



Panel Discussion: ESA / Clean Water Act / Porter-Cologne Water Quality Control Act

Moderator: David Ivester | Briscoe, Ivester, & Bazel LLP

Panelists:

- ❖ Tom Mumley | SFRWQCB
- ❖ Tony Francois | Briscoe, Ivester, & Bazel LLP

November 7, 2022

SF Bay Region Regulatory Update

BPC EXPERT BRIEFING: CEQA AND ENVIRONMENTAL REGULATORY UPDATE 2022

November 7, 2022

Thomas Mumley
Assistant Executive Officer
SF Bay Water Board



Basin Plan Amendment

New Section 1.7: The Challenge of Climate Change

- **Climate change water quality impacts**

New Section 4.27: Climate Change and Aquatic Habitat Protection, Management, and Restoration

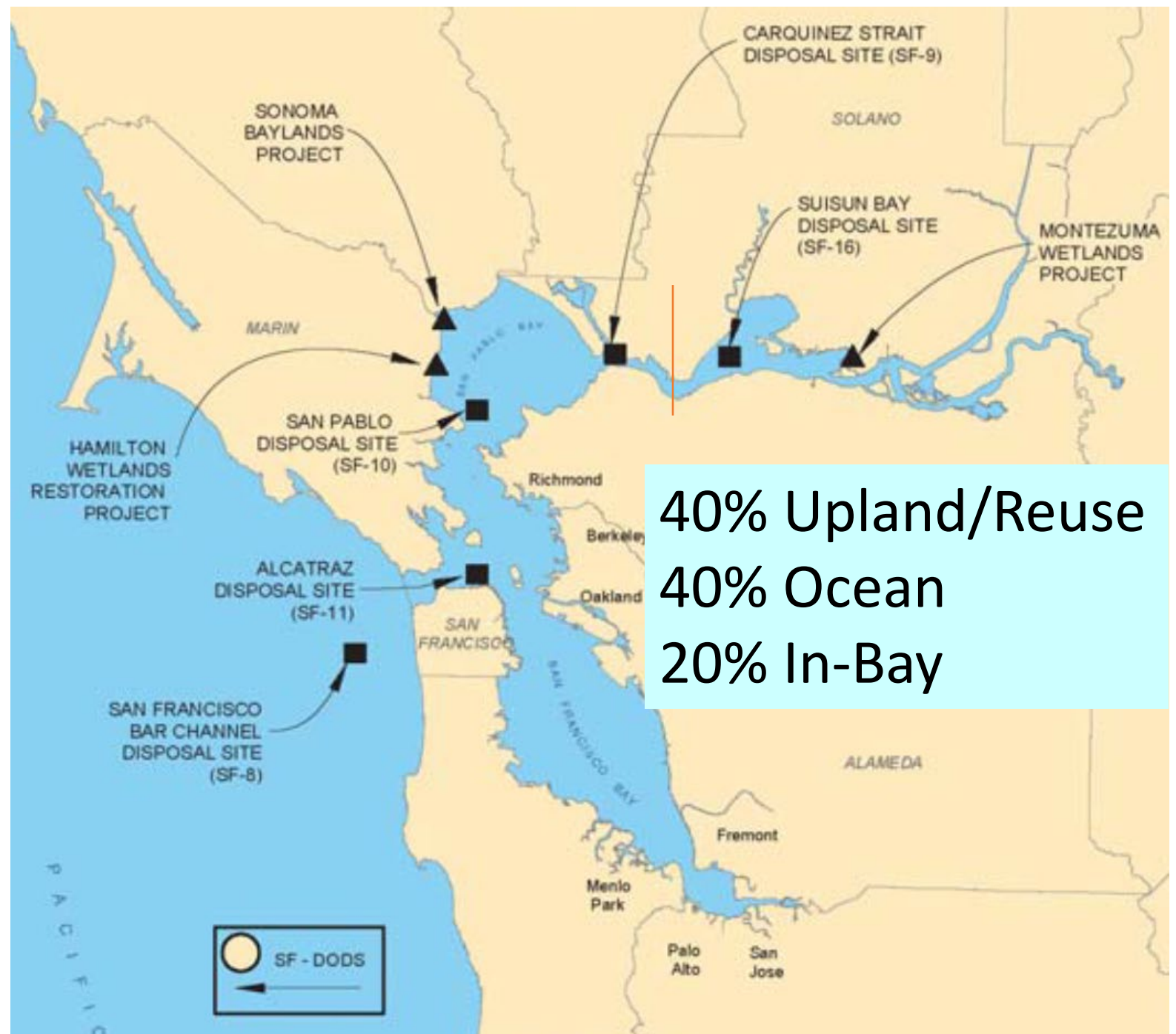
- **Potential considerations for projects in coastal waters**

Informational,
Non-Regulatory
Existing dredge and fill
regulations govern

State Wetland Definition and
Procedures for Discharges of
Dredged or Fill Material to Waters
of the State

