SUMMARY of POWERS EXERCISED by REGULATORY AGENCIES over DIKED HISTORIC BAYLANDS and RECOMMENDATIONS

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Revised FEBRUARY 1983

A Technical Report Prepared for

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

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This publication was prepared with financial assistance from the Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, under the provisions of the Federal Coastal Zone Management Act of 1972, as amended.

Prepared for the San Francisco Bay Conservation
and Development Commission
as part of the BCDC Diked Historic Baylands Study

April, 1982

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This technical report, by E. Clement Shute, Jr. and Marc B. Mihaly, Shute, Mihaly & Weinberger, Attorneys at Law was prepared as part of the Diked Historic Baylands Study. The purpose of the consultants' report is to analyze the powers exercised by regulatory agencies over diked baylands and make recommendations for Commission action. The technical report should be read in conjunction with the staff report entitled Diked Historic Baylands of San Francisco Bay.

In this report the term "diked wetlands" is used to mean diked historic baylands

I. SYNOPSIS OF EXISTING REGULATORY CONTROL OVER DIKED WETLANDS.

It is the purpose of this section to outline in general terms the existing regulatory structure. We will discuss first the question of jurisdiction, i.e., which wetlands are included in the current regulatory scheme. Secondly, we will analyze the types of activities that require a permit. Finally, we outline the standards by which the major regulatory entities judge whether or not to issue a permit for activity in a wetland. In this discussion, emphasis is placed on the Army Corps of Engineers since it is the agency with the most comprehensive regulatory authority. The authority of most state agencies is limited to the influence they wield with the Corps itself. The various policies and approaches of local government in granting land use permits are discussed separately.

A. U.S. Army Corps of Engineers

1. Jurisdiction: Which Bay Wetlands Are Covered by the Existing Regulatory System?

The Corps of Engineers is responsible for regulating various activities in wetlands. Jurisdiction is granted to the Corps through two major federal statutes, Sections 9 and 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. Section 401 and Section 403)

and Section 404 of the Federal Water Pollution Control Act as amended in 1972 and 1977, now called the Clean Water Act (33 U.S.C. Section 1344). These laws, especially the Rivers and Harbors Act, are very general, and one must look to the applicable regulations for any detailed guidance. There are two sets of important regulations, one issued by the Corps itself governing all of its activities in wetlands, and one issued by the Environmental Protection Agency, but administered by the Corps of Engineers. In interpreting the Corps' authority under the Rivers and Harbors Act, one refers to the Corps regulations alone. However, when dealing with Corps authority under the Clean Water Act, the Corps regulations and EPA regulations must be read together.[1/]

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1. An understanding of the structure of these regulations greatly facilitates their use. The Corps regulations are found at 33 C.F.R. §§ 320-329, and were most recently amended and issued on July 19, 1977. 42 Federal Register 37122 et seq. The EPA regulations are found at 40 C.F.R. §§ 230 and following, and were issued and amended in their most recent form on December 24, 1980. 45 Federal Register 85336 et seq. The federal Register citations are important because they contain a preamble to each set of regulations which explains agency policy, and in cases where the regulations themselves are unclear, offers evidence as to how the agency will act.

The Corps regulations contain first a section defining general regulatory policies, including a discussion of wetlands. These general policies apply to all Corps activities, whether carried out under the authority of sections 9 and 10 of the Rivers and Harbors Act or section 404 of the Clean Water Act. Following these general provisions there are specific sections which are applicable only to the Rivers and Harbors Act, namely sections 321 and 322, which deal with sections 9 and 10 of the Rivers and Harbors Act respectively, and section

Generally speaking, the jurisdiction of the Corps is somewhat more limited under the 1899 Rivers and Harbors Act than under the Clean Water Act. The 1899 Act was designed to deal with activities that could interfere with navigation, and accordingly, jurisdiction under that act is generally limited to the line of mean high tide. In contrast, both Congress and the courts have recognized that water pollution may be caused by activities above the line of mean high tide, and accordingly, jurisdiction under the Clean Water Act extends to activities conducted above that level, including adjacent wetlands.

a. Rivers and Harbors Act of 1899.

The 1899 Rivers and Harbors Act regulates activities in the "navigable waters of the United States," and all the jurisdictional questions under the Act involve administrative and judicial interpretation of what that term means.

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329 of the regulations which defines "navigable waters of the United States" which is the jurisdictional limit of the Corps' authority under sections 9 and 10 of the Rivers and Harbors Act. Section 323 of the regulations deals specifically with the Corps' regulation of wetlands under the Clean Water Act and references specifically the additional regulations promulgated by the Environmental Protection Agency. In sum, when analyzing the Corps' jurisdiction under sections 9 and 10 of the River and Harbors Act, one should refer to sections 320, 321, 322 and 329 of the regulations. When analyzing the Corps' jurisdiction under section 404 of the Clean Water Act, one should refer to section 320 and section 323 of the Corps regulations and the EPA regulations.

Section 329 of the Corps regulations defines the term as follows:

> "Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." Section 329.4.

