SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION
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January 14, 2011

TO: Commissioners and Alternates

FROM: Will Travis, Executive Director (415/352-3653 travis@bcdc.ca.gov)
Brad McCrea, Regulatory Program Director (415/352-3613, bradm@bcdc.ca.gov)

SUBJECT: **Staff Recommendation on BCDC Permit Application No. 7-06, Brooklyn Basin Redevelopment Project, City of Oakland, Alameda County**
(For Commission consideration on January 20, 2011)

Recommendation Summary

The staff recommends that the Commission approve Oakland Harbor Partners', the City of Oakland's, and the Port of Oakland's BCDC Permit Application No. 7-06, which, as conditioned, would result in a mixed-use waterfront development to be constructed over approximately 15 years in four phases consistent with the conceptual plan set forth in Exhibit A. The project would result in:

1. Construction of up to 3,100 residential units. Most buildings would be six to eight stories. Five buildings would reach up to 240 feet in height;
2. Up to 200,000 square feet of ground-floor retail and commercial space distributed throughout the development;
3. Approximately twenty six acres of parks and open space, including the existing 8.6 acre Estuary Park;
4. Shoreline stabilization and 0.93 acres of high marsh habitat creation;
5. The demolition of approximately three acres of the Ninth Avenue Terminal wharf, the demolition of approximately 3.8 acres of the existing Terminal shed building to create a waterfront park, the seismic retrofit of the remaining portion of the Ninth Avenue Terminal wharf, and retention of approximately 20,000 square feet of the Terminal's bulkhead building for a variety of public trust uses; and
6. New public streets and sidewalks.

The staff recommendation includes a number of conditions requiring public access areas and improvements, the provision of interim shoreline access prior to and during construction, and a number of conditions requiring the use of construction best management practices to assure that construction of the project meets the requirements of the Commission's law and policies.

Staff Recommendation

The staff recommends that the Commission adopt the following resolution:

I. Authorization

A. Subject to the conditions stated below, the permittees, Oakland Harbor Partners, LLC, the City of Oakland, and the Port of Oakland, are hereby granted permission to construct the Brooklyn Basin Redevelopment Project, located between the Oakland Estuary and Embarcadero roadway, southeast of Jack London Square, in the City of Oakland, Alameda County. Authorized work includes the following:

1. **Estuary Park Subarea**

   a. **Within the 100-foot Shoreline Band:**

      (1) Construct, use and maintain approximately 53,000 square feet (1.2 acres) of landscaping and shoreline park improvements at Estuary Park consistent with a future plan developed by the City of Oakland and pursuant to Special Condition II-A, required herein. Bay Trail improvements include approximately 16 benches, at least one interpretive/historic marker, one vertical trail marker, three Bay Trail directional maps and a 30- to 40-foot-wide trail with separated bicycle and pedestrian pathways and landscaping.

2. **Channel Park Subarea**

   a. **In the Bay:**

      (1) **Shoreline Reconfiguration.** Excavate approximately 500 square feet of contaminated earth from an approximately 250-foot-long section of existing shoreline, place approximately 950 square feet of new backfill material, and place, use and maintain approximately 950 square feet of ACB mat and marsh plants to create new open water, shoreline protection and high tidal marsh; and

      (2) **Outfall.** Construct, use, and maintain one approximately 100-square-foot storm drain outfall near the terminus of 4th Avenue.

   b. **Within the 100-foot Shoreline Band:**

      (1) **Shoreline Reconfiguration.** Excavate approximately 51,500 square feet (1.2 acres) of contaminated earth from an approximately 1,200-foot-long section of existing shoreline, place approximately 51,500 square feet of backfill material, and place, use and maintain approximately 21,300 square feet (0.49 acres) of ACB mat and marsh plants, to create new open water, shoreline protection and high tidal marsh;

      (2) **Open Space Improvements.** Construct, use and maintain approximately 1,200 feet of pathway, landscaping and shoreline park improvements including approximately 14 benches, one Bay Trail directional map, and an approxi-

mately 30-foot-wide trail with separated bicycle and pedestrian pathways and landscaping, tying into the Lake Merritt Channel Bridge and Embarcadero pathways.

3. **South Park (West) Subarea**

   a. **In the Bay:**

      (1) **Shoreline Reconfiguration.** Excavate approximately 2,100 square feet (0.05 acres) of contaminated earth from an approximately 280-foot-long section of existing shoreline, place approximately 2,100 square feet of clean backfill material, and place, use and maintain approximately 2,100 square feet of ACB mat and marsh plants, to create new open water, shoreline protection and high tidal marsh; and

      (2) **Wetland Enhancement.** Place, use and maintain up to approximately 100 cubic yards of fill material to improve the existing wetland enhancement project at the mouth of Clinton Basin.

   b. **Within the 100-foot Shoreline Band:**

      (1) **Shoreline Reconfiguration.** Excavate approximately 20,650 square feet (0.47 acres) of contaminated earth from an approximately 650-foot-long section of existing shoreline, place approximately 20,650 square feet of clean backfill material, and place, use and maintain approximately 20,650 square feet of ACB mat and marsh plants, to create new open water, shoreline protection and high tidal marsh; and

      (2) **Open Space Improvements.** Construct, use and maintain an approximately 730-foot-long section of 35-foot-wide public access path, landscaping and shoreline park improvements including approximately 10 benches, one Bay Trail directional map, one interpretive/historic marker, and an approximately 30-foot-wide trail with separated bicycle and pedestrian pathways and landscaping.

4. **South Park (Clinton Basin) Subarea**

   a. **In the Bay:**

      (1) **Dock Removal.** Remove approximately 25,800 square feet (0.59 acres) of existing marina docks and associated floating fill from a closed marina;

      (2) **Shoreline Reconfiguration and Shoreline Protection.** Excavate approximately 33,000 square feet (0.76 acres) of contaminated earth from an approximately 970-foot-long section of existing shoreline embankment and place, use and maintain approximately 45,800 square feet (1.05 acres) of engineered fill and riprap on the east and west sides of Clinton Basin;

      (3) **Public Access.** Place, use and maintain a 23,100-square-foot (0.53 acres) portion of permanent pile-supported fill to create an approximately 30-foot-wide concrete public promenade along 1,340-foot of shoreline, and 33,000 square feet (0.76 acres) of permanent solid fill to create a public access plaza at Gateway Park. Overall public access improvements include approximately 36 benches, one Bay Trail directional map, two interpretive/historic markers, pedestrian-scale lighting and trash receptacles; and

      (4) **Outfalls.** Construct, use, and maintain three approximately 100-square-foot storm drain outfalls, one on each of the three sides of Clinton Basin.

b. **Within the 100-foot Shoreline Band:**

(1) **Mixed Use Development.** Construct, use and maintain approximately 104,300 square feet (2.39 acres) of mixed-use development with ground floor retail from 86- up to 240-foot-high residential buildings;

(2) **Shoreline Protection.** Excavate approximately 19,600 square feet (0.45 acres) from an approximately 1,340-foot-long section of existing shoreline and place, use and maintain approximately 19,600 square feet of engineered fill and riprap on the east and west sides of Clinton Basin;

(3) **Public Access.** Place, use and maintain an 18,700-square-foot (0.43 acres) portion of permanent pile-supported fill along 1,340 feet of shoreline to create an approximately 30-foot-wide concrete public promenades, and 41,100 square feet (0.94 acres) of permanent solid fill to create a public access plaza at Gateway Park; and

(4) **Roadway Improvements.** Construct, use and maintain an approximately 195-foot-long section of roadway and streetscape improvements within an approximately 3,900-square-foot (0.09 acres) portion of the Embarcadero roadway and within an approximately 14,700-square-foot (0.34-acre) portion of Main Street.

5. **Shoreline Park Subarea**

a. **In the Bay and within the 100-foot Shoreline Band:**

(1) **Open Water at Shoreline Park.** At the west end of the Ninth Avenue Terminal Wharf and at the west end of Shoreline Park, remove an approximately 160,000-square-foot (3.79 acre) shed building, remove up to 134,250 square feet (3.08 acres) of the wharf deck and substructure to create an open water area, and cut approximately 1,600 to 1,800 piles at least two feet below the mudline and remove to an authorized location outside the Commission's jurisdiction;

(2) **Open Water at Ninth Avenue Terminal Wharf Wooden Apron.** Along the south edge of the Ninth Avenue Terminal Wharf, remove an approximately 4,400-square-foot wooden apron and substructure to create open water, and cut approximately 100 piles at least two feet below the mudline and remove to an authorized location outside the Commission's jurisdiction;

(3) **Seismic Strengthening of the Ninth Avenue Terminal Wharf.** Repair, seismically strengthen and maintain the remaining portion of the Ninth Avenue Terminal Wharf and substructure for a public park by conducting either: (1) a steel pile retrofit consisting of a series of concrete frames supported by four large-diameter steel pipe piles; or (2) a wrapped-pile retrofit consisting of encasing the upper 6-feet of each pile with a fiberglass wrap and installing dowels through the wharf deck and into each pile;

(4) **Public Access at Shoreline Park.** Construct, use and maintain landscape and park improvements at the proposed approximately seven-acre Shoreline Park (2,130 feet of shoreline frontage), including a public fountain, approximately 40 benches, pedestrian-scale lighting, wharf railings, one Bay Trail directional map, four interpretive/historic markers, and a vertical trail marker;

(5) **Ninth Avenue Terminal Bulkhead Building.** Renovate, use and maintain an approximately 20,000 square-foot (0.34-acre) bulkhead building for uses consistent with the public trust (i.e., Maritime Museum, Community Center, Café);

(6) **Stormwater Detention Basin.** Construct, use, and maintain one approximately 24,600-square-foot (0.56 acres) stormwater detention basin as a "rain garden";

(7) **Former Train Trestle.** Repair, renovate, use and maintain an existing wooden train trestle for public access purposes;

(8) **Outfalls.** Construct, use, and maintain an approximately 150-square-foot storm drain outfalls adjacent to the 9th Avenue Terminal bulkhead building; and

(9) **Slope Dressing.** Place, use and maintain approximately 0.35 acres of riprap along approximately 430 feet of shoreline.

6. **In All Areas of the Commission's Shoreline Band Jurisdiction:**

a. **Temporary and Interim Uses and Improvements**. During project construction, construct, use and maintain temporary and interim uses and improvements, such as temporary roads and recreational trails (including the "Interim Public Access" required by Special Condition II-B-4), staging areas, construction trailers and construction laydown areas within the Commission's jurisdiction.

B. This authority is generally pursuant to and limited by the application, dated December 27, 2006, including all accompanying and subsequent correspondence and exhibits.

C. Work authorized herein must commence prior to December 31, 2012 or this permit will lapse and become null and void. Once commenced, all work within a particular phase as set forth in Special Condition II-B-6 and Exhibit D and authorized herein must be diligently pursued to completion and must be completed within 15 years of commencement or by December 31, 2027, whichever is earlier, unless an extension of time is granted by amendment of the permit.

D. In each of the four project phases, new fill will be placed and existing fill removed to provide public access, create marsh, protect the shoreline, and/or create new open water. At the end of the projected 15-years it will take to construct the project, the proposed development will result in a net increase in the size of the San Francisco Bay of 130,990 square feet (3.00 acres). As summarized in Table 1, below (the sums of which are aggregated by phase), the project will increase the Bay surface area by the reducing the total amount of existing solid fill, floating fill and pile-supported fill.

At Channel Park, excavation for shoreline protection and marsh creation will result in a 0.64-acre increase in Bay surface area. At South Park, similar work will result in a 0.01-acre increase in Bay surface area. At Clinton Basin, the net result of placing and removing solid fill for public access (including Gateway Park) will decrease the Bay surface area by approximately 0.54 acres, removal of existing floating docks will increase the Bay surface area by approximately 0.59 acres, and the construction of a pile-supported public access promenade will decrease the Bay surface area by approximately 0.84 acres. At Shoreline Park and the Ninth Avenue Terminal Wharf, the removal of existing solid fill (0.06 acres) and pile-supported structures (3.08 acres) will result in a net increase of Bay surface area.

Table 1. Fill Areas for the Project by Phases (in acres)

Type of Fill	Description	Removed	Placed	Total Net Fill
Phase I (2012-2015)				
Solid (ac)	Shoreline Park (Remove Wharf Pilings)	(0.06)	0	(0.06)
Floating (ac)		0	0	0
Pile-supported (ac)	Shoreline Park West, (Remove Ninth Ave. Terminal Wharf)	(3.08)	0	(3.08)
Phase 2 (2016-2020)				
Solid (ac)	Gateway Park, Channel Park Shoreline	(1.02)	0.92	(0.10)
Floating (ac)	Marina Docks	(0.59)	0	(0.59)
Pile-supported (ac)	Clinton Basin	0	0.84	0.84
Phase 3 (2020-2022)				
Solid (ac)	South Park (West) Shoreline	(0.01)	0	(0.01)
Floating (ac)		0	0	0
Pile-supported (ac)		0	0	0
Project				
Total Solid (ac)		(1.09)	0.92	(0.17)
Total Floating (ac)		(0.59)	0.00	(0.59)
Total Pile-supported (ac)		(3.08)	0.84	(2.24)
Overall Total Fill (ac)		**(4.76)**	**1.76**	**(3.00)**

With the exception of Estuary Park, there is currently no formal public access within the project boundary and the area is closed to public access. The proposed project includes a series of public parks interlinked by the Bay Trail. The proposed parks are: (1) Estuary Park (enhance the existing park); (2) Channel Park; (3) South Park (West); (4) South Park (Clinton Basin), including Gateway Park; and (5) Shoreline Park (Exhibit B). Prior to the construction of the new parks, subsurface contamination will be remediated pursuant to plans approved by the California Department of Toxic Substances Control. New site furnishings, including seating, trail markers, special lighting and way finding signage, will be added to each of the new or improved parks and access areas will be designed to meet current ADA requirements. The parks will be permanently guaranteed for public uses and maintained by an assessment district created by the project.