Federal Clean Water Act
Section 404(b)(1) **Guidelines**

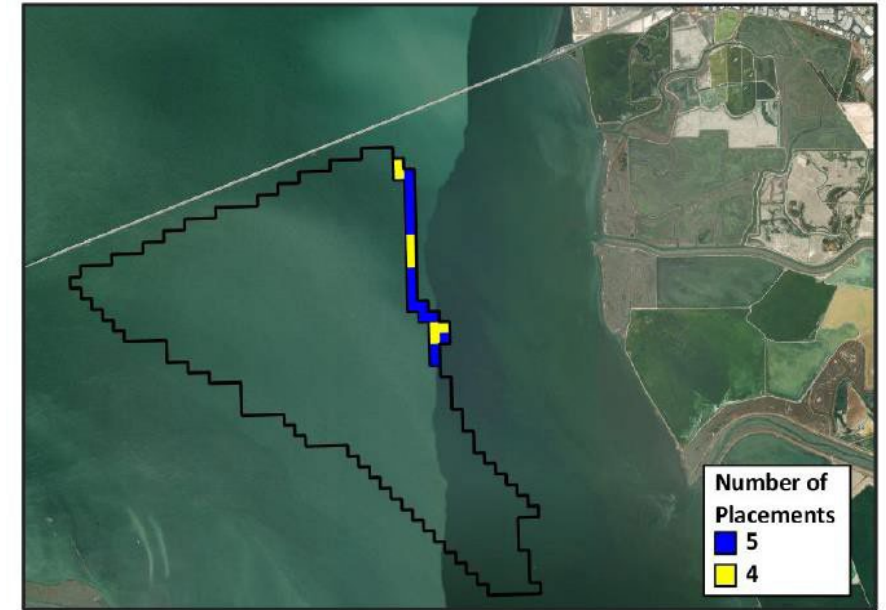
Long Term Management Plan for Placement of Dredged Material



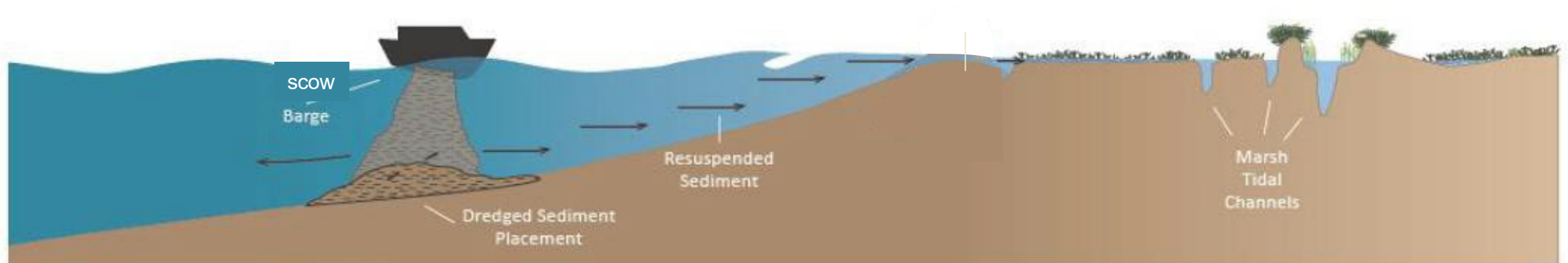
STRATEGIC SHALLOW WATER PLACEMENT PILOT

Pilot placement of approximately 100K CY in the nearshore adjacent to Whale's Tail Marsh at Eden Landing

- Placement depths 9 to 12 feet



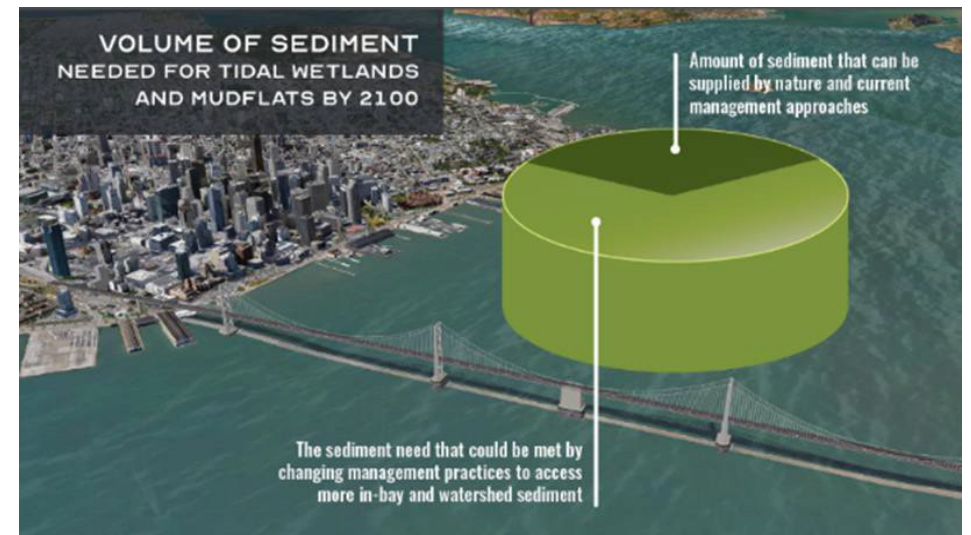
Shallow-Water Placement





OAKLAND 2022 - IN-BAY/ BENEFICIAL USE PILOT

- 💧 Army Corps, US EPA, BCDC, and Water Board collaborative effort
- 💧 Target placement of material dredged from Oakland Harbor
 - Approx 50% of material at a beneficial use site
 - Approx 50% of material in-bay