The same regulation has specific sections that deal with "bays and estuaries" such as the San Francisco Bay. In those waters, jurisdiction extends to the line on the shore reached by the plane of the mean (average) high water, even though portions of the water body may be shallow or obstructed by shoals, vegetation, or other barriers. Sections 329.14(a)(2) and (b). The Corps originally asserted that the shoreward limit of its jurisdiction extended to the line of higher high water on the Pacific coast, but this interpretation was overturned in Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978). The printed regulations still refer to higher high waters, but the Corps has indicated in a letter to the Secretary for Resources of the State of California that Corps jurisdiction is now limited to the line of mean high water, not mean higher high water (letter to Secretary Johnson from Colonel JOhn M. Adsit, District Engineer, August 11, 1978).

Wetlands are expressly included in this definition, even though one could not literally "navigate through them":

> "Jurisdiction thus extends to the edge. . . of all [bays and estuaries], even though portions of the water body may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered 'navigable in law' . . . ." Section 329.12(b).

Corps jurisdiction under the 1899 Rivers and Harbors Act also extends to wetlands that have been separated from the Bay by a dike or other obstruction, as long as the wetlands lie below what was historically the level of mean high tide. The regulations state:

> "[A]n area will remain 'navigable in law' even though no longer covered with water whenever the change has occurred suddenly, or was caused by artificial sources intended to produce that change." Section 329.13.

This issue was addressed by the Ninth Circuit Court of Appeals in Leslie Salt Co. v. Froehlke, supra. The Court held that the definition of "navigable waters of the United States" was inextricably linked with the traditional judicial definition of tidelands, which in turn were defined by the historic level rather than the current level

of high tide. The Court stated:

> "We hold that in tidal areas, 'navigable waters of the United States,' as used in the Rivers and Harbors Act, extend to all places covered by the ebb and flow of the tide to the mean high water (MHW) mark in its unobstructed, natural state." 578 F.2d at 753 (emphasis added). 2/

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2. This was not the major issue addressed in the Froehlke case. The court was primarily concerned with whether Corps' jurisdiction under the Rivers and Harbors Act extended to mean high water or, as the Corps asserted, mean higher high water. The difference in San Francisco Bay is considerable. Perhaps as much as 125 miles of shallow tide lands and 63 miles of salt ponds would be included in the mean higher high water definition, but were excluded by the Court's decision in Froehlke. House Comm. on Government Operations, Increasing Protection for our Waters, Wetlands and Shorelines: the Corps of Engineers. H.R. Rep. No. 92-1323, 92d Cong., 2d Sess. 29 (1972).

It is clear from the text of the Froehlke opinion, however, that the Corps' jurisdiction under the Rivers and Harbors Act included areas below the historic level of mean high water. The Court stated that for purposes of fixing a shoreward limit, the terms "tidewater" and "navigable waters" are interchangeable, and then turned to the cases concerning the limit of tide waters to assist in its analysis of the underlying question of whether the proper line was mean high water or mean higher high water. In passing, the Court noted that:

> "the term 'navigable waters' has been judicially defined to cover: 1) non-tidal waters which were navigable in the past or which could be made navigable in fact by 'reasonable improvement' [citations]." Froehlke at 749.

The Army Corps of Engineers has adopted this interpretation of the Froehlke case, indicating in a letter to the Secretary of Resources that its jurisdiction "includes unfilled areas presently behind dikes but formerly below the mean high water mark" (letter to Secretary Johnson from John M. Adsit, District Engineer, August 11, 1978). The use of the words "unfilled areas" implies that the Corps would assert jurisdiction under the Rivers and Harbors Act for areas which have wetland characteristics.

b. Section 404 of Clean Water Act.

The jurisdiction of the Corps of Engineers is somewhat broader under the Clean Water Act since that act includes wetlands regardless of whether they are above or below the level of mean high water. This distinction is not immediately apparent from the text of section 404 of the Clean Water Act which requires permits for the discharge of dredged or fill material into the "navigable waters" of the United States. "Navigable waters" are in turn defined in the Clean Water Act as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). This is the same definition as in the 1899 Rivers and Harbors Act. However, citing legislative

history, the courts have adopted a broader interpretation of the jurisdictional limits under section 404. The courts have emphasized the functional purpose of the Clean Water Act to avoid and control water pollution, and have accordingly indicated that jurisdiction under the Act extends to those areas where prohibited activity could reasonably be expected to cause water pollution, rather than a reference to the traditional standard of mean high water. The court in Froehlke stated:

> "[T]he case law clearly supports an expansive reading of the term 'navigable waters' as used in the FWPCA, 33 U.S.C. § 1251, et seq. . . . . Congress intended to control the discharge of pollutants into waters at the source of the discharge, regardless of its location vis-a-vis MHW or MHHW lines." 578 F.2d at 753 n.12. 3/

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3. The court in Froehlke declined to determine the line of ultimate jurisdiction under the Clean Water Act in San Francisco Bay, but did hold that the area behind the dikes of the Leslie Salt Co. was included:

> "The water in Leslie's salt ponds, even though not subject to tidal action, comes from the San Francisco Bay to the extent of 8 to 9 billion gallons a year. We see no reason to suggest that the United States may protect these waters from pollution while they are outside of Leslie's tide gates, but may no longer do so once they have passed through these gates in Leslie's ponds." Id. at 755.