Table 2. Approximate Public Access Areas

Type of Public Access	Square Feet	Acres	New or Improved?
Estuary Park	80,500	1.85	Improved *
Channel Park	231,800	5.32	New
South Park (West)	88,500	2.03	New
South Park (Clinton Basin) including Gateway Park and promenades	135,050	3.10	New
Shoreline Park	576,100	13.22	New
TOTAL *	**1,111,950**	**25.5**	**New**

* Does not include 3.3 acres of existing dedicated public access at Estuary Park that was required as a BCDC condition of approval for the Jack London Aquatic Center.

II. Special Conditions

The authorization made herein shall be subject to the following special conditions, in addition to the standard conditions in Part IV:

A. **Conceptual and Final Plan Review**

1. **Advisory Board Review**.

   a. **Engineering Criteria Review Board**. Preliminary engineering plans and engineering criteria shall be reviewed by or on behalf of the Engineering Criteria Review Board (ECRB) prior to submittal to the staff for final approval pursuant to Special Condition II-A-3. The specific drawings required depend on the type of project and shall be as determined by the staff engineer or other appropriate Commission staff. Such materials shall demonstrate to the satisfaction of the ECRB that the permittees have adopted design criteria appropriate to the nature of the project and use of any structures constructed in connection therewith. Such criteria shall take into account the soil and foundation conditions at the site and potential earthquake-induced forces.

   b. **Design Review Board**. Preliminary plans for the phased public access areas and contiguous development authorized herein shall be reviewed by or on behalf of the Commission's Design Review Board (DRB) prior to submittal of construction documents to the staff for final approval pursuant to Special Condition II-A-3. It is anticipated that some plan review may be conducted at the staff level, with the Board reviewing site-specific, public access and open space plans for each development phase.

2. **Construction.** The final plans submitted pursuant to this condition shall generally conform to Exhibit A of this permit. Final construction plans for the structures authorized herein shall be prepared and submitted for Commission review as described below. No material changes to the design of the project shall be made without the prior written approval of the Commission staff.

3. **Final Plan Review**. No work whatsoever shall be commenced pursuant to this authorization until final precise site, demolition, construction staging, engineering, grading and drainage, architectural, layout, public access, landscaping, irrigation and best management practices plans and any other relevant criteria, specifications,

and plan information for that portion of the work have been submitted to, reviewed, and approved in writing by or on behalf of the Commission. Construction staging plans shall ensure that continuous public access is maintained within permanent and interim public access areas required herein, subject only to such interruptions as are reasonably necessary in conjunction with the development of the project and approved by or on behalf of the Commission. The specific drawings and information required will be determined by the staff. To save time, preliminary drawings should be submitted and approved prior to final drawings.

a. **Site, Architectural, Layout and Public Access Plans**. Site, demolition, construction staging, grading and drainage, architectural, layout, public access, landscaping, irrigation and best management practices plans shall include and clearly label the shoreline (Mean High Water Line or the inland edge of marsh vegetation where marsh is present), the line 100 feet inland of the line of the shoreline, property lines, roadways, the boundaries of all areas to be reserved for public access purposes, and details showing the location, types, dimensions, and materials to be used for all authorized improvements.

b. **Engineering Plans**. Engineering plans shall include a complete set of construction drawings and specifications and design criteria. The design criteria shall be appropriate to the nature of the project, the use of any structures, soil and foundation conditions at the site, and potential earthquake-induced forces. Final plans shall be signed by the professionals of record and be accompanied by:

   (1) Evidence that the design complies with all applicable codes; and

   (2) Evidence that a thorough and independent review of the design details, calculations, and construction drawings has been made.

c. **Horizontal Control Points**. As shown on plans required herein, the permittees shall install a minimum of four permanent horizontal control points of a type and at locations approved by or on behalf of the Commission. These control points shall be placed under the supervision of a registered civil engineer or land surveyor, and shall be accurately located and mapped in relation to each other, to the closest known existing control point or other acceptable fixed point in the project area, and to the limits of any proposed fill in the Bay. These control points shall be located so as to facilitate field checking, with simple equipment, of the limits of the fill authorized pursuant to this authorization. Such fill limits shall be dimensioned from these control points, or, if the scale of the drawing is adequate, it shall carry a note stating that field dimensions may be scaled from the drawing and the accuracy of such scaling, e.g., "Field dimensions to an accuracy of $\pm$ six inches may be scaled from the drawing." The control point locations shall be clearly shown on all plans submitted pursuant to Special Condition II-A.

d. **Preliminary and Final Plans**. Plans submitted shall be accompanied by a letter requesting plan approval, identifying the type of plans submitted, the portion of the project involved, and indicating whether the plans are final or preliminary. Approval or disapproval shall be based upon:

   (1) Completeness and accuracy of the plans in showing the features required above, particularly the shoreline (Mean High Water, deck edge or the inland edge of marsh vegetation where marsh is present), property lines, and the line 100-feet inland of the shoreline, and any other criteria required by this authorization;

(2) Consistency of the plans with the terms and conditions of this authorization;

(3) The provision of the amount and quality of public access to and along the shoreline and in and through the project to the shoreline required by this authorization;

(4) Consistency with legal instruments reserving public access areas;

(5) Assuring that any fill in the Bay does not exceed this authorization;

(6) Consistency of the plans with the recommendations of the Design Review Board and the Engineering Criteria Review Board;

(7) Assuring that appropriate provisions have been incorporated for safety in case of seismic event;

(8) Assuring that the placement of fill in the Bay will avoid or minimize impacts to the Bay;

(9) Assuring that appropriate elevations have been met to prevent overtopping, flooding, and 100-year storm events in all public access areas; and

(10) Assuring that existing public access will not be impeded during construction to the maximum extent feasible.

Plan review shall be completed by or on behalf of the Commission within 45 days after receipt of the plans to be reviewed.

4. **Conformity with Final Approved Plans**. All work, improvements, and uses shall conform to the final approved plans. Prior to any use of the facilities authorized herein, the appropriate design professional(s) of record shall certify in writing that, through personal knowledge, the work covered by the authorization has been performed in accordance with the approved design criteria and in substantial conformance with the approved plans. No noticeable changes shall be made thereafter to any final plans or to the exterior of any constructed structure, outside fixture, lighting, landscaping, signage, landscaping, parking area, or shoreline protection work without first obtaining written approval of the change(s) by or on behalf of the Commission.

5. **Discrepancies between Approved Plans and Special Conditions**. In case of any discrepancy between final approved plans and Special Conditions of this authorization or legal instruments approved pursuant to this authorization, the Special Condition or the legal instrument shall prevail. The permittees are responsible for assuring that all plans accurately and fully reflect the Special Conditions of this authorization and any legal instruments submitted pursuant to this authorization.

6. **Appeals of Plan Review Decisions**. Any plan approval, conditional plan approval or plan denial may be appealed by the permittees or any other interested party to the Design Review Board or, if necessary, subsequently to the Commission. Such appeals must be submitted to the Executive Director within 30 days of the plan review action and must include the specific reasons for appeal. The Design Review Board shall hold a public hearing and act on the appeal within 60 days of the receipt of the appeal. If subsequently appealed to the Commission, the Commission shall hold a public hearing and act on the appeal within 90 days of the receipt of the subsequent appeal.

B. **Public Access**

1. **Area.** The park and public access areas totaling approximately 25.5-acres, as generally shown on Exhibit A shall be made available exclusively to the public for unrestricted public access for walking, bicycling, sitting, viewing, fishing, picnicking, and related purposes. Within these areas, utilities may be placed underground and portions used to treat stormwater provided that such uses do not alter the primary public access use. On limited and rare occasions, if the permittees wish to use the required public access areas for other than the uses described above, the permittees must obtain written approval by or on behalf of the Commission 30 days prior to such use of the public access areas.

2. **Permanent Guarantee**. Prior to the completion of public access in any one development phase, as further described in Special Condition II-B-6, the permittees shall, by instrument or instruments acceptable to counsel for the Commission, dedicate to a public agency or otherwise permanently guarantee such rights for the public to the portion of the new and/or improved 25.5-acre public access areas(s), as shown on Exhibit A included in such phase. The instrument(s) shall create rights in favor of the public which shall commence no later than after completion of construction of any public access improvements required by this authorization and prior to the use of any structures authorized herein. Such instrument shall be in a form that meets recordation requirements of Alameda County and shall include a legal description of the property being restricted and a map that clearly shows the shoreline (Mean High Water Line or the inland edge of marsh vegetation where marsh is present), the property being restricted for public access, the legal description of the property and of the area being restricted for public access, and other appropriate landmarks and topographic features of the site, such as the location and elevation of the top of bank of any shoreline or levees, any significant elevation changes, and the location of the nearest public street and adjacent public access areas. Approval or disapproval of the instrument shall occur within 30 days after submittal for approval and shall be based on the following:

   (a) Sufficiency of the instrument to create legally enforceable rights and duties to provide the public access area required by this authorization;

   (b) Inclusion of an exhibit to the instrument that clearly shows the area to be reserved with a legally sufficient description of the boundaries of such area; and

   (c) Sufficiency of the instrument to create legal rights in favor of the public for public access that will run with the land and be binding on any subsequent purchasers, licensees, and users.

3. **Recordation of the Public Access Instrument.** Within 30 days after approval of the instrument, the permittees shall record the instrument on all parcels within the applicable phase of the property affected by this permit and shall provide evidence of recording to the Commission. No changes shall be made to the instrument after approval without the express written consent by or on behalf of the Commission. The instrument shall create rights in favor of the public which shall commence no later than the dates outlined in Special Condition II-B-6 for each development phase and shall continue so long as any use or improvements authorized herein remain. Such improvements shall be fully consistent with the plans approved pursuant to Special Condition II-A of this authorization and substantially conform to Exhibit A.

4. **Interim Public Access.** Until such time that permanent public access is provided pursuant to Special Condition II-B-5, the permittees shall construct a system of continuous, interim public access trails along the entire project shoreline. The implementation of the interim public access areas shall be conducted as follows:

   a. **Channel Park and the Ninth Avenue Terminal**. Within 12 months from the close of escrow of portions of the project site to Oakland Harbor Partners (OHP) by the City of Oakland, a municipal corporation acting by and through its Board of Port Commissioners (Port), and the execution of the ground lease of the balance of the project site to OHP from the Port, the applicants shall construct an interim trail along two segments of the project shoreline – at Channel Park and adjacent to the Ninth Avenue Terminal bulkhead building shown on Exhibit B. At Channel Park, the interim public access shall extend from the Embarcadero Bridge to the eastern limit of Channel Park, unless the existing water-related tenant is still in operation and precludes use of a portion of the shoreline. At the Ninth Avenue Terminal, the interim public access shall connect to the existing public access area at the northeast end of the project site (adjacent to the existing waterfront restaurant), continue across the existing wooden train trestle, and extend approximately 600 feet along the Ninth Avenue Terminal building where it may terminate. If allowed by tenant leaseholds in the remaining portion of the terminal building, the interim public access along the Ninth Avenue Terminal building shall extend an additional 500 feet to the southwestern end of the Ninth Avenue Terminal building.

   b. **All Other Shoreline Areas**. Upon completion of the first Phase I residential unit, or within five years from issuance of the first City of Oakland building permit, whichever is sooner, the permittees shall construct a 12-foot-wide interim trail along the remaining shoreline of the project site, including all areas where structures exist**.** In certain areas, interim access may not be possible directly contiguous with the shoreline because of safety or use conflicts associated with water-related tenants. In these cases, alternative interim access, as close to the shoreline as feasible, shall be provided.

   Interim public access shall include, at a minimum, a 12-foot-wide all-weather trail along an alignment approved by or on behalf of the Commission. The interim access area may include a chain link fence landward of the trail. However, the fence shall be set back at least five feet so as to not compromise public safety or public views to the Bay from the trail. It is anticipated that the interim public access will not include lighting and will be open from dawn to dusk. The trail shall be built within development Phases I, II, III and IV prior to the remediation of such phases, pending the approval of the California Department of Toxic Substances Control (DTSC). The permittees reserve the right to remove or suspend the use of the temporary trail only as necessary to allow for site remediation, project construction or to provide for public safety during project development. When trail closures are needed for public safety, site remediation, and construction, an alternative interim alignment shall be constructed or otherwise provided.

