beyond the scope of what The Bay Foundation believes is reasonable or called on to be provided under the 2018 MOA.

The Bay Foundation believes the records sharing provision of the 2018 MOA requires the sharing of documents to the extent required by California law. The Bay Foundation is a private, non-profit entity not subject to laws pertaining to public agencies. The Bay Foundation 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.

Regardless of legal requirements, The Bay Foundation proposes revising the records sharing provision in the MOA to specify a list of certain records to be shared with the Commission, in addition to what is shared between The Bay Foundation and the Commission in the regular course of business.



I look forward to continued discussion regarding this proposed revision to the records sharing provision as well as more broad revisions of the 2018 MOA.

Sincerely,

A handwritten signature in black ink, appearing to read "TF", is written over a light blue horizontal line.

Tom Ford
Chief Executive Officer