This expansive view of Clean Water Act, section 404 jurisdiction has been articulated by other courts as well. See, e.g., United States v. Holland, 373 F.Supp. 655 (M.D. Fla. 1974):

Thus, the Corps has jurisdiction over existing wetlands under section 404 of the Clean Water Act, even though the wetlands were above the line of either actual or historic mean high water. The test of jurisdiction is not the historic mean high water line, but is whether the activity disturbing the wetlands would have an effect upon the bay itself.

The Corps regulations define the terms "Waters of the United States" for the purposes of section 404 jurisdiction by creating five categories: the territorial seas (Class 1); coastal and inland waters (Class 2), tributaries to navigable waters (Class 3), inter-state waters and their tributaries (Class 4), and a catch-all of "all other waters (Class 5). Repeated reference is made to

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". . . The mean high water line is no limit to federal authority under the FWPCA. While the line remains a valid demarcation for other purposes, it has no rational connection to the aquatic ecosystems which the FWPCA is intended to protect. Congress has wisely determined that federal authority over water pollution properly rests on the commerce clause and not on past interpretations of an act designed to protect navigation. [The court is referring to the Rivers and Harbors Act.] And the Commerce Clause gives Congress ample authority to reach activities above the mean high water line that pollute the waters of the United States." Id. at 676.

wetlands. Class 2 is defined as:

> "Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, <u>including adjacent wetlands</u>."

Class 3 is defined as follows:

> "Tributaries to navigable waters of the United States, <u>including adjacent wetlands</u> . . . ."

Class 4 is defined as:

> "Interstate waters and their tributaries, <u>including adjacent wetlands</u>."

Class 5 is defined as:

> "All other waters of the United States not identified in paragraphs (1) - (4) above, such as isolated wetlands and lakes . . . ."
> <u>Id</u>., § 323.2(a)(1) - (5).

The words "adjacent" and "wetlands" are individually defined as well. The term "adjacent" is defined as:

> "Bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands." Id., § 323.2(d).

Thus, there is no doubt that the jurisdiction of the Corps under section 404 extends to diked wetlands. Nor do these wetlands have to be immediately bordering or contiguous to the bay, as long as they are "neighboring."

The definition of the term "wetlands" is extremely significant. The regulation states:

> "The term 'wetlands' means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." Id., § 323.2(c).

Thus, to be a wetland, an area must support vegetation typical of areas periodically inundated by water. Thus, although the jurisdiction of the Corps under the Clean Water Act is broader than under the 1899 Rivers and Harbors Act in the sense that it is not limited by the line of mean high water, it is narrower in the sense that an area must be truly "wet" to sustain the jurisdiction. Theoretically, under the 1899 Act, the Corps of Engineers could assert jurisdiction over activities in an area that is for all practical purposes "dry," if it were below the historic level of mean high water. Under the Clean Water Act, on the other hand, the Corps could assert jurisdiction above the line of mean high water, but not if the land no longer retained any wetland characteristics. To the extent that this limitation of jurisdiction under the Clean Water Act is not clear in the regulations, it is made clear by a statement of the Corps issued in the preamble to the regulations:

> "We do not intend, by this clarification, to assert jurisdiction over those areas that once were wetlands and part of an aquatic system, but which, in the past, have been transformed into dry land for various purposes."
> 42 Fed. Reg. 37128 (July 19, 1977).

An additional limitation on the Corps regulation of wetlands under the Clean Water Act is that it will not require permits for "plowing, cultivating, seeding and harvesting for the production of food, fiber and forest products." Id. § 323.2(l)(n). This limitation will be discussed further below.

As noted previously, the authority of the Corps of Engineers to issue a permit under section 404 of the Clean Water Act is regulated by EPA regulations as well as by Corps regulations. The EPA regulations generally mirror the regulations issued by the Corps. See 40 C.F.R. § 230 et seq. The term "wetlands" is defined in precisely the same language. 40 C.F.R. § 230.3(t). The term "adjacent" is defined in the same language as in the Corps regulations. Id., § 230.3(b).

In sum, the jurisdiction of the Corps is somewhat broader under the Clean Water Act than under the Rivers and Harbors Act, but the areas above the line of mean high water must be truly "wet" in order to be regulated, and agricultural activities that do not result in runoff or other direct discharge into the bay inself would not be subject to a permit requirement. The combined effect of these two Acts is that the jurisdiction of the Corps

covers all areas near the bay that exhibit true wetland characteristics. Areas that are now dry but were once wetlands would also be included as long as they lie below the line of historic mean high water and have not been so permanently altered that they have no potential wetland values. Areas above the line of mean high water which do not exhibit wetlands characteristics would not be covered by Corps jurisdiction even if they were historically wetlands.