5. **Improvements Within the Total Public Access Area**. In accordance with the public access phasing requirements described in Special Condition II-B-6, the permittees shall install the following improvements, as generally shown on attached Exhibit B. Such improvements shall be consistent with the plans approved pursuant to Condition II-A and substantially conform to Exhibit B:

a. **Estuary Park Subarea.** An approximately 312,000-square-foot (7.2-acre) area with landscaping and shoreline park improvements at Estuary Park consistent with a future plan developed by the City of Oakland and approved by or on behalf of the Commission pursuant to Special Condition II-C, required herein. Bay Trail improvements shall include approximately 16 benches, at least one interpretive/historic marker, one vertical trail marker, three Bay Trail directional maps and a 30- to 40-foot-wide trail with separated bicycle and pedestrian pathways and landscaping.

b. **Channel Park Subarea**

(1) **Open Space Improvements.** An approximately 189,000-square-foot (4.3-acre) area with landscaping and shoreline park improvements at Channel Park. Trail improvements shall include approximately 14 benches, one Bay Trail directional map, and an approximately 30-foot-wide trail, with separated bicycle and pedestrian pathways and landscaping, connecting with the Lake Merritt Channel Bridge and Embarcadero pathways.

c. **South Park (West) Subarea**

(1) **Open Space Improvements.** An approximately 86,000-square-foot (2.0-acre) area with landscaping and shoreline park improvements at South Park (West). Trail improvements shall include a 35-foot-wide public access path, landscaping and shoreline park improvements including approximately 10 benches, one Bay Trail directional map, one interpretive/historic marker, and an approximately 30-foot-wide trail with separated bicycle and pedestrian pathways and landscaping.

d. **South Park (Clinton Basin) Subarea**

(1) **Public Access.** Two approximately 30-foot-wide concrete public promenades along 1,340-foot of shoreline, and a 2.9-acre public access plaza (including Gateway Park) at the head of Clinton Basin with approximately 36 benches, one Bay Trail directional map, two interpretive/historic markers, pedestrian-scale lighting and trash receptacles;

e. **Shoreline Park Subarea**

(1) **Public Access at Shoreline Park.** An approximately 7-acre Shoreline Park (2,130 feet of shoreline frontage), including a public fountain, approximately 40 benches, pedestrian-scale lighting, wharf railings, one Bay Trail directional map, four interpretive/historic markers, and a vertical trail marker;

(2) **Stormwater Detention Basin.** An approximately 24,600-square-foot (0.56 acres) stormwater detention basin as a "rain garden"; and

(3) **Former Train Trestle.** Modest public access improvements along the existing train trestle located northeast of the Ninth Avenue Terminal bulkhead building. The scope of improvements is anticipated to include ADA accessibility, connections to adjacent public access areas, and minor strengthening and/or rehabilitation of the substructure and decking.

6. **Public Access Phasing**. The permanent public access improvements required pursuant to Special Condition II-B-5 shall be installed in phases with the construction of the adjacent development area, as follows:

   a. **Bay Trail Improvements**. The permanent Bay Trail improvements for each phase as generally shown on Exhibits B and D shall be installed as follows:

      (1) **Phase 1**. Prior to either: (a) the issuance of a certificate of occupancy for the 1st residential unit in Phase 1; or (b) the date that is 5 years after the issuance of the first City of Oakland building permit for a vertical structure within the project, whichever occurs first;

      (2) **Phase 2**. Prior to either: (a) the issuance of a certificate of occupancy for the 1st residential unit in Phase 2; or (b) the date that is 8 years after the issuance of the first City of Oakland building permit for a vertical structure within the overall project, whichever occurs first;

      (3) **Phase 3**. Prior to either: (a) the issuance of a certificate of occupancy for the 1st residential unit in Phase 3; or (b) the date that is 11 years after the issuance of the first City of Oakland building permit for a vertical structure within the overall project, whichever occurs first;

      (4) **Phase 4**. Prior to either: (a) the issuance of a certificate of occupancy for the 1st residential unit in Phase 4; or (b) the date that is 14 years after the issuance of the first City of Oakland building permit for a residential structure within the overall project, whichever occurs first;

   b. **Balance of the Per Phase Public Access Improvements**. All public access improvements required under Special Condition II-B-5 in each phase, as generally shown on Exhibits B and D shall be completed as follows:

      (1) **Phase 1**. Prior to either: (a) the issuance of the 550th certificate of occupancy for a residential unit in the project; or (b) the date that is 5 years after the issuance of the first City of Oakland building permit for a residential structure within the overall project, whichever occurs first;

      (2) **Phase 2**. Prior to either: (a) the issuance of the 1,650th certificate of occupancy for a residential unit in the project; or (b) the date that is 8 years after the issuance of the first City of Oakland building permit for a residential structure within the overall project, whichever occurs first;

      (3) **Phase 3**. Prior to either: (a) the issuance of the 2,340 th certificate of occupancy for a residential unit in the project; or (b) the date that is 11 years after the issuance of the first City of Oakland building permit for a residential structure within the overall project, whichever occurs first.

      (4) **Phase 4**. Prior to either: (a) the issuance of the 2,800 th certificate of occupancy for a residential unit in the project; or (b) the date that is 14 years after the issuance of the first City of Oakland building permit for a residential structure within the overall project, whichever occurs first.

7. **Public View Corridor.** The permittees shall provide no fewer than six dedicated view corridors as generally shown on Exhibit C. Any structures within the dedicated view corridor, including the public access improvements required herein, shall require

plan review approval pursuant to Special Condition II-A of this permit, to ensure that views of the Bay from the Embarcadero roadway and other public areas are not adversely affected by proposed structures or landscaping.

8. **View Corridor Dedication or Restriction Document.** No later than the dates outlined in Special Condition II-B-6 for each development phase, the permittees shall submit to the Commission's Executive Director a legal instrument that dedicates to a public entity other than the Bay Commission or otherwise restrict in perpetuity as open space for visual access purposes the corridors as required by Special Condition II-B-7, above. The instrument shall include a map that shows the shoreline (Mean High Water Line, edge of seawall or inland edge of marsh vegetation) and a metes and bounds description of the area being restricted as open space and shall be in a form suitable for recording in the Alameda County.

   The Executive Director shall review and either approve or disapprove the proposed instrument within 30 days of its receipt. Approval or disapproval shall be based on the sufficiency of the instrument to create the required open space condition. If the Executive Director approves the instrument, the permittees shall record the instrument on all parcels affected by the instrument within 30 days of its approval and shall thereafter provide the Commission with a copy of the recorded instrument. If the Executive Director disapproves the instrument, the permittees shall correct all deficiencies and resubmit the corrected instrument for further staff review within 30 days of receipt of the written notification of disapproval. The Executive Director shall then review the corrected instrument in accordance with this review procedure, and the permittees shall record the approved instrument on all parcels affected by the instrument within 30 days of its approval.

9. **Maintenance**. The areas and improvements within the public access areas totalling 25.5 acres described above and the 3.3-acre Estuary Park shall be permanently maintained by and at the expense of the permittees or their assignees. Such maintenance shall include, but is not limited to: repairs to all path surfaces; replacement of any plant materials that die or become unkempt; repairs or replacement as needed of any public access amenities such as signs, benches, trash containers, and lights; periodic cleanup of litter and other materials deposited within the access areas; removal of any encroachments into the access areas; assurance that the public access signs remain in place and visible; and repairs to or adaptation of any public access areas or improvements that are damaged by future subsidence, uneven settlement, or flooding, or inundation caused by sea level rise, including raising land elevations or redesigning public access features to protect and ensure the usability of the public access areas and improvements at all times. Within 30 days after notification by staff, the permittees shall correct any maintenance deficiency noted in a staff inspection of the site. The permittees shall obtain approval by or on behalf of the Commission of any maintenance that involves more than in-kind repair and replacement.

10. **Assignment.** The permittees may transfer maintenance responsibility to a public agency, Community Facilities District or another party acceptable to the Commission at such time as the property transfers to a new party in interest but only provided that the transferee agrees in writing, acceptable to counsel for the Commission, to be bound by all terms and conditions of this permit.

11. **Reasonable Rules and Restrictions.** The permittees may impose reasonable rules and restrictions for the use of the public access areas to correct particular problems that may arise. Such limitations, rules, and restrictions shall have first been approved in writing by or on behalf of the Commission upon a finding that the proposed rules

will not significantly affect the public nature of the area, will not unduly interfere with reasonable public use of the public access areas, and will tend to correct a specific problem that the permittees have both identified and substantiated. Rules may include restricting hours of use and delineating appropriate behavior.

C. **Estuary Park**. Prior to the issuance of a certificate of occupancy for the 1st residential unit in Phase 1, or five years from the issuance of the first building permit for Phase 1, the permittees shall design and construct a new public park within the public access areas located to the west of the Lake Merritt Channel consistent with conceptual plans approved by the City of Oakland. The conceptual park design shall be reviewed and approved by or on behalf of the Commission pursuant to the requirements of Special Condition II-A, herein.

D. **Future Public Access Connection to Neighboring Parcel.** The permittees shall enable the construction of a future public access connection between its property and the neighboring parcel(s) to facilitate the completion of the Bay Trail. Within one year of commencement of construction of any shoreline public access area on a neighboring parcel, the permittees shall install improvements to create a physical connection to the new public access areas from the public access areas required herein. At such time, the permittees shall reasonably coordinate the design, construction, and maintenance with the permittees of the adjacent parcel(s) to create a continuous and seamless transition between the public access areas, including landscaping. The exact manner in which the connection is made shall be reviewed, and if adequate, approved by or on behalf of the Commission pursuant to Special Condition II-A.

E. **Riprap**

1. **Riprap Material.** Riprap material shall be either quarry rock or specially cast or carefully selected concrete pieces free of reinforcing steel and other extraneous material and conforming to quality requirements for specific gravity, absorption, and durability specified by the California Department of Transportation or the U. S. Army Corps of Engineers. The material shall be generally spheroid-shaped. The overall thickness of the slope protection shall be no more than three feet measured perpendicular to the slope. Use of dirt, small concrete rubble, concrete pieces with exposed rebar, large and odd shaped pieces of concrete, and asphalt concrete as riprap is prohibited.

2. **Riprap Placement.** Riprap material shall be placed so that a permanent shoreline with a minimum amount of fill is established by means of an engineered slope not steeper than two (horizontal) to one (vertical). The slope shall be created by the placement of a filter layer protected by riprap material of sufficient size to withstand wind and wave generated forces at the site.

3. **Riprap Plans**

   a. **Design.** Professionals knowledgeable of the Commission's concerns, such as civil engineers experienced in coastal processes, should participate in the design of the shoreline protection improvements authorized herein.

   b. **Plan Review**. No work whatsoever shall be commenced on the shoreline protection improvements authorized herein until final riprap plans have been submitted to, reviewed, and approved in writing by or on behalf of the Commission. The plans shall consist of appropriate diagrams and cross-sections that (1) show and clearly label the five-foot (NGVD) contour line (the mean high tide line or the inland edge of marsh vegetation), property lines, grading limits,

and details showing the location, types, and dimensions of all materials to be used, (2) indicate the source of all materials to be used, and (3) indicate who designed the proposed shoreline protection improvements and their background in coastal engineering and familiarity with the Commission's concerns. Approval or disapproval of the plans shall be based upon (1) completeness and accuracy of the plans in showing the features required above, (2) consistency of the plans with the terms and conditions of this permit, (3) assuring that the proposed fill material does not exceed that which is authorized this permit, (4) the appropriateness of the types of fill material and their proposed manner of placement, and (5) the preparation of the plans by professionals knowledgeable of the Commission's concerns, such as civil engineers experienced in coastal processes. All improvements constructed pursuant to this permit shall conform to the final approved plans. No changes shall be made thereafter to any final plans or to the constructed shoreline protection improvements without first obtaining written approval of the change(s) by or on behalf of the Commission.

4. **Maintenance.** The shoreline protection improvements authorized herein shall be regularly maintained by, and at the expense of the permittees, any assignee, or other successor in interest to the project. Maintenance shall include, but not be limited to, collecting any riprap materials that become dislodged and repositioning them in appropriate locations within the riprap covered areas, replacing in-kind riprap material that is lost, repairing the required filter fabric as needed, and removing debris that collects on top of the riprap. Within 30 days after notification by the staff of the Commission, the permittees or any successor or assignee shall correct any maintenance deficiency noted by the staff.

F. **Seismic Instrumentation Plan.** The permittees shall develop and submit to the Commission's Engineering Criteria Review Board (ECRB), for final review and approval, a comprehensive seismic instrumentation plan for the newly filled areas pursuant to the following requirements:

1. **Seismic Instrumentation Advisory Panel.** The permittees shall seek the advice of experts on seismic instrumentation to inform the permittees on the development of a comprehensive seismic instrumentation program. The advisors should consist of members with expertise in structural engineering, seismic engineering, seismic instrument specialists, and may consist of members from the California Geological Survey ("CGS") Structures Advisory Panel.

2. **Preliminary Design Stage.** Prior to construction of the new solid fill or pile-supported fill at Clinton Basin, or the seismic retrofit work at the Ninth Avenue Terminal wharf, the permittees shall submit a preliminary draft seismic instrumentation plan ("Draft Plan") to the Commission staff, for review and comment by the ECRB. The Draft Plan shall be developed by the permittees, based on feedback from the Advisory Panel at approximately 25 to 50 percent design stage and shall, at a minimum, contain the following information:

   a. The number, type, and tentative location of sensors such as accelerometers, displacement meters, and other sensors as needed to be placed at the Ninth Avenue Terminal wharf, and other filled areas, such as the public promenades and the Gateway Park plaza. The sensors shall be plotted on cross-sections showing the filled areas, and the geologic materials beneath the filled areas;

b. Information on the transmission and recording of signals from the sensors so that relative timing can be achieved for each of the recorded signals in filled areas with accuracies of 1 -2 milliseconds;

c. Interrogation capabilities via telephone, internet or direct computer link for immediate retrieval of recordings and instrument status; and

d. Any initial recommendations from the Advisory Panel.

The ECRB shall review the Draft Plan and provide comments to the permittees at a scheduled ECRB meeting.