Climate Change Actions

Vulnerability assessments and adaptation plans

Facility/Project Type	Regulatory Tool
Wastewater facilities	Surveys and 13383 orders
Bayfront Landfills	Waste Discharge Requirements (WDRs)
Refineries	13383 orders
Industrial cleanup sites	13267 and 13304 orders
Wetland Restoration Projects	WDRs and Water Quality Certifications



Climate Change and Sea Level Rise



- Adaptation / resilience planning
- Municipal wastewater facilities
- Industrial wastewater facilities
- Landfills
- Military sites
- In-Bay contamination sites
- Near-Bay contamination sites**
- Groundwater-level rise**
- Transportation infrastructure**
 - Airports/roads
- Flood protection
- Habitat protection/restoration
- Habitat migration
- Sediment supply**
- Beneficial reuse of dredge material**
- Nature-based solutions**
- Nutrient management

CLIMATE CHANGE AND AQUATIC HABITAT PROTECTION, MANAGEMENT, AND RESTORATION Qs

- 1. Is the proposed project design, as well as assessment of its near-term and long-term impacts at site- and landscape-scales, based on the best available science describing climate change and its influence on the environment?**
- 2. Is the proposed project designed as part of a phased adaptation strategy that anticipates reasonably foreseeable projects and accommodates these projects in a manner that protects future beneficial uses of the site and its landscape?**
- 3. Is the proposed project designed within a landscape-scale, cross-jurisdictional framework, such as an operational landscape unit?**
- 4. Does the proposed project utilize practicable natural and/or nature-based design features, or a combination of traditional and nature-based (hybrid) features?**
- 5. For a proposed dredge or fill activity, what are the near- and long-term direct, indirect, and cumulative impacts to the acreage, functions, and values of waters of the state when considering the reasonably foreseeable conditions from climate change?**

Tony Francois, *Briscoe, Ivester & Bazel LLP*

- Sackett Litigation over extent of Clean Water Act wetland authority
- Federal Rulemaking defining “waters of the United States”

Sackett and Adjacent Wetlands

Adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent wetlands.”

Significant Nexus Test

Under the “significant nexus” test originating with the 2006 Supreme Court decision in *Rapanos v. United States*, wetlands are regulable under the Clean Water Act if they have a connection to a downstream navigable water and, taken alone or in a similarly situated collection, have a significant effect on the chemical, physical, or biological integrity of the downstream traditional navigable water.





Possible Outcomes of Sackett Case

- **Significant Nexus likely discarded as a test for wetland regulation under CWA**

Replaced with?

- Continuous Surface Connection with Line Drawing Problem
- Something Else?

Pending EPA Rulemaking Redefining Navigable Waters under the CWA

- Proposed in November 2021**
- Pending at Office of Management and Budget**
- Uncertain Whether/When Rule Will Be Adopted**
- Major Provisions Compared to 1986 Regulations**
- Not Compared to 2020 Regulation**

Waters of the United States Means:

1986 Regulation	Proposed 2022 Regulation
1. All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;	(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
2. All interstate waters including interstate wetlands;	(2) All interstate waters including interstate wetlands;

Waters of the United States Means:

3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

- a. Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
- b. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
- c. Which are used or could be used for industrial purposes by industries in interstate commerce;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds:

(i) That are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1), (a)(2), (a)(5)(i), or (a)(6) of this section;

or

(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6) of this section;

Waters of the United States Means:

4. All impoundments of waters otherwise defined as waters of the United States under this definition;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition, other than impoundments of waters identified under paragraph (a)(3) of this section;

Waters of the United States Means:

5. Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(5) Tributaries of waters identified in paragraph (a)(1), (2), (4), or (6) of this section:

(i) That are relatively permanent, standing or continuously flowing bodies of water; or

(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6) of this section;

Waters of the United States Means:

6. The territorial seas;	(6) The territorial seas;
7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section;	<p>(7) Wetlands adjacent to the following waters (other than waters that are themselves wetlands):</p> <p>(i) Waters identified in paragraph (a)(1), (2), or (6) of this section; or</p> <p>(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(4) or (a)(5)(i) of this section and with a continuous surface connection to such waters; or</p> <p>(iii) Waters identified in paragraph (a)(4) or (a)(5)(ii) of this section when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6) of this section;</p>

Questions?

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