2. Regulated Activities.

Generally speaking, most activities that could damage wetlands require a permit from the Army Corps of Engineers either under sections 9 and 10 of the Rivers and Harbors Act or under section 404 of the Clean Water Act or both. The Rivers and Harbors Act requires permits for the construction of most major physical projects that are typically instituted in or near navigable waters, or for dredging, filling or stream channelization. Section 404 of the Clean Water Act requires permits for the discharge of dredged or fill material into the waters of the United States.

a. Rivers and Harbors Act of 1899.

Section 9 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 401) prohibits the construction of "any

bridge, dam, dike, or causeway" in or over a navigable water of the United States without the consent of Congress if the water is interstate, or without the consent of both the applicable state legislature and the Secretary of the Army and Chief of Engineers if the water is intra-state. Section 10 of the Act, 33 U.S.C. § 403, requires a permit from the Secretary of the Army and Chief of Engineers for other construction projects such as wharves, breakwaters, jetties, and other structures. Section 10 also requires a permit for dredging, filling, stream channelization, or any work performed either in the waters of the United States, or outside the waters of the United States which affect the navigable capacity of waters of the United States.

The Corps regulations further define those activities which require a permit:

> "Department of the Army permits are required under section 10 for all structures or work in or affecting navigable waters of the United States . . . ." § 322.3(a).

The term "structure" is defined in the regulations in the same terms as in the Act to include such items as a wharf, pier,

breakwater, jetty, floating vessel, piling, etc. Section 322.2(b). The term "work" is defined to include "without limitation, any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States. These definitions of "work" and "structure" are sufficiently broad that activity in wetlands which could likely endanger the biological integrity of the wetlands would require a permit from the Army Corps of Engineers under section 9 or 10 of the Rivers and Harbors Act.

b. Clean Water Act of 1977.

Under Section 404 of the Clean Water Act, the Corps, subject to EPA guidelines and oversight, regulates the "discharge of dredged and fill material" into the waters of the United States. 33 U.S.C. § 1344.

The regulations issued by the Corps define each of these terms. "Dredged material" is broadly defined to mean any "material that is excavated or dredged from the waters of the United States." The term "fill material" is defined as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of the water body."

The phrases "discharge of dredged material" and "discharge of fill material" are also defined with sufficient breadth to cover almost any imaginable activity which could endanger wetlands. "Discharge of dredged material" is defined as follows:

> "Any addition of dredged material to the waters of the United States. The term includes, without limitation, the addition of dredged material to a specified disposal site located in waters of the United States and the runoff or overflow from a contained land or water disposal." § 322.2(l).

Thus, the phrase refers not only to the actual deposit of dredged material into waters of the United States, but the runoff into such waters that may occur if dredged material is deposited onto dry land adjacent to the bay. The phrase "discharge of fill material" is defined as follows:

> "[T]he addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary

to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt or other material for its construction; site development fills for recreational, industrial, commercial, residential and other uses; causeways or roadfills; dams and dikes; artificial islands; property protection and/or reclamation devices such as rip rap, groins, sea walls, breakwaters such as sewage treatment facilities; intake and outfall pipes associated with power plants and subaqueous utility lines; artificial reefs." § 323.3(n).

The major exception to this highly inclusive definition of discharge of dredged or fill material is agricultural activity. The Corps regulations explicitly state that the terms "discharge of dredged material" and "discharge of fill material" do <u>not</u> include "plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products." Section 323.2(l) and (n). This apparently means that such activities as the moving of earth and digging of ditches would ordinarily require a Corps permit if they were associated with activities such

as subdivision development, but would not need a Corps permit if they were performed in the course of farming.

There is, however, a limitation to the agricultural exception. In a preamble to its regulations, the Corps warned that one should not interpret the agricultural exclusion "as an exclusion of all practices by the farming and forestry industry including those that do involve discharges of dredged or fill material into water. The FWPCA does not allow us to make such an exemption or exclusion for any industry." 42 Fed. Reg. 37130 (July 19, 1977). Apparently this means that if the farming activities are undertaken in such a way as to discharge significant quantities of material into the adjacent waters, they could require a Corps permit.

In addition section 404 contains certain categorical exemptions for normal farming, maintenance of currently serviceable structures such as dikes, dams, etc., farm or stock ponds, temporary sedimentation basins, and the construction and maintenance of farm or forest roads. 33 U.S.C. § 1344(f)(1)(A)-(e). There is also an exception for activities regulated pursuant to statewide programs approved by the Corps to control minor discharges through best management practices. 33 U.S.C. § 1344(f)(1)(F).

California has no such program. It should be noted, however, that all of the categorical exemptions are limited to situations where the project involved does not have as its purpose "bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced . . . ." Section 1344(f)(2). Thus, fill for normal farming or for a forest road would be categorically exempt, but not if it was undertaken so as to convert previously wet areas into dry areas. Finally, section 404(r) exempts federal construction projects authorized specifically by Congress as long as the federal agency prepares an EIS for Congressional review. 33 U.S.C. § 1344(r).

In sum, taken together, sections 9 and 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act, provide for regulation by the Corps of a broad range of activities which might be conducted on wetlands. The major exception is that agricultural activities are excluded from the Clean Water Act. Since that exception does not exist in the Rivers and Harbors Act, it would apply only in situations where the wetlands fall outside Rivers and Harbors Act jurisdiction but inside Clean Water Act jurisdiction, that is, above the line of historic

mean high water, but within a wetland which is "adjacent" to the bay. In that situation, farming activity would be permitted without a Corps permit as long as it did not result in the discharge of significant amounts of material into the waters of the bay.

3. The Standard Which the Corps Applies in Reviewing Permit Applications.

The Corps determines whether or not to issue a permit for a given project based on criteria contained in its own regulations, and, with respect to section 404 of the Clean Water Act, the regulations issued by EPA. The Corps regulations apply both to permits under section 9 or 10 of the Rivers and Harbors Act and to section 404 of the Clean Water Act, while the EPA regulations apply only to section 404. Therefore, in determining the criteria that apply to the permit, under sections 9 and 10 of the Rivers and Harbors Act, one need look only to the Corps regulations, while in determining the criteria under the Clean Water Act, the Corps regulations and EPA regulations must be read together and impose cumulative obligations.

a. General Policies Contained in the Corps Regulations Applicable to Permits under Both the Rivers and Harbors Act and the Clean Water Act.

Section 320.4 of the Corps regulations contains "General Policies for evaluating permit applications," and

establishes standards and policies which the Corps must consider in making permit decisions under both the Rivers and Harbors Act and the Clean Water Act. The section defines what it terms to be "important wetlands,"[4/] and then establishes a two-prong test as to whether the permit will be granted to work in such wetlands. First, the District Engineer must subject the proposed project

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4. Wetlands considered to perform "functions important to the public interest" are defined to include:

" (i) Wetlands which serve important natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic or land species;
(ii) Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges;
(iii) Wetlands, the destruction or alteration of which would affect detrimentally natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics;
(iv) Wetlands which are significant in shielding other areas from wave action, erosion, or storm damage. Such wetlands are often associated with barrier beaches, islands, reefs and bars;
(v) Wetlands which serve as valuable storage areas for storm and flood waters;
(vi) Wetlands which are prime natural recharge areas. Prime recharge areas are locations where surface and ground water are directly interconnected; and
(vii) Wetlands through natural water filtration processes serve to purify water.

to a "public interest review" to determine whether "the benefits of the proposed alteration outweigh the damage to the wetlands resource." Section 320.4(a)(b)(4). The general criteria the district engineer should apply in determining whether a project is in the public interest are listed in the regulations, and include such factors as economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, water quality, etc. The evaluation should consider the "relative extent of the public and private need for the proposed work" and the "desirability of using appropriate alternative locations and methods," as well as other listed factors. § 320.4(a). Quite obviously, this "public interest evaluation" allows for considerable discretion on the part of the Corps.

The second prong of the test is more restrictive. It requires that the proposed alteration be "necessary," and in considering the question of necessity, the district engineer is obligated as follows:

> "[T]he District Engineer shall consider whether proposed activity is primarily dependent on being located in, or in close proximity to the aquatic environment, and whether feasible alternative sites are available." Section 320.4(b)(4).

Thus, the proposed project is "necessary" only if it is "water-dependent" and no feasible alternative sites are available. The regulations place the burden of demonstrating water-dependency on the applicant, and the applicant is also required to provide sufficient data to allow an evaluation of the feasibility of alternative sites. Id. Also, the regulations require that the Corps consider the cumulative effect of each proposed project in the context of other projects and related wetlands. Section 320.4(b)(3).

b. EPA Regulations used by the Corps in Administering Section 404 of the Clean Water Act.

The criteria outlined in section (a) above are applicable to the administration of both the Rivers and Harbors Act and the Clean Water Act. In addition, permits issued under the Clean Water Act are subject to the requirements of regulations issued by EPA. These regulations were recently revised in December 1980, and adopt an approach similar to but somewhat more restrictive than the general Army Corps of Engineers regulations discussed above.

The EPA regulations first establish a test of "no practical alternative" which is similar to the "necessity" test employed in the Corps regulations:

"[N]o discharge of dredged or fill material shall be permitted if there is a practical alternative to the proposed discharge which would have less adverse impact on the acquatic ecosystem, so long as the alternative does not have other significant adverse consequences." 40 C.F.R. § 230.10(a); 45 Fed. Reg. 85348.

The term "practicable" is also defined in the regulations:

"An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." Id. § 230.10(a)(2).

The regulations make it clear that the Corps does not limit itself to alternatives that involve land already under the owernship or control of the applicant, but should look at alternative sites:

"If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fill the basic purpose of the proposed activity may be considered." Id.

The EPA Regulations impose a significant presumption which has the effect of making them somewhat stronger than the regulations issued by the Corps:

> "Where the activity associated with the discharge which is proposed for a special aquatic site [this includes wetlands] does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not 'water dependent'), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic eco-system, unless clearly demonstrated otherwise." Section 230.10(a)(3).

Given the broad jurisdiction of the Corps under the Clean Water Act and the range of activities covered, this paragraph is probably the most significant statement in the body of regulations affecting diked wetlands in the San Francisco Bay. Unless the activity is clearly water-

dependent, the regulation presumes that alternative sites away from a wetland area are superior, and it is up to the applicant to make what would normally be a difficult showing that other sites are not available or that the project could not be performed in another area.

4. The Requirement of Consultation with Other Agencies.

Both the regulations issued by the Corps and the regulations issued by EPA require that the Corps consult with certain specified federal and state agencies. This requirement is significant because it is one of the primary means by which California agencies have influence, albeit indirectly, over diked wetlands. The general policies for evaluating permit applications which apply to both the Clean Water Act and the Rivers and Harbors Act require that the Corps "consult with applicable state agencies." First, there is a general requirement that "State regulatory laws or programs for classification and protection of wetlands will be given great weight." Section 320.4(b)(5). Secondly, there is a reference to the Fish and Wildlife Coordination Act of 1956, 16 U.S.C. 742(a) et seq. and its requirements for consultation with State officials as follows:

"Corps of Engineers officials will consult with the Regional Director, U. S. Fish and Wildlife Service, the Regional Director of National Marine Fisheries Service, and the head of the agency responsible for fish and wildlife for the state in which the work is to be performed, with a view to the conservation of wildlife resources by prevention of the direct and indirect loss and dmaage due to the activity proposed in a permit application. They will give great weight to these views on fish and wildlife considerations in evaluating the application. The applicant will be urged to modify his proposal to eliminate or mitigate any damage to such resources, and in appropriate cases the permit may be conditioned to accomplish this purpose." Section 320.4(c).

Thus, the Corps consults the Department of Fish and Game on all applications affecting wetlands, and in fact, the recommendations of the department are given great weight.

In addition, Corps regulations provide that no permit will be issued to a non-federal applicant until certification has been provided that the proposed activity complies with the coastal zone management program if applicable and that the appropriate state agency has concurred with the certification. Section 320.4(h). The importance of the coastal zone management program is also recognized in the regulations issued by EPA for administration of section 404 of the Clean Water Act by the Corps. As discussed above, those regulations do not permit work in wetlands if "practicable alternatives" to the proposed project exist outside of a wetland area. The regulations refer to approved coastal zone management programs in making that determination:

> "To the extent that practical alternatives have been identified and evaluated under a Coastal Zone Management program, a section 208 program, or other planning process, such evaluation shall be considered by the permitting authority as part of the consideration of alternatives under the Guidelines." 40 C.F.R. § 230.10(a)(5).

In sum, the Corps is required by its regulations to consider the comments of such state agencies as the Department of Fish and Game and BCDC. Currently the Corps

in fact does give great weight to State agency comments. To the extent that State agency positions are incorporated in the Coastal Zone Management Plan or some other formal "policy," they may have more influence with the Corps, especially on the specific question of whether "alternative" sites are available for specific projects outside of the wetland area.

B. Other Federal Laws and Policies.

Some wetland areas in the Bay are in federal--most notably military--ownership and control. Although federal activities on these lands are usually exempt from State and local regulations, they are subject to several federal laws which offer a degree of wetland protection.[5/] Similarly, proposed development projects in non-federal wetlands sometimes involve federal funding or assistance, and therefore must comply with federal environmental laws.

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5. The Supremacy and Plenary Powers Clauses of the U.S. Constitution exempt federal activities from state and local regulations, absent a "clear and unambiguous" directive from Congress. See Hancock v. Train, 426 U.S. 167, 179-80 (1976) (holding Clean Air Act state permit requirements inapplicable to federal facilities); EPA v. California, 426 U.S. 200, 211 (1976) (holding Clean Water Act NPDES permit requirements inapplicable to federal facilities). In 1977, Congress nullified the effect of these two decisions by amending the Clean Air Act and Clean Water Act to require federal compliance with state permit requirements. See 42 U.S.C. § 7418; 33 U.S.C. § 1323.

1. National Environmental Policy Act (NEPA).

NEPA directs each federal agency to give full consideration to the environmental effects of its activities, including carrying out, funding, or authorizing projects. For any activity which would significantly affect the environment, the agency must prepare an environmental impact statement (EIS) which includes a detailed discussion of the proposed action, its probable environmental effects, its unavoidable adverse impacts, its cumulative effects, any alternatives, and any irretrievable commitment of resources involved in the proposed action. 42 U.S.C. §§ 4321 et seq. The EIS process allows other agencies and the public to comment on development activities in wetlands.

2. Executive Order No. 11990 - Protection of Wetlands.

Executive Order No. 11990, 42 Fed. Reg. 26961 (May 24, 1977), applies to all federal agencies responsible for (1) acquiring, managing and disposing of federal lands and facilities; (2) undertaking, assisting or financing construction projects; or (3) conducting federal programs affecting land use, including water and related land resources planning, regulating and licensing activities. The Order directs each agency to "minimize the destruction, loss or degradation of wetlands, and to preserve and enhance

the natural and beneficial values of wetlands."

Specifically, the Order provides that before undertaking or assisting new construction in wetlands (which includes draining, dredging, channelizing, filling, diking, impounding, and related activities, and any other structures or facilities), an agency must find that (1) there is no practicable alternative, and (2) the proposed action includes all practicable measures to minimize harm to wetlands. It also provides that before leasing or transferring federally-owned wetlands to non-federal parties, an agency must insure that appropriate use restrictions are included in the conveyance.

The Order supplements NEPA by mandating consideration of a list of factors relevant to wetland preservation; its chief value seems to lie in providing additional emphasis on wetland protection where federal actions are concerned. See 44 Fed. Reg. 1455 (EPA implementation procedures); 44 Fed. Reg. 66699 (FWS implementation procedures).

3. Coastal Zone Management Act of 1972.

This Act, 16 U.S.C. secs. 1451 et seq., provides that federal agencies conducting or supporting activities

directly affecting the coastal zone must do so in a manner consistent, to the maximum extent practicable, with the State's coastal zone management program. 16 U.S.C. § 1456(c)(1). A federal agency undertaking any development project in the coastal zone must insure its consistency, to the maximum extent practicable, with the State program. 16 U.S.C. § 1456(c)(2). The consistency requirement allows BCDC to wield some influence over proposed projects in diked wetlands. The Commission's experience in the Hamilton Air Force Base matter illustrates the strengths and weaknesses of that process.

C. State Laws and Policies.

1. State Water Resources Control Board and Regional Water Quality Control Board.

The State and Regional Boards exercise water quality review and permit authority pursuant to the Clean Water Act, 33 U.S.C. §§ 1251 et seq., and the Porter-Cologne Water Quality Control Act, Cal. Water Code §§ 13000 et seq.

a. Clean Water Act Certifications of Conformance.

Section 401 of the Clean Water Act requires applicants for federal licenses or permits for activities

which may result in a discharge to navigable waters (e.g., Corps permits) to obtain a certification from the State that the project will not violate water quality standards. 33 U.S.C. § 1341. The State Board issues or waives such certifications, usually on the recommendation of the Regional Board. The Board may issue a certification with conditions to ensure that a project will comply with effluent limitations and standards in the Clean Water Act and EPA regulations, as well as any state water quality standards. Cal. Water Code § 13160; 23 Cal. Admin. Code §§ 2340-2348; 40 C.F.R. § 121 (EPA's state certification regulations). See also Resources Agency Basic Wetlands Protection Policy (<u>infra</u>, p. 40).

b. Clean Water Act (NPDES) Permits.

Section 402 of the Clean Water Act established the National Pollutant Discharge Elimination System to regulate the discharge of pollutants (other than dredged or fill materials) from point sources into navigable waters. 33 U.S.C. § 1342. This permit program is administered by the Regional Board pursuant to 33 U.S.C. § 1342(b) and Cal. Water Code §§ 13370-13389. NPDES permits (called "waste discharge requirements" in California are required for solid waste, sewage, munitions, chemical waste, biological materials, radioactive materials, heat, and industrial, municipal and agricultural waste discharged into navigable water.

NPDES permits are required for discharges into "waters of the United States" within the State's jurisdiction. Cal. Water Code § 13376. This includes waters subject to the ebb and flow of the tide and adjacent wetlands, defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 40 C.F.R. § 122.3(t) (EPA regulations for the NPDES program). As with the Corps' section 404 program, this definition of wetlands may preclude NPDES regulation over diked wetlands which are now "dry" upland areas.

The Regional Board issues permits, or waste discharge requirements, using effluent limits and water quality plans established pursuant to the Clean Water Act and the Porter-Cologne Act. See 40 C.F.R. §§ 122-125 (EPA Regulations); San Francisco Bay Basin Water Quality Control Plan. See also California Environmental Quality Act (CEQA), Cal. Pub. Resources Code §§ 21000 et seq.; 23 Cal. Admin. Code §§ 2700 et seq. (State Board regulations re CEQA); Resources Agency Basic Wetlands Protection Policy.

c. Porter-Cologne Act Waste Discharge Requirements.

The NPDES program is supplemented by a State permit program established by the Porter-Cologne Act, which covers all waste discharges which may affect water quality (other than discharges into navigable waters). Cal. Water Code §§ 13260 et seq. "Waste" includes sewage and all other waste substances associated with human habitation, or of human or animal origin, or from any producing, manufacturing or processing operation. Cal. Water Code § 13050(d).

This permit program operates essentially the same way as the NPDES program; its significance lies in the extent of the Regional Board's jurisdiction. If water quality may be affected, the Regional Board can regulate discharges onto land or underground. With respect to diked wetlands, therefore, proposed discharges on upland "dry" areas may require a Regional Board permit (waste discharge requirement) in some circumstances.

The Regional Board administers the program in accordance with State Board regulations (23 Cal. Admin. Code §§ 2200-2233), the San Francisco Bay Basin Water Quality Control Plan, and the policies in the Porter-Cologne Act, including coastal marine environment policies which give

highest priority to "improving or eliminating discharges that adversely affect . . . wetlands, and other biologically sensitive sites." Cal. Water Code § 13142.5. See also CEQA; 23 Cal. Admin. Code §§ 2700 et seq.; Resources Agency Basic Wetlands Protection Policy.

2. Department of Fish and Game.

The Department has several responsibilities which may affect projects in diked wetlands. It issues permits for streambed alteration; it has some limited responsibilities with respect to native plant protection; and it comments on all projects under consideration by other state and federal agencies which may affect fish and wildlife resources.

a. Streambed Alteration Agreements.

In general, any proposed project that will divert or obstruct the natural flow or change the bed, channel or bank of any river, stream or lake designated by the Department, or use any streambed material, must be reviewed by the Department for its effects on fish and wildlife resources. The project may not proceed until (a) the Department finds that it will not substantially adversely affect fish or wildlife; or (b) the Department's proposals for modifications necessary to protect fish and wildlife are incorporated into the project. Cal. Fish & Game Code §§ 1601, 1603. The Department has designated,

for the purpose of these sections, all rivers, streams, lakes and streambeds in the state, including all rivers, streams and streambeds that may have intermittent flows of water. 14 Cal. Admin. Code § 720.

b. Native Plant Protection.

The Department is required to notify landowners of the presence of native plants designated as endangered or rare by the Fish and Game Commission. Cal. Fish & Game Code § 1904. See 14 Cal. Admin. Code § 670.2 (listing rare and endangered plants). A landowner who has received such notice must let the Department know at least 10 days in advance of any proposed change in the land use, to give the Department an opportunity to salvage the plant. Cal. Fish & Game Code § 1913(c). The Department also has commenting and consulting authority with respect to other State agency programs for native plant conservation, including "the identification, delineation and protection of habitat critical to the continued survival of endangered or rare native plants." Cal. Fish & Game Code § 1911.

c. Commenting Policies.

The Department comments on all Corps permit applications, pursuant to the Fish and Wildlife Coordination

Act, on BCDC and RWQCD applications, and on other environmental documents circulated pursuant to NEPA or CEQA. The Department reviews project applications and proposals in accordance with its responsibility for protection of fish and wildlife resources and habitat. The Department opposes wetland development unless a project is dependent upon a waterfront site, no less damaging alternatives exist, and any loss of existing or potential fish and wildlife habitat is offset by restoration of an area of comparable size and value. Department of Fish and Game San Francisco Bay Management Guidelines, in Protection & Restoration of San Francisco Bay Fish & Wildlife Habitat II (1979); see also CEQA; Resources Agency Basic Wetlands Protection Policy.

3. Other State Laws or Policies.

State laws and policies which may affect wetland development include:

a. CEQA

Under the California Environmental Quality Act, Cal. Pub. Resources Code §§ 21000 et seq., an environmental evaluation is required for all projects carried out

by public agencies, receiving public financial assistance, or involving a public agency permit or lease. If a project may have a significant adverse effect on the environment, an environmental impact report (EIR) must be prepared which describes the effects and identifies alternatives and mitigation measures. Like NEPA, CEQA allows public agencies (and the public) the opportunity to comment on proposed projects in diked wetlands. Of some significance, and unlike NEPA, CEQA contains a provision which requires that measures to reduce environmental impacts be adopted or that a finding be made that such steps are infeasible for social or economic reasons. Pub. Resources Code § 21081.

b. Resources Agency Basic Wetlands Protection Policy (September 19, 1977).

Departments, boards and commissions within the Resources Agency (including the Regional Water Quality Control Board and the Department of Fish and Game) must observe this policy when developing or authorizing projects, or influencing projects and permit actions taken by other authorities. The policy prohibits authorization or approval of projects that fill, harm, or destroy wetlands. Exceptions to the policy may occur only if the proposed project (1) is water-dependent or an essential transportation, water conveyance or utility project; (2) has no feasible, less environmentally damaging alternative location; (3) does

not adversely affect the public trust; and (4) includes adequate compensation for project-caused losses. While the policy does not define the term "wetlands," it specifically mentions and presumably applies to the wetland areas outside BCDC's jurisdiction. The policy was amended on July 30, 1980 to exempt wetlands of one-half acre or less provided that (1) the wetland has insignificant biological, educational, and recreational values; (2) it is surrounded by developments incompatible with a significant fish or wildlife habitat; (3) it is not adjacent to another wetland, waterway or open space; (4) it cannot feasibly be managed or restored to a significant level or biological productivity; and (5) its destruction would not adversely affect any unique, endangered or rare plant or animal. The exemption is intended to apply only where the public genefits of the project far outweigh the loss of the wetland, e.g., in development of wetlands perpetuated by street or storm drain runoff in residential, commercial or industrial areas. In addition, the exemption is accompanied by a condition requiring acre-for-acre compensation in the form of a new or restored wetland of significant biological value.

c. Keene-Nejedly California Wetlands Preservation Act.

In 1976 the Legislature enacted Chapter 7 of the Public Resources Code §§ 5810-5818, finding that:

> "[T]he remaining wetlands