3. **Final Design Stage.** The permittees shall revise the Draft Plan based on comments provided by the ECRB and feedback from the Advisory Panel and prepare and submit a final seismic instrumentation plan ("Final Plan") to the Commission staff. If deemed necessary by the ECRB, the Final Plan shall be reviewed and commented upon by the ECRB. The Final Plan shall be developed by the permittees at the 100 percent design stage and approved by or on behalf of the Commission prior to installation of the seismic instrumentation.

4. **Instrumentation Installation.** Within 6 months from construction of the filled areas described above, the permittees shall complete installation of the seismic instrumentation pursuant to the Final Plan and provide written notice to the Commission staff of its completion. The notice shall also summarize any problems or issues that may have arisen during the installation process.

G. **In-Kind Repairs and Maintenance.** Any in-kind repairs and maintenance of all areas shall only use construction material that is approved by relevant Government agencies for use in San Francisco Bay. Construction shall only occur during current approved months during the year to avoid potential impacts to fish and wildlife. Commission staff should be contacted to confirm current restrictions. Repair and maintenance work shall be confined to existing structural footprints and shall not result in the enlargement of the existing wharf, pier or other pile supported or floating structures.

H. **Mitigation to Offset Impacts to Bay Resources and Marsh Restoration**

1. **Marsh Creation.** Prior to the commencement of any work at any location pursuant to this authorization, the permittees shall submit a marsh restoration plan and program, to be approved by or on behalf of the Commission for the restoration and enhancement of tidal wetlands totaling approximately 0.65 acres located along the shoreline, primarily along Channel Park and South Park shorelines. The plan and program shall be constructed generally in accord with the plans approved by or on behalf of the Commission and shall contain the following:

a. **Site Conditions and Modifications.** A topographic map of the site in one-foot contours and a topographic map showing the proposed modifications. All elevations shall be relative to National Geodetic Vertical Datum (NGVD or NAVD). The map shall include typical cross-sections showing proposed elevation of the marsh plain, any channels, and any high spots. The map shall show: (1) figures for the ratios of typical horizontal to vertical slopes for existing and proposed marsh surface and channels; (2) proposed plant species along the cross-sections according to their expected zone of growth; (3) the elevation of adjacent surrounding properties; and (4) the estimated elevations of Mean Higher High

Water, Mean High Water, Mean Lower Low Water, Mean Sea Level, the maximum predicted tide, and the 100-year tide. To promote natural sedimentation and colonization of the site, constructed elevations shall generally be six to twelve inches below target elevations;

b. **Soil and Water Information**. The program shall include a report identifying the type of soils found at the site and the soil type of any fill to be imported to the site. Information shall be provided on the quantitative soil measurements of salinity, pH, organic content, and bulk density. All imported soils must be within 10% of the range of values found at the reference marsh for soil qualities such as grain size, organic content, salinity, and pH. Information shall also be provided on the water, including water analysis of salinity, pH, biochemical oxygen demand (BOD), dissolved oxygen (DO), and, if appropriate, heavy metals;

c. **Schedule.** The program shall include a schedule indicating when excavation, fill, and grading will occur, the time to be allowed for settlement, the time when temporary isolation berms will be removed and the time when planting, if any, will occur. The schedule will ensure that there will always be a net increase in Bay surface area within any project phase. The marsh creation at Channel Park shall occur either prior to or concurrent with the placement of solid fill at Gateway Park. The program shall include an estimate of the extent of expected sedimentation over a ten-year period;

d. **Identification of a Suitable Reference Site**. The permittees shall identify nearby reference sites that shall be evaluated as part of the monitoring program or that has recent reports describing plant composition, coverage, growth rates, and shall provide a reference for evaluating the progress of the restoration site; and

e. **Monitoring**. Every other year, starting within one year of fill placement, for a ten-year period, or until those portions of the restoration site subject to tidal action are approximately 95% vegetated as compared with nearby reference marshes, whichever occurs first, the permittees shall report to the Commission on the effects of the project in restoring tidal marsh and transitional habitat at the restoration site. The report shall include measuring sedimentation rates, percentage of the site revegetated, plant survival, approximate percentage representation of different plant species, and a qualitative assessment of plant growth rates for the tidal restoration area, including adjacent transitional and upland habitats. Undesirable exotic plant species such as pepperweed (*Lepidium latifolium*), *Spartina alterniflora*, broom, or star thistle shall be reasonably controlled (coverage of less than 5 percent of their expected zone of growth) during the ten-year monitoring period. Should adverse conditions be identified during the ten-year monitoring period, the permittees shall take corrective action as specified by or on behalf of the Commission.

2. **Removal of a Portion of Ninth Avenue Wharf.** Prior to the occupancy of the first residential unit in Phase I, the permittees shall remove approximately 134,250 square feet (3.08 acres) of the wharf deck and substructure at the west end of the Ninth Avenue Terminal Wharf to create open water. The permittees shall cut approximately 1,600 to 1,800 pilings at least two feet below the mudline and remove the material to an authorized location outside of the Commission's jurisdiction (see Exhibit B).

I. **South Park (West) Wetland Enhancement.** The permittees shall, in coordination with the BCDC staff, improve as deemed appropriate, the existing wetland enhancement project at the mouth of Clinton Basin authorized in BCDC Permit No. M02-48 issued to the Port of Oakland. It is anticipated that the extent of the necessary work will be minor in scope, will be aimed at improving the habitat value of existing wetland, and will be designed to reflect the natural processes at the site, including but not limited to soil compaction, sand deposition and adjacent human activities. Any site modifications will be monitored with the wetlands created at Channel Park and South Park.

J. **Construction Activities and Materials**

1. **Certification of Contractor Review.** Prior to commencing any grading, demolition, or construction, the general contractor or contractors in charge of that portion of the work shall submit written certification that s/he has reviewed and understands the requirements of the permit and the final BCDC-approved plans, particularly as they pertain to any public access or open space required herein, or environmentally sensitive areas.

2. **Construction Operations and Debris Removal**. All construction operations shall be performed to prevent construction materials from falling, washing or blowing into the Bay or drifting and becoming a navigation or pollution hazard. In the event that such material escapes or is placed in an area subject to tidal action of the Bay, the permittees shall immediately retrieve and remove such material at its expense. All construction debris shall be removed to an authorized location outside the jurisdiction of the Commission. In the event that any such material is placed in any area within the Commission's jurisdiction, the permittees, their assignees, or successors in interest, or the owners of the improvements, shall remove such material, at their expense, within ten days after it has been notified by the Executive Director of such placement.

3. **Construction Timing**. All in–Bay construction, demolition and removal activities shall be confined to the dry months of May to October to minimize disturbance to migratory waterfowl and nesting resident birds. Construction activities conducted during the nesting season for breeding raptors and passerine birds, including Cooper's Hawk, shall be limited to outside the breeding season. Preconstruction surveys of all potential nesting habitat shall be conducted and, if species are present, no-disturbance zones shall be created to minimize any potential impacts on these species.

4. **Pile Driving Restrictions**

   a. **Pile Driving Method**. The permittees shall use a vibratory hammer to install all steel piles in the Bay to avoid potential impacts to fish species from elevated underwater sound pressure levels. If geotechnical studies indicate that an impact hammer is necessary due to unforeseen hard driving conditions, the permittees shall inform the Commission in writing that an impact hammer is needed, shall limit pile-driving to between June 1 and November 30 of each year to minimize impacts to fish species such as steelhead trout and Chinook and coho salmon, shall use a wood cushion between the pile and impact hammer, and shall limit pile-driving during periods of minimal current (slack tide). If it is not feasible to use a wood cushion, the permittees shall use an air bubble curtain to attenuate sound levels from the steel piles, or shall assure that sound pressure levels generated from the pile-driving are below 150 decibels at 10 meters or do not exceed the maximum decibels and accumulated sound pressure levels established by NOAA Fisheries. Any pile driving work occurring outside of the

work windows described above shall be conducted in accordance with NOAA Fisheries directives. If an air bubble curtain is used, a qualified biologist shall monitor pile driving to ensure that the air bubble curtain is functioning properly and project-generated sound waves do not exceed the required thresholds.

5. **Pile Removal.** All piles to be removed under this permit shall be cut at least two feet below the mudline to ensure adequate navigational safety.

6. **Creosote Treated Wood.** No pilings or other wood structures that have been pressure treated with creosote shall be installed in any area subject to tidal action in the Bay within the Commission's jurisdiction as part of the project authorized herein. Existing creosote pilings may be left in place to support the wooden train trestle and the seismically retrofitted Ninth Avenue Terminal.

K. **Fish and Wildlife Protection**

1. **Herring Restrictions**. If work occurs in the water during the herring spawning or hatching season (December through February), a professional biologist or other individual competent to identify herring spawning activity shall inspect the project site three times a week during the construction operations occurring between December 1 and February 28 of any year. If herring spawning is detected by the on-site biologist or qualified individual, Department of Fish and Game personnel, or the Commission staff, all construction in the water shall cease for a minimum of 14 days and shall continue suspended until it can be determined by the on-site biologist or qualified individual, Department of Fish and Game personnel, or the Commission staff that the herring hatch has been completed and larval herring concentrations have left the site. To facilitate rapid and efficient communication under these circumstances, the permittees shall provide the Commission staff and Department of Fish and Game personnel with all necessary telephone numbers and other contact information. Construction in the water may be resumed thereafter at the sole discretion of the permittees and the Commission staff, but shall be terminated if further spawning takes place at the site.

2. **Marine Mammals.** If marine mammals are observed within 1,000 feet of the project site, pile driving shall cease and only resume **once** the mammals have completely exited the project site.

3. **Best Management Practices.** For all in-Bay operations and work activity, the permittees shall use silt curtains and gunderbooms that isolate the work areas and prevent silt and sediment from entering the Estuary. To further reduce turbidity or changes in water quality, excavation and dredging operations shall be conducted from land, where feasible.

L. **Water Quality Protection.** Prior to the commencement of work authorized by this permit, the permittees shall provide a copy of the Water Quality Certification and Waste Discharge Requirements for the authorized project following issuance and receipt of said document from the California Regional Water Quality Control Board (Water Board), San Francisco Bay Region. If said Water Quality Certification requires the permittees to perform work within the Commission's jurisdiction that is not specifically authorized by this permit, the permittees shall obtain authorization for that work from the Commission through an amendment to this permit. The permittees shall also employ all measures described in the Water Board's Water Quality Certification and Waste Discharge Requirements to ensure that effects to water quality from construction activities are minimized.

M. **Foundation Layout Inspection**

1. **Written Request.** Prior to constructing any building forms for any structure that will be located in or adjacent to BCDC's 100-foot-wide shoreline band or required public access or open space area, the permittees shall request in writing an inspection by the Commission staff of the foundation layout as it has been surveyed and staked in the field relative to MHW or 5 feet mean sea level in marshland.

2. **Certificate of Foundation Layout Inspection.** Within five working days of receipt of the written request for an inspection, the Commission's staff will inspect the foundation layout as it has been surveyed and staked in the field for any structure that will be located in or adjacent to BCDC's 100-foot-wide shoreline band or required public access or open space area. The permittees shall not commence construction of the forms or pour the foundation until the staff has confirmed in writing that the foundation layout is consistent with the terms and conditions of the permit by providing the permittees with a Certificate of Foundation Layout Inspection.

3. **Responsibility of Permittees.** If the staff is unable to perform this inspection within the 5-day period, the permittees may commence such work, but the staff's inability to complete such an inspection does not relieve the permittees of the responsibility to provide public access areas and build any structures (the project) in accord with the approved plans.

N. **Certificate of Occupancy or Use**. Prior to occupancy or use of any of the phased improvements authorized herein, the permittees shall submit the Notice of Completion and Compliance required herein and request in writing an inspection of the project site by the Commission staff. Within 30 days of receipt of the written request for an inspection, the Commission's staff will: (1) review all permit conditions; (2) inspect the project site; and (3) provide the permittees with written notification of all outstanding permit compliance problems, if any. The permittees shall not occupy or make use of any improvements authorized herein until the staff has confirmed that the identified permittees compliance problems have been satisfactorily resolved and has provided the permittees with a Certificate of Occupancy or Use. Failure by the staff to perform such review and inspection and notify the permittees of any deficiencies of the project within this 30-day period shall not deem the project to be in compliance with the permit, but the permittees may occupy and use the improvements authorized herein.

O. **Recording**. The permittees shall record this permit or a notice specifically referring to this permit on all parcels affected by this permit with the City and County of Alameda within 30 days after execution of the permit issued pursuant to this authorization and shall, within 30 days after recordation, provide a copy of the recorded permit to the Commission.

P. **Notice of Assignment**

1. **Notice to Buyers**. Prior to entering into any agreement to transfer any interest in any property subject to this permit, the permittees, or any assignee(s) of this permit or any part of it, shall provide the third party with a copy of this permit and shall call his or her attention to any provisions regarding public access or open space or the need to obtain approval of construction plans prior to the commencement of any construction. This condition does not apply to purchasers of single units.

2. **Assignment of Permit.** No more than ten days after transferring any interest in any property subject to this permit to another party, the transferor(s) shall (a) notify the Commission of the nature of the transfer, the name, address, and telephone number of the transferee, and the effective date of the transfer, and (b) shall also submit an assignment of this permit for the area transferred that has been executed by the transferor and the transferee and that indicates that the transferor has transferred the permit as it applies to the property that was transferred and that the transferee has read, understood, and has agreed to be bound by the terms and conditions of this permit. This condition does not apply to purchasers of single units

Q. **Hold Harmless, Defend, and Indemnify**. The permittees shall hold harmless, defend, and indemnify the State of California, its agencies and departments, including the Commission, and its agents and employees, including all Commission members and Commission employees, from any and all claims, demands, losses, lawsuits, and judgments accruing or resulting to any person, firm, corporation, governmental entity, or other entity who may be injured or damaged by work performed in accordance with the terms and conditions of this permit. This condition shall also apply to any damage caused by flooding of or damage to property that is alleged to be caused as a result of some action or lack of action by the State of California, the Commission and the State's other agencies and departments growing out of the processing of this permit.

R. **Abandonment**. If, at any time, the Commission determines that the improvements in the Bay authorized herein have been abandoned for a period of two years or more, or have deteriorated to the point that public health, safety or welfare is adversely affected, the Commission may require that the improvements be removed by the permittees, its assignees or successors in interest, or by the owner of the improvements, within 60 days or such other reasonable time as the Commission may direct.

S. **Enforcement Program and Civil Penalties**. The Commission has an enforcement program that reviews its permits for compliance. The Commission may issue cease and desist and civil penalty orders if violations are discovered. The McAteer-Petris Act provides for the imposition of administrative civil penalties ranging from $10 to $2,000 per day up to a maximum of $30,000 per violation. The Act also provides for the imposition of court-imposed civil penalties of up to $30,000 in addition to any other penalties, penalties for negligent violations of between $50 and $5,000 per day, knowing and intentional penalties of between $100 and $10,000 per day, and exemplary penalties, which are supplemental penalties, in an amount necessary to deter future violations. In addition, anyone who places fill, extracts materials, or makes any substantial change in use of any water, land or structure within the area of the Commission's jurisdiction without securing a permit from the Commission is guilty of a misdemeanor.

III. Findings and Declarations

This authorization is given on the basis of the Commission's findings and declarations that the work authorized herein is consistent with the McAteer-Petris Act, the *San Francisco Bay Plan*, the California Environmental Quality Act, and the Commission's amended coastal zone management program for San Francisco Bay for the following reasons:

A. **Use.** Bay Plan Map No. Five of the *San Francisco Bay Plan* designates Estuary Park, an approximately 8.6 acre area within the proposed development boundaries, as a Waterfront Park Priority Use Area. No change to the boundary of that priority use designation is proposed. Estuary Park currently contains, a launching ramp, a public parking lot, the Jack London Aquatic Center, a low public dock for non-motorized small boat access, boat slips for approximately eight sailboats, a fishing pier, a waterfront trail, a

large grass area, and a picnic area. The project proposal includes changing the existing worn waterfront trail into a separated bicycle and pedestrian Bay Trail with shoulders and landscaping to accommodate greater demand. Further, the project will facilitate the redesign of Estuary Park. The new park design will be a product of a community planning process that will occur in the future. Because all the uses proposed within Estuary Park are for park uses, the Commission finds that the uses are consistent with the priority use area designation.

B. **Bay Fill.** The Commission may allow fill only when it meets the fill requirements identified in Section 66605 of the McAteer-Petris Act, which states, in part: (a) the public benefits from fill must clearly exceed the public detriment from the loss of water areas, and fill should be limited to water-oriented uses, including water-oriented recreation and public assembly; (b) no alternative upland location exists for the uses proposed on fill; (c) the fill should be the minimum amount necessary; (d) the fill should minimize harmful effects to the Bay including the Bay's water volume, circulation, water quality, and fish and wildlife resources; (e) the fill should be constructed in accordance with sound safety standards; and (f) the fill should be authorized when the applicant has valid title to the affected property.

1. **Public Benefit v. Public Detriment and Water-Oriented Use.** Most of the project's proposed fill will be used to provide public access, provide a permanent shoreline, create a living shoreline, or seismically retrofit existing structures over the Bay. Specifically, the proposed new fill will: (1) seismically strengthen the remaining Ninth Avenue Terminal wharf to create a 9.7-acre park, including the rehabilitated terminal bulkhead building, on top of the wharf; (2) improve public access to the Bay by creating two 30-foot-wide, pile-supported promenades at Clinton Basin; (3) create a neighborhood bayfront public plaza (Gateway Park) in the center of the development; and (4) repair existing and install new shoreline revetments to protect the shoreline and improve shoreline appearance. The rehabilitated bulkhead building will be used for public trust consistent uses, such as a restaurant, maritime museum, and/or community center, all considered Bay-oriented commercial recreation and/or public assembly uses.

   In its informal opinion of October 8, 1986, the Attorney General's office advised the Commission that when a proposed development upon a pier involves work to the pier itself or its substructure, the scope of the Commission's permit review, and whether the water-oriented use requirement is triggered, varies with the physical extent, nature and purpose of the work. The Attorney General's office advised the Commission that routine repairs, such as those that are necessary to keep pace with the ordinary wear and tear suffered by an existing structure, that do not change the essential utility of the structure, or allow the structure to be perpetuated indefinitely through the periodic repetitions of such work, will not extend the Commission's Bay jurisdiction to piers that were constructed prior to September 17, 1965, the date the Commission obtained its permit jurisdiction over San Francisco Bay. However, the Attorney General's Office also advised that "…[A]nything beyond such routine repairs tends toward creation of what is essentially a 'new' structure, in that the structure is, at the very least, one that is significantly different from what existed prior to the work in terms of its utility or life expectancy or time period that will be necessary to amortize its overall cost….Accordingly, any such work on a pier should be treated as 'further filling' of the Bay within the meaning of Section 66605, and must be assessed for the water-oriented nature of the uses supported by the pier."

The proposed seismic strengthening and repair of the Ninth Avenue Terminal wharf go beyond routine repairs because the proposed improvements will significantly extend the life of this structure. Therefore, the Commission views the retrofitted Ninth Avenue Terminal wharf and bulkhead building as if they were located in the Commission's Bay jurisdiction under the McAteer-Petris Act and the Bay Plan, and any uses on the wharf and bulkhead building must be consistent with the McAteer-Petris Act requirements for Bay fill. Because a significant percentage of the project's overall public access relies on converting the 1920s pile-supported wharf to a public access bayfront "green", the permittees propose improving the pier sufficiently that it will withstand a credible seismic event to ensure that the proposed public access on the wharf is available for the life of the project.

At Clinton Basin, approximately three-quarters of an acre of solid fill is proposed at the north end of the basin for public access (Gateway Park). According to the applicants, the fill will improve the public benefit of the overall project.

The application states:

> "The vision for the project's waterfront is a continuous series of parks and pedestrian and bicycle pathways. In order to realize this vision it is necessary to create a central park linking the parks and pathways of the two peninsulas where Clinton Basin meets the Embarcadero. The size and location of the Gateway Park are intended to create this link and become a gathering place for public events such as farmers markets and street fairs."

The Commission's Design Review Board concurred with the project proposal for Gateway Park, stating that the "Bay fill for public access around Clinton Basin will be beneficial to the scheme and is an important enhancement to the project."

Approximately 0.84 acres of pile-supported fill will be placed to create public promenades on the north and south sides of Clinton Basin. These 30-foot-wide promenades are intended to create a different public access experience than is typically provided along the shoreline of the Bay. The Commission's Design Review Board concurred with this design approach, stating that the urban quality of Clinton Basin will be beneficial to the public and that the shoreline should have a vertical edge at Clinton Basin and amenities that support that urban quality.

Additionally, some fill will be placed to repair existing revetments and to improve shoreline appearance in other areas of the project site where riprap currently exists.

For these reasons, the Commission finds that the public benefits associated with the fill for the project exceed the public detriment from the placement of that fill and that the fill serves water-oriented uses or is otherwise permissible within the Commission's Bay jurisdiction as fill for the Public Trust consistent uses.

2. **No Alternative Upland Location.** As discussed above, the project proposes some fill to improve shoreline protection and shoreline appearance. Much of the existing waterfront edge consists of debris, concrete rubble, various sizes of riprap, and abandoned structures. The application states, "[t]he fill along the east and west of Clinton Basin is necessary to…provide the necessary shoreline protection to prevent erosion." No alternative upland location exists for protecting the shoreline against wave energy.

   Some fill is proposed for two pile-supported promenades and a public plaza at the north end of Clinton Basin. The permittees believe the pile-supported promenades will bring people closer to the water than would otherwise be possible if located

above and away from the fluctuating tides. The application states, "by locating the urban promenade over the water, the project's overall public access plan will be improved, offering the public a unique shoreline access opportunity that does not currently exist at other Oakland locales." This approach is consistent with the Bay Plan's public access policies and with the Commission's Design Review Board advice, which supports design variation and diversity of shoreline access areas.

The solid fill at the north end of Clinton Basin will create much of the proposed Gateway Park, a public plaza that will function as the project's main gathering space for visitors and residents. The plaza design is intended to provide greater separation between the heavily trafficked Embarcadero roadway and I-880 and the water's edge, while improving continuity between the two main land masses at the site.

The application states:

> "A significant portion of the project is located on two peninsulas that project into Brooklyn Basin in the Oakland Estuary. These two peninsulas are separated by Clinton Basin, which lies at the center of the project. Currently, Clinton Basin extends almost to the Embarcadero, the roadway that establishes the project's northern boundary. The current configuration of Clinton Basin negatively impacts the planned parks and pathways by effectively cutting the project in two."

For these reasons, the Commission finds that there is no alternative upland location for the uses proposed on fill.

3. **Minimum Amount of Fill.** As described above, the proposed fill will be primarily for protecting the shoreline from erosion, improving shoreline appearance, and providing public access. A stated goal of the project is to minimize the amount of Bay fill necessary to create the public parks and pathways within the project. The permittees state that, "[t]he location and design of the public access were scrutinized to the point that the proposed project contains the minimum amount of fill necessary to provide this access to the Bay." The application further states that "[t]he amount of fill proposed at the head of Clinton Basin is the least amount necessary to create this critical link in the chain of public open spaces within the project."

   Within Clinton Basin, approximately half of the two 30-foot-wide, pile-supported, public promenades will be constructed mostly over areas that are currently land but that will become Bay after the basin is widened. The promenade is envisioned as a shared-use zone occupied by pedestrians and bicyclists. In determining whether a 30-foot-wide promenade is the minimum amount necessary for its intended use, the Commission considered other similar projects that have been approved and constructed in the past. Promenade widths vary around the Bay, however, the proposed promenade dimensions are generally consistent with other promenades authorized by the Commission. For example, the East Promenade on the Bay side of the San Francisco Ferry Building is 32 feet wide. The "Portwalk" promenade along McCovey Cove at the San Francisco Giants ballpark ("AT&T Park") is approximately 25 feet wide.

   At the end of Clinton Basin, approximately 0.76 acres of solid fill will be placed to create a central neighborhood gathering area in the form of a public plaza (Gateway Park). At its first review of this project, the Commission's Design Review Board agreed that some fill at the end of Clinton Basin would be appropriate for public

access purposes, and an important enhancement to the project, but that exact amount needed studying. At a subsequent review, the Board was presented with additional information on the design purpose of the proposed fill.

Special Condition II-A-3c has been included to facilitate field checking of the limits of the authorized fill to ensure that only authorized amounts of fill is placed.

For these reasons, the Commission finds that the fill is the minimum necessary to complete the project.

4. **Minimizing Impacts.** Approximately 10,200 cubic yards of material will be excavated and approximately 26,320 cubic yards of material will be placed for shoreline protection, to remediate contaminated areas, to create marsh habitat, and to construct outfall structures. As discussed more fully in the "Natural Resources Policies" section below, the measures incorporated into the project minimize the fill impacts to the Bay, including water volume, circulation and quality, and fish and wildlife resources. The Final Environmental Impact Report (FEIR) for the project determined that with implementation of identified mitigation measures, many of which are required in this authorization, any potential impacts to biological resources and water quality will be reduced to a less than significant level. The Regional Water Quality Control Board (RWQCB) staff has stated that it expects to issue a water quality certification and waste discharge requirements for the project by March 2011.

5. **Sound Safety Standards/Sea Level Rise.** Policy 1 of the Bay Plan Safety of Fills section states, in part: "The Commission has appointed the Engineering Criteria Review Board…to: (a) establish and revise safety criteria for Bay fills and structures thereon; (b) review all except minor projects for the adequacy of their specific safety provisions, and make recommendations concerning these provisions…." Policy 3 states: "To provide vitally-needed information on the effects of earthquakes on all kinds of soils, installation of strong-motion seismographs should be required on all future major land fills. In addition, the Commission encourages installation of strong-motion seismographs in other developments on problem soils, and in other areas recommended by the U.S. Coast and Geodetic Survey, for purposes of data comparison and evaluation." Policy 4 states: "To prevent damage from flooding, structures on fill or near the shoreline should have adequate flood protection including consideration of future relative sea level rise as determined by competent engineers." Policy 5 states, in part: "To minimize the potential hazard to Bay fill projects and bayside development from subsidence, all proposed developments should be sufficiently high above the highest estimated tide level for the expected life of the project…"

   The application states, "The proposed shoreline improvements will be designed to meet current engineering standards based on recent geotechnical investigations. Project features to be constructed in areas with unstable existing soil conditions may require soil stabilization (or removal) or may require the feature to be supported on piles."

   The Commission's Engineering Criteria Review Board (ECRB) reviewed the Ninth Avenue Terminal wharf seismic strengthening project for seismic and engineering design safety on July 11, 2007. The ECRB was satisfied with the engineering criteria used in the design of the proposed project but encouraged the permittees to further study whether sand lenses are present at the site. The permittees agreed that if it was

determined, upon more detailed review by the Commission's senior engineer, that the project should return to the ECRB, that such a review may occur after Commission action.

Special Condition II-A-1a requires that preliminary engineering plans and engineering criteria be reviewed by or on behalf of the Commission's Engineering Criteria Review Board prior to submittal to the staff for final approval. The review shall be focused on whether the permittees have adopted design criteria appropriate to the nature of the project and the use of any structures. Such criteria shall take into account the soil and foundation conditions at the site and potential earthquake-induced forces.

Although the permit application did not include the installation of strong-motion seismographs, the permittees subsequently agreed to install seismic instrumentation at the project. In order to provide vitally needed information on the effects of earthquakes, Special Condition II-F has been included, requiring the installation of an appropriate number of seismic instruments to monitor seismic activity for use by seismologists as determined by a panel of experts in consultation with the ECRB.

Regarding sea level rise, current estimates vary widely, from an observed, historically measured value of 8-inches per century to 33-inches per century predicted (maximum) by the Intergovernmental Panel on Climate Change (IPCC). In 2010, the California Climate Action Team developed future sea level rise projections (relative to sea level in 2000) that range from 10 inches to 17 inches at 2050, and 31 inches to 69 inches at 2100. There is strong agreement among climate models for the likely amount of sea level rise at 2050. However, beyond 2050, there is more uncertainty because modeling results vary depending on how quickly the international community reduces greenhouse gas emissions.

Because the science of climate change and sea level rise is evolving, the permittees believe it is prudent to establish a planning horizon and accommodate sea level rise rather than design to an estimate which will very likely change over time.

The proposed project consists of two flood protection components – a perimeter protection component along the shoreline, and another protection component for the interior areas of the site. Both of these components provide for some level of protection against future 100-year flood events as a result of rising sea levels for the next approximately 50 years.

The permittees state that, for the perimeter system, it is not practical to build a wall around the project for a design condition that may develop over several decades. At the same time, it is not prudent to build to present sea level conditions and keep raising the developed areas as Bay waters rise. Therefore, the project will provide perimeter protection along the project boundary with a perimeter elevation of +6.0 feet above Mean High Water. The application states that the perimeter protection is designed to provide flood protection for present day 100-year flood conditions plus freeboard of approximately 28 inches. The additional freeboard provides flood protection against the future 100-year flood event (tide or wave induced), which will be brought about by rising sea levels.

The permittees state that interior building elevation provide a minimum finish floor elevation of +6.5 feet above Mean High Water. The buildings will not be flooded during a storm surge that is approximately 34-inches higher than the present day 100-yr flood event. Over a 50-year planning horizon, the proposed interior elevations are high enough to provide flood protection for current estimates of sea level rise.

Beyond the 50-year planning horizon and under the highest rate of relative sea level rise, the proposed interior grades are high enough to provide flood protection for a period of at least 61 years, based on current sea level projections.

The permittees state that, beyond these planning horizons, additional protection can be achieved through shoreline adaptation. The horizontal space exists along the shoreline for a variety of adaptations that will increase perimeter elevations in the future as necessary.

To ensure that future shoreline adaptation is implemented if needed, Special Condition II-B-9 has been included to alter public access areas that are damaged by future subsidence and/or inundation caused by sea level rise.

For these reasons, the Commission finds that the project will be constructed in accordance with sound safety standards, consistent with Bay Plan policies regarding safety of fills.

6. **Valid Title of Project Site.** The project site is owned by the City of Oakland, a municipal corporation acting by and through its Board of Port Commissioners (Port of Oakland), and is subject to the Public Trust. On October 17, 2008, the Port of Oakland and Oakland Harbor Partners, LLC (OHP) entered into an option agreement that authorizes the sale of certain portions of the project site to OHP, the interim ground lease of the balance of the project site to OHP, and the ultimate transfer of the balance of the project site to the City of Oakland. Additionally, the Port of Oakland, OHP and the State of California, acting by and through its State Lands Commission, have entered into an exchange agreement that authorizes, among other matters, the sale of the applicable portions of the project site to OHP and the transfer of the balance of the project site to the City of Oakland.

7. **Fill for Bay Oriented Commercial Recreation and Public Assembly.** The San Francisco Bay Plan contains policies concerning filling for Bay-oriented commercial recreation and Bay-oriented public assembly. Known as the "50% Rule," the policies restrict uses permitted on replacement fill to water-oriented uses, such as Bay-oriented commercial recreation and public assembly, public recreation, open space and public access to the Bay. The Bay Plan defines Bay-oriented commercial recreation and Bay-oriented public assembly as "facilities specifically designed to attract large numbers of people to enjoy the Bay and its shoreline, such as restaurants, specialty shops and hotels." The policies further require that, on replacement fill, uses other than public recreation, open space and public access to the Bay, can cover an area of the Bay no larger than 50 percent of the area being uncovered. Bay-oriented commercial recreation and public assembly uses on publicly owned land are required to be consistent with a comprehensive special area plan for the geographic vicinity of the project. The goal behind this policy is to ensure that redeveloped maritime piers provide public benefits, such as open water, public access and public views of the Bay.

   The project involves rehabilitating and reusing approximately 20,000 square feet of the Ninth Avenue Terminal Bulkhead building. Bay-oriented commercial recreation and public assembly uses, including a maritime museum, café and community center, are proposed within the rehabilitated pier shed building. This rehabilitation work will require such substantial repairs to the pilings, support structures and deck supporting the pier shed building that the entire structure, including the pier shed building will be considered Bay fill once the repairs are complete. Similar uses have been approved by the Commission in the past on Bay fill.

In evaluating whether the project is consistent with the Bay Plan's fill policies for commercial recreation on fill, the Commission should consider the larger context in which this proposal is being made, and that the majority of the historic finger-pier, pile-supported Bay fill in the Port of Oakland has already been removed. Over the past forty years, the Port of Oakland modernized its maritime shipping waterfront to accommodate container ships, which required removal of old finger piers and the construction of crane wharves throughout much of the Port. In the non-port areas of the Port's jurisdiction, much of the historic port piers were removed and only small piers remain, mostly supporting commercial recreation uses such as restaurants or public access. The only large piers remaining in the non-port area are the Livingston Street Pier and the wharf located on this project site, the Ninth Avenue Terminal.

In addition to the 2.24 acres (net) of pile-supported pier removal proposed with this project, there have been other significant fill removal efforts in the Oakland Inner Harbor over the past few decades. In the early 1990s, a large area of Bay fill was removed from the project site (Channel Park) with the demolition of the Pacific Dry Dock operations located near the 5th Avenue Marina in Oakland.

No comprehensive special area plan has been prepared for the project site. However, in the late 1990s, the BCDC staff participated in a planning effort resulting in the Estuary Policy Plan (1999). The Estuary Policy Plan is intended to be incorporated into the City of Oakland's General Plan. Compared to the General Plan, the Estuary Policy Plan has a more focused geographic scope and is, therefore, more specific on the topics of land use, transportation, open space, recreation and historic preservation. The Estuary Policy Plan calls for recognizing that the Ninth Avenue Terminal shed, or portions thereof, may be suitable for rehabilitation and adaptive reuse, but that the terminal building impedes public access to and views of a key area of the Estuary.

The Commission finds that the goals of its Bay Plan policies addressing fill for Bay-oriented commercial recreation and public assembly have been met along the Oakland waterfront without the preparation of a Commission sponsored special area plan. The Commission further finds that it is not necessary to prepare a special area plan for the Oakland Estuary in the Port of Oakland's jurisdiction pursuant to the Bay Plan replacement fill policies, given the minimal amount of historic pile-supported fill that remains. The Commission finds that the proposed pier removal to create permanent open water, pier rehabilitation, and limited Bay-oriented commercial recreation and public assembly uses that are part of this project are consistent with the general thrust of these Bay Plan policies. The Commission finds that this project as proposed, in the context of historical and proposed fill removal and the public access on the rehabilitated pier, and the limited commercial recreation and public assembly uses proposed are generally consistent with the Commission's replacement fill policies.

For all the reasons listed above, the Commission finds that the project is consistent with the Commission's law and related policies on the placement of fill.

C. **Shoreline Protection.** Policy 2 of the Bay Plan policies on Protection of the Shoreline state: "New shoreline erosion control projects and the maintenance or reconstruction of existing erosion control facilities should be authorized if: (a) the project is necessary to protect the shoreline from erosion; (b) the type of the protective structure is appropriate for the project site and the erosion conditions at the site; and (c) the project is properly designed and constructed." Policy 4 states, "[s]horeline protective projects should include provisions for nonstructural methods such as marsh vegetation where feasible"

and "[a]long shorelines that support marsh vegetation or where marsh establishment has a reasonable chance of success, the Commission should require that the design of authorized protective projects include provisions for establishing marsh and transitional upland vegetation as part of the protective structure, wherever practicable."

The project will include various shoreline protection solutions at different locations along the project site. In a report, entitled "Proposed Shoreline Improvements," the permittees state that the existing riprap at Estuary Park "looks in good shape, but is failing in isolated areas where individual rocks have been scoured out, probably due to wave action." The project, however, includes no shoreline treatment along this section of shoreline. At Channel Park and South Park (West), the shoreline protection concept includes a high marsh edge with an Articulating Concrete Block (ACB) mat revetment along most of the 1,850-foot shoreline. The report states that, "this treatment will improve the appearance of the shoreline, compensate for some of the Bay Fill within Clinton Basin, and resist erosion." At South Park (West), steep contours along approximately 350 feet of shoreline may require more management to establish upland vegetation. At South Park (Clinton Basin), the shoreline will be straightened to accommodate an urban promenade edge and recreational boating when, and if, a future marina is built. On the east and west sides of the basin, the riprap will be placed under a pile supported promenade. At the north end of the basin, a vertical, steel sheet pile bulkhead will be built. The permittees state that, "these alternatives were selected to balance the issues of performance, durability, constructability, and cost." At Shoreline Park (West), a portion of the Ninth Avenue Terminal wharf will be demolished, exposing open water and the existing breakwater that is currently under the wharf. The bulkhead is believed to be in good condition. Therefore, new shoreline protection will be limited to replacing slope dressing, which is defined in the application as, "Rock Slope Protection that is placed on the slope [against the existing bulkhead] without significant excavation or foundation support, and consists of smaller armor stone…." At the Ninth Avenue Terminal Wharf, no shoreline protection work is proposed under the existing wharf.

Special Condition II-E has been included to ensure that the specifications, placement, design and maintenance of shoreline erosion control measures, particularly riprap improvements, are consistent with the Commission's policies.

For these reasons, the Commission finds that the shoreline work will be consistent with the Bay Plan policies regarding protection of the shoreline.

D. **Public Access**. Section 66602 of the McAteer-Petris Act states that "…maximum feasible public access, consistent with a proposed project, should be provided." In assessing whether a project provides maximum feasible public access consistent with the project, the Commission relies on the McAteer-Petris Act and the policies of the San Francisco Bay Plan.

Policy 1 and Policy 6 of the Bay Plan policies on Public Access state that "a proposed fill project should increase public access to the Bay to the maximum extent feasible" and that the public access improvements "…should be designed and built to encourage diverse Bay-related activities and movement to and along the shoreline, should permit barrier free access for the physically handicapped to the maximum extent feasible, should include an ongoing maintenance program, and should be identified with appropriate signs." Policy 7 states that, "in some areas, a small amount of fill may be allowed if the fill is necessary and is the minimum absolutely required to develop the project in accordance with the Commission's public access requirements." Policy 8 states that, "access to and along the waterfront should be provided by walkways, trails, or other appropriate means and connect to the nearest public thoroughfare where convenient

parking or public transportation may be available…." Policy 11 states that, "the Design Review Board should advise the Commission regarding the adequacy of the public access proposed" and Policy 2 of the Bay Plan's Appearance, Design and Scenic Views section state that "all bayfront development should be designed to enhance the pleasure of the user or viewer of the Bay" and that "maximum efforts should be made to provide, enhance, or preserve views of the Bay and shoreline, especially from public areas, from the Bay itself, and from the opposite shore. "

In determining whether the project will provide the "maximum feasible public access consistent with the project," the Commission considers a number of factors, including the demand on existing public access areas and the need for additional public access generated by the Brooklyn Basin project.

A very limited amount of improved public access currently exists within the project area. The proposed project will result in the creation of a new neighborhood in the City of Oakland, replacing a primarily industrial section of the City. The new development will contain up to 3,100 housing units and 200,000 square feet of commercial and retail space. The application states that approximately 5,061 new residents and employees are expected to live and work within the Brooklyn Basin neighborhood and use the proposed open spaces.

The employment, housing and population growth associated with the Brooklyn Basin project will generate a greater demand for public access to the Bay and shoreline along the Oakland Estuary. New employees, residents, and visitors will use the nearby shoreline before and after work and during lunch, thereby adding to the existing public access demand.

To provide public access and to offset the project impacts on public access, the permittees will provide a series of public parks interlinked by the Bay Trail. The qualities of these open spaces are generally discussed above in the Public Access Special Conditions. Of the 62 acres comprising the project site, approximately 17.3 acres are within the Commission's jurisdiction; of this area, approximately 11.6 acres (67%) will be dedicated for public access purposes. In total, the project not including improvements to existing Estuary Park, will provide approximately 25.5 acres (40% of the project site) of new public access.

Public access areas and improvements will be phased with the development of adjoining parcels. Permanent Bay trail improvements shall be installed prior to the occupancy of the first residential unit in each phase or within a date certain after issuance of the first City of Oakland building permit for a vertical structure within the overall project. The balance of the public access improvements in Phase I will be completed prior to the certificate of occupancy of the 550th residential unit or 5 years from issuance of the first building permit; all Phase II improvements will be completed prior to the certificate of occupancy of the 1,650th residential unit or 8 years from the first building permit issued in Phase I; all Phase III improvements will be completed prior to the certificate of occupancy of the 2340th residential unit or 11 years from the issuance of the first building permit in Phase I; and all Phase IV improvements will be completed prior to the certificate of occupancy of the 2,800th residential unit or 14 years from the issuance of the first building permit in Phase I. Special Condition II-B-6 has been included to ensure that these phasing commitments are met.

The permittees state that the shoreline public access has been designed to encourage diverse Bay-related activities and different waterfront experiences. Given the public access locations proposed, their site orientation, aspect and type of shoreline (e.g., riprap, high marsh, pile-supported promenade, seawall, wharf), it is likely that each

open space area will have a distinct character. For example, Estuary Park, originally designed in the 1960s by landscape architect Lawrence Halprin, is an existing park that includes an existing deck, a large trellis shade structure, picnic areas, a public parking lot, a public boat ramp and the Jack London Aquatic Center. Scheduled to be environmentally remediated, augmented and updated with new design features, the overlay of new improvements on the existing park will provide a highly active waterfront open space. Across the mouth of Lake Merritt channel, Estuary Park, will provide passive open spaces adjacent to newly created "soft" shorelines where new marsh and upland transition plants meet the park edge. Further to the east, South Park, including the public access areas around Clinton Basin, will provide the project's most urban shoreline spaces. The two promenades, plaza and park areas will be in close proximity to retail, commercial and residential uses where residents and the public mix in this neighborhood core. At the east end of the project, Shoreline Park will be built upon the Ninth Avenue Terminal wharf after the terminal shed building is demolished. Designed in a grand classical style, the park will provide a flexible open space area with various paths, a large public fountain at the terminus of Main Street and a panorama of the Brooklyn Basin area. At the end of Shoreline Park, up to approximately 20,000 square feet of the Ninth Avenue Terminal bulkhead building will be retained for public trust uses, such as restaurants, a museum and/or interpretive displays. Adjacent to the bulkhead building, stormwater detention basins will be built as publicly-accessible rain gardens, providing play opportunities similar to the successful park in Portland, Oregon's Pearl District neighborhood. Although qualitatively distinct from one another, all of the open space areas will be unified in style through use of similar design elements and site furnishings, such as the Bay Trail design, street lights, pedestrian path lights, trash receptacles, 20-foot-tall "trail markers," interpretive historic markers, directional signage and landscaping.

In its review of the proposed project, the Commission's Design Review Board (Board) stated that the size of the public access area seemed adequate for the anticipated uses, but that the quality of the public access areas should be more closely reviewed at future Board meetings. The Board was generally supportive of the project, but had concerns that the creation of new shoreline areas will be done in a manner that erodes the "gritty waterfront" character and creates a quality of "sameness", thereby losing "the fabric of the place." The Board also questioned the use of large amounts of lawn within the public areas, stating that Channel Park may be an opportunity for something other than turf. The Board stated that the urban edge of Clinton Basin will be interesting and desirable. The Board also agreed that a soft shoreline around Channel Park made sense, but questioned the type of enhancement proposed at the existing habitat area at South Park. Regarding the enhancement, the Board questioned whether a tidal marsh mudflat was sustainable in a sandy beach area that is depositional. The Board expressed interest in retaining the Ninth Avenue Terminal shed building (instead of demolishing it for a green open space), stating that the building will help retain the distinctive industrial waterfront character.

In order to retain the site's industrial character wherever feasible, Special Condition II-B-5e(3) has been included. This condition requires the retention of an existing wooden train trestle for public access. It is anticipated that the availability of the trestle for public use involves a scope of work that includes improving accessibility for persons with disabilities and minor strengthening of the substructure, deck and railings. Wholesale renovation of the trestle and/or significant seismic strengthening is not anticipated.

Special Condition II-A-1b has been included to allow preliminary plans for the phased public access areas and contiguous development to be reviewed by or on behalf of the Commission's Design Review Board prior to submittal of construction documents to the staff. It is anticipated that some of the plan review activities may be conducted at the staff level, with review by the Board on site-specific, open space planning and public access issues for each development phase.

Regarding the open space design and, particularly, the Ninth Avenue Terminal building, the Final Environmental Impact Report (FEIR) identifies mitigation measures to ensure that the park design incorporates landscaping, sculptural elements, paths and lighting that conceptually reference the expanse of the Ninth Avenue Terminal's footprint and height. The FEIR further requires that a minimum of 200 square feet of floor area within the bulkhead building be set aside for an historical exhibit depicting the history of the Oakland Municipal Terminals.

The project proposes public parking along new streets and adjacent to new parks and open spaces. Specifically, public parking is proposed within the existing public parking lot at Estuary Park, within two new 15-vehicle parking lots, one each at Channel Park and South Park, and approximately 90 spaces along the entire length of Shoreline Park. All streets within the project have been designed with on-street public parking, although it has not yet been decided whether those spaces will be metered.

Due to the projected 15-years that it will take to construct the project, the permittees have proposed temporary shoreline access trails that will be built pursuant to the obligations set forth in the development agreement between the City of Oakland and Oakland Harbor Partners, LLC. The proposal includes constructing a twelve-foot-wide asphalt trail along a mutually agreed upon alignment with a chain link fence along the landward side of the temporary trail. The temporary trail will not include lighting and will be open from dawn to dusk. The trail will be built within development Phases I, II, III and IV prior to the remediation of such phases, pending the approval of the California Department of Toxic Substances Control (DTSC). The developer will have the right to remove or suspend the use of the temporary trail as necessary in order to allow for site remediation, project construction or to provide for public safety during development. When trail closures are needed to allow site remediation or construction, an alternative alignment will be sought that will allow continuous access. There has been considerable public concern over the timing for implementing the temporary trail. To address this concern, the interim public access schedule will be accelerated. Two portions of the trail will be built within 12 months of close of escrow of the site. The remainder of the shoreline will be opened for public use upon completion of the first Phase I residential unit, or five years from the issuance of the first Phase I building permit. The requirement for temporary trail access is consistent with prior Commission action. For example, in December 2000, the Commission required Catellus Development Corporation, the City and County of San Francisco and the Port of San Francisco to implement interim public access around Mission Creek Channel in San Francisco.

Special Condition II-B-4 has been added to facilitate interim public access to and along the shoreline in a manner that acknowledges existing water-related tenants, public safety concerns and existing site constraints.

For these reasons, the Commission finds that the project's public access improvements, as conditioned, are the maximum feasible consistent with the project.

E. **Recreation.** Policy 1 of the Bay Plan policies on Recreation states: "Diverse and accessible water-oriented recreational facilities, such as marina, launch ramps, beaches, and fishing piers, should be provided to meet the needs of a growing and diversifying popula-

tion…and improved to accommodate a broad range of water-oriented recreational activities for people of all races, cultures, ages and income levels. Periodic assessments of water-oriented recreational needs that forecast demand into the future and reflect changing recreational preferences should be made to ensure that sufficient, appropriate water-oriented recreational facilities are provided around the Bay." The Bay Plan policies on Recreation support recreational facilities such as waterfront parks, trails, marinas, non-motorized small boat access, fishing piers, launching lanes and beaches, provided they are located, improved and managed consistent with certain standards identified in the Bay Plan.

Estuary Park currently contains a launching ramp, a public parking lot, the Jack London Aquatic Center, a low public dock for non-motorized small boat access, boat slips for approximately eight sailboats, a fishing pier, a waterfront trail, a large grass area, and a picnic area. The project proposal includes changing the existing worn waterfront trail at Estuary Park to a separated bicycle and pedestrian Bay Trail with shoulders and landscaping to accommodate greater user demand. Further, the project will facilitate the redesign of Estuary Park. At this time, no specific uses are proposed other than the existing uses described above. The new design of the park will be a product of a community planning process that will occur in the future.

For these reasons, the Commission finds that the proposed uses are consistent with the Bay Plan policies on Recreation.

F. **Public Trust Consistency**. The Bay Plan provides that the "purpose of the public trust is to assure that the lands to which it pertains are kept for trust uses, such as commerce, navigation, fisheries, wildlife habitat, recreation and open space."

All areas of Bay fill will be for the purposes of creating new marsh such as at Channel Park and South Park, providing new public access and open space such as at Clinton Basin and Shoreline Park, and protecting the shoreline from erosion and improving shoreline appearance along segments of the shoreline where deteriorated shoreline protection currently exists.

For these reasons, the Commission finds that the uses will be consistent with the Public Trust doctrine and the Burton Act.

G. **Natural Resources Policies.** Policy 1 of the Bay Plan policies on Subtidal Areas state: "Any proposed filling or dredging project in a subtidal area should be thoroughly evaluated to determine the local and Bay-wide effects of the project on: (a) the possible introduction or spread of invasive species; (b) tidal hydrology and sediment movement; (c) fish, other aquatic organisms and wildlife; (d) aquatic plants; and (e) the Bay's bathymetry. Projects in subtidal areas should be designed to minimize and, if feasible, avoid any harmful effects."

Policy 2 of the Bay Plan policies on Fish, Other Aquatic Organisms, and Wildlife states, in part: "Specific habitats that are needed to conserve, increase, or prevent the extinction of any native species, species threatened or endangered…should be protected…." Policy 4 states that the Commission should "…consult with the California Department of Fish and Game and the U.S. Fish and Wildlife Service or [NMFS] whenever a proposed project may adversely affect an endangered or threatened…species" and "...[g]ive appropriate consideration to the recommendations of the [state and federal resource agencies] in order to avoid possible adverse effects of a proposed project on fish, other aquatic organisms and wildlife habitat."

Policy 1 of the Bay Plan policies on Mitigation states, "Projects should be designed to avoid adverse environmental impacts….Whenever adverse impacts cannot be avoided, they should be minimized to the greatest extent practicable." Policy 2 states that "[i]ndividual compensatory mitigation projects should be sited and designed within a Bay-wide ecological context, as close to the impact site as practicable." Policy 3 states, "[w]hen determining the appropriate location and design of compensatory mitigation, the Commission should also consider potential effects on benefits provided to humans from Bay natural resources, including economic (e.g., flood protection, erosion control) and social (e.g., aesthetic benefits, recreational opportunities).

As further described in the Bay Fill section above, the project will involve construction activities such as dredging, pile driving and other in-water work.

The project's DEIR identified four special-status fish that have the potential to occur at or near the project site: Pacific herring, central California coast and central valley steelhead, central California coast coho salmon, and Chinook salmon. In addition, the DEIR identified one special-status marine mammal species (harbor seal) and two special-status birds (California brown pelican and Cooper's hawk) that could occur at or near the site. The DEIR concluded that for each of the four fish species, there is a low to moderate likelihood that the species will occur within the project site. There is potential for Pacific herring to spawn in the project area because the area is within or near spawning habitat and marine structures provide suitable substrates on which egg masses could be attached. Steelhead and coho and Chinook salmon may incidentally occur in the Oakland Inner Harbor during migration, but will not use it as foraging or spawning habitat. Harbor seals use the Bay for foraging, resting and reproduction, but the closest known haul-out near the project area is at the Alameda Breakwater Gap, approximately five miles from the Oakland Inner Harbor. The DEIR states that no harbor seals were observed during a survey conducted by a biologist for the DEIR. The California brown pelican is a common visitor to the Oakland Estuary. However, no nesting colonies are documented in the Bay Area or in the project vicinity. However, a brown pelican was observed in flight at the project site by project biologists during an October 2004 site visit. The Cooper's hawk is known to occur within the urban areas of Oakland and near Lake Merritt and preys on small urban-adapted birds such as pigeons and mourning doves. In addition, the double-crested cormorant is a resident species; the closest documented rookery site is at the San Francisco-Oakland Bay Bridge. However, based on lack of suitable nest sites within the project site, cormorants are not expected to nest in or near the project site.

The DEIR found that construction-related activities, such as dredging and pile-driving, conducted during spawning and migration could result in potentially significant impacts to fisheries resources.

To reduce potential impacts to fisheries, the permittees propose to implement measures for protection of salmonids and Pacific herring during dredging projects and for indirect impacts on the San Francisco Bay "Essential Fish Habitat" (EFH) that are identified in the *Long-Term Management Strategy (LTMS) for the Placement of Dredged Material in the San Francisco Bay Region* (2001). These include restricting dredging and other in-water construction activities to the specified work windows that avoid the direct and indirect impacts on juvenile or adult herring or salmonids that will otherwise result from dredging-related increases in turbidity or changes in water quality. The DEIR found that impacts of dredging operations on coho salmon, Chinook salmon, steelhead, and Pacific herring will be less than significant, provided that dredging activities are conducted within the work windows identified in the LTMS.

Potential impacts resulting from pile-driving activities will be avoided or reduced to a less-than-significant level by either avoiding pile-driving activities between November 1 and June 1 or assuring that pile-driving will result in noise levels below 150 decibels at 10 meters. Any pile-driving work occurring outside of these work windows will be conducted in accordance with National Marine Fisheries Service directives and Army Corps of Engineers permits to reduce potential impacts on fish species.

Further, implementation of Best Management Practices (BMPs) as outlined in the LTMS will reduce impacts on special-status fish species. This authorization requires implementing BMPs, including using silt curtains and gunderbooms that isolate the work area and prevent silt and sediment from entering the estuary. To further prevent silt and sediment from entering the estuary, the permittees propose to conduct excavation and dredging operations from land, where feasible. Backhoes and cranes operating from land will be used for the removal of debris and concrete riprap along the estuary edge. A similar process is proposed in areas where excavation for marsh restoration is planned. Construction operations along Clinton Basin and Shoreline Park will be barge-mounted or involve water-based equipment such as scows, derrick barges and tugs. All dredged material will be placed in upland areas.

The DEIR determined that fish and wildlife will likely move away from the area during the actual dredging process. However, the dredging equipment will likely entrain benthic fish and organisms. Because the affected area is a relatively small area in the Bay, the benthic fish and invertebrate community will likely regenerate in this area from adjacent areas.

Additionally, the DEIR identified mitigation measures that will protect the Port of Oakland's existing restoration project at the southwest end of Clinton Basin during construction activities. The Port's mitigation area will be clearly marked by a qualified biologist prior to the start of any grading or construction activities and a buffer zone established. All construction personnel working in the vicinity of the mitigation area shall be informed of its location and the buffer zone. This authorization requires that the permittees work with the Port of Oakland to evaluate the habitat functions of the mitigation area and determine whether small site modifications could improve its value and be more compatible with site dynamics.

The DEIR found that construction activities conducted during the nesting season for breeding raptors and passerine birds, including Cooper's hawk, could result in potentially significant impacts. The DEIR, however, determined that with implementation of identified mitigation measures, such as limiting construction activities to outside the breeding season, conducting preconstruction surveys of all potential nesting habitat and creating no-disturbance buffer zones, any potential impacts on these species will be reduced to a less than significant level.

Regarding compensatory mitigation for environmental impacts associated with filling, the project has proposed on-site mitigation. To offset the impacts of placing approximately 0.92 acres of solid fill to create Gateway Park, the project includes: (1) the removal of approximately 0.38 acres of solid fill at Clinton Basin to create a wider basin and more open water; and (2) the removal of approximately 0.65 acres of solid fill at Channel Park and South Park to create more open water, new high marsh habitat and provide the aesthetic benefit of a natural shoreline. Additionally, approximately 0.06 acres of solid fill will be removed at the east end of the project site resulting from wharf and pile demolition. As a result of the mitigation for solid fill placement, the Bay will get larger by approximately 7,450 square feet (0.17 acres).

To offset the approximately 0.84 acres of pile-supported fill for public promenades at Clinton Basin, the project will remove approximately 3.08 acres of pile-supported fill at the Ninth Avenue Terminal wharf to create open water. As a result of this mitigation for work associated with the pile-supported fill, the Bay will get larger by approximately 97,575 square feet (2.24 acres).

For all these reasons, the Commission finds that, with the incorporation of the mitigation measures found in the FEIR and those in Special Conditions II-H through II-K of the permit, the project is consistent with the Bay Plan policies regarding subtidal areas; fish, other aquatic organisms, and wildlife; and mitigation.

H. **Water Quality.** Policy 1 of the Bay Plan policies on Water Quality states, "Bay water pollution should be prevented to the greatest extent feasible…" and Policy 2 states that, "…the policies, recommendations, decisions, advice and authority of the State Water Resources Control Board and the Regional Board, should be the basis for carrying out the Commission's water quality responsibilities."

As described in the Natural Resources section above, the project will involve construction activities such as dredging, pile driving and other in-water work. This includes excavation of material for shoreline protection and marsh creation, and placement of solid and pile-supported fill for public access. Additionally, the project includes removal of existing floating docks and existing pile-supported wharf structures.

The existing shoreline includes old wharves, unprotected eroding banks, and shorelines where concrete blocks, slabs, and debris have been dumped or placed for shoreline protection. The proposed marsh restoration will regrade and revegetate the shoreline from the mouth of Lake Merritt Channel to the existing sandy beach at the existing wetlands restoration project at the northwest corner of Clinton Basin. Clinton Basin will be recontoured and armored and areas around Shoreline Park will be improved by dressing the slope with new riprap where needed. The Draft Environmental Impact Report (DEIR) found that the existing shoreline conditions at the project site result in reduced tidal ebb and flow and that the project will improve shoreline conditions and natural areas for potential habitats along the estuary and Lake Merritt Channel.

The staff at the Regional Water Quality Control Board (RWQCB) has worked closely with the permittees over the past year. The RWQCB staff has stated that a water quality certification in conjunction with waste discharge requirements (WDRs) will likely be issued by the RWQCB in February or March 2011. WDRs will be required due to the long-term build out of the project. As part of RWQCB's approval, the permittees will be required to obtain the water quality certification and WDRs prior to the commencement of construction of the project. These approvals will include conditions that the permittees must incorporate in the project to avoid or mitigate for potential water quality impacts.

In addition, dewatering may be performed in open excavation areas that extend below the water table both during remedial activities and during construction. All extracted groundwater will be either hauled offsite to a facility approved by the Department of Toxic Substances Control (DTSC), discharged to the East Bay Municipal Utilities District (EBMUD) facilities, or discharged to a storm sewer or directly to surface water under a General National Pollutant Discharge Elimination System (NPDES) permit. At the time that any specific project phase involving groundwater extraction is undertaken, an analysis will be made as to whether it is cost effective and appropriate to discharge to EBMUD or the surface water. If needed, an NPDES permit will be obtained following procedures set out by the RWQCB.

For all these reasons, the Commission finds that with the incorporation of the mitigation measures found in the FEIR, the RWQCB's recommendations, and the terms in Special Condition II-L of the permit, the project is consistent with the Bay Plan policies regarding water quality.

I. **Review Boards**

1. **Engineering Criteria Review Board.** On June 11, 2007, the Commission's Engineering Criteria Review Board (ECRB) reviewed the proposed project for seismic and engineering design safety. The scope of the work reviewed was primarily related to the 9th Avenue Terminal wharf. The ECRB was satisfied with the engineering criteria used in the design of the proposed project, but encouraged the permittees to further study whether sand lenses are present at the site. The permittees agreed that, if it was determined upon more detailed review by the Commission's senior engineer that the project should return to the ECRB, that such a review will occur after Commission action.

2. **Design Review Board.** The Design Review Board (DRB) reviewed the Brooklyn Basin project four times at its meetings of May 9, 2005, April 10, 2006, November 6, 2006 and May 7, 2007.

   At its first meeting, the Board advised the permittees that: (1) the project should evaluate street geometries that relate to important views; (2) building heights should vary; (3) eight-story buildings need to be evaluated as they relate to public views; (4) the retention of the Ninth Avenue Terminal shed building will maintain the distinctive industrial waterfront character; (4) the proposed urban edge of Clinton Basin will be interesting and desirable; (5) public parking for open spaces and impacts on existing public parking need to be further evaluated; (6) increasing the height of the residential towers and lowering the podium buildings might improve public connections and views to the Bay; and (7) the exact amount of Bay fill for public access needs studying and should be determined based on the public's sense of arrival to Gateway Park and to the Bay.

   At its second review, the Board advised that: (1) buildings should be evaluated to maximize views and sunlight on the public open space areas; (2) the character of the site should be integrated into the project design; (3) Bay fill for public access and shoreline appearance around Clinton Basin will be beneficial to the scheme and is an important project enhancement; and (4) the pile-supported Ninth Avenue Terminal structure is a critical component of the proposed public access and that there should be a commitment to maintaining the structure in perpetuity. Additionally, the Board agreed that the views from the street grid north of the freeway appear to be blocked and requested an analysis of the view corridors from those streets.

   At its third review, the Board recommended that the project take into account climate change and sea level rise. The Board agreed that the 9th Avenue terminal building and the wharf edge lent interest to the waterfront. Regarding the shoreline treatments, the Board stated that a tidal marsh mudflat in a sandy area may not make sense because of the depositional nature of the site, but that a soft shoreline edge should be maximized where feasible throughout the project. The Board said that the street widths appeared to be adequate for the anticipated uses and that the quantity of open space is adequate. There was Board support for the density of development around Clinton Basin and the Board encouraged development of an urban shoreline in this area. However, there was concern about whether enough sunlight will be available for Gateway Park and the promenades along the edge of Clinton Basin. There was not consensus on how maximum sunlight on the public

spaces might be achieved. The Board asked that the size, and expected level of use for Gateway Park be explained as it relates to the amount of fill placed for public access. The Board agreed that short time restrictions for public parking will benefit the public open spaces and that adequate public art should be part of the project proposal.

In its last review of the project, the Board stated that in the latest project design, the permittees had responded to the concerns about views to the water from the city and that the shadow study eliminates concerns about shadows on public spaces. The Board said that Channel Park will be an opportunity for a planting design that does not include turf, but that, otherwise, the open space design meets the Board's expectations about variety and diversity of shoreline spaces.

J. **Environmental Review.** On June 20, 2006, the City of Oakland, the lead agency, certified an Environmental Impact Report (EIR) for the proposed project in accordance with the California Environmental Quality Act (CEQA). The certification was set aside by order of Alameda Superior Court due to a finding of certain deficiencies in the EIR. Following the release of revisions to the analysis for the EIR, the City of Oakland adopted the EIR revisions and re-adopted the related EIR certification on January 20, 2009.

K. **Conclusion**. For all the above reasons, the Commission finds, declares, and certifies that, subject to the Special Conditions stated herein, the project authorized herein is consistent with the McAteer-Petris Act, the *San Francisco Bay Plan*, the *San Francisco Waterfront Special Area Plan,* the Commission's Regulations, the California Environmental Quality Act, and the Commission's Amended Management Program for the San Francisco Bay segment of the California coastal zone.

IV. Standard Conditions

A. **Permit Execution**. This permit shall not take effect unless the permittees execute the original of this permit and return it to the Commission within ten days after the date of the issuance of the permit. No work shall be done until the acknowledgment is duly executed and returned to the Commission.

B. **Notice of Completion**. The attached Notice of Completion and Declaration of Compliance form shall be returned to the Commission within 30 days following completion of the work.

C. **Permit Assignment**. The rights, duties, and obligations contained in this permit are assignable. When the permittees transfer any interest in any property with the exception of owners or lessors of individual residential or commercial units, either on which the activity is authorized to occur or which is necessary to achieve full compliance of one or more conditions to this permit, the permittees/transferors and the transferees shall execute and submit to the Commission a permit assignment form acceptable to the Executive Director. An assignment shall not be effective until the assignee executes and the Executive Director receives an acknowledgment that the assignee has read and understands the permit and agrees to be bound by the terms and conditions of the permit, and the assignee is accepted by the Executive Director as being reasonably capable of complying with the terms and conditions of the permit.

D. **Permit Runs With the Land**. Unless otherwise provided in this permit, the terms and conditions of this permit shall bind all future owners and future possessors of any legal interest in the land and shall run with the land.

E. **Other Government Approvals**. All required permissions from governmental bodies must be obtained before the commencement of work; these bodies include, but are not limited to, the U. S. Army Corps of Engineers, the State Lands Commission, the Regional Water Quality Control Board, and the city or county in which the work is to be performed, whenever any of these may be required. This permit does not relieve the permittees of any obligations imposed by State or Federal law, either statutory or otherwise.

F. **Built Project must be Consistent with Application**. Work must be performed in the precise manner and at the precise locations indicated in your application, as such may have been modified by the terms of the permit and any plans approved in writing by or on behalf of the Commission.

G. **Life of Authorization**. Unless otherwise provided in this permit, all the terms and conditions of this permit shall remain effective for so long as the permit remains in effect or for so long as any use or construction authorized by this permit exists, whichever is longer.

H. **Commission Jurisdiction**. Any area subject to the jurisdiction of the San Francisco Bay Conservation and Development Commission under either the McAteer-Petris Act or the Suisun Marsh Preservation Act at the time the permit is granted or thereafter shall remain subject to that jurisdiction notwithstanding the placement of any fill or the implementation of any substantial change in use authorized by this permit. Any area not subject to the jurisdiction of the San Francisco Bay Conservation and Development Commission that becomes, as a result of any work or project authorized in this permit, subject to tidal action shall become subject to the Commission's "bay" jurisdiction.

I. **Changes to the Commission's Jurisdiction as a Result of Natural Processes**. This permit reflects the location of the shoreline of San Francisco Bay when the permit was issued. Over time, erosion, avulsion, accretion, subsidence, relative sea level change, and other factors may change the location of the shoreline, which may, in turn, change the extent of the Commission's regulatory jurisdiction. Therefore, the issuance of this permit does not guarantee that the Commission's jurisdiction will not change in the future.

J. **Violation of Permit May Lead to Permit Revocation**. Except as otherwise noted, violation of any of the terms of this permit shall be grounds for revocation. The Commission may revoke any permit for such violation after a public hearing held on reasonable notice to the permittees or their assignees if the permit has been effectively assigned. If the permit is revoked, the Commission may determine, if it deems appropriate, that all or part of any fill or structure placed pursuant to this permit shall be removed by the permittees or their assignees if the permit has been assigned.

K. **Should Permit Conditions Be Found to be Ilegal or Unenforceable**. Unless the Commission directs otherwise, this permit shall become null and void if any term, standard condition, or special condition of this permit shall be found illegal or unenforceable through the application of statute, administrative ruling, or court determination. If this permit becomes null and void, any fill or structures placed in reliance on this permit shall be subject to removal by the permittees or their assignees if the permit has been assigned to the extent that the Commission determines that such removal is appropriate. Any uses authorized shall be terminated to the extent that the Commission determines that such uses should be terminated.

L. **Permission to Conduct Site Visit.** The permittees shall grant permission to any member of the Commission's staff to conduct a site visit at the subject property during and after construction to verify that the project is being and has been constructed in compliance with the authorization and conditions contained herein. Site visits may occur during business hours without prior notice and after business hours with 24-hour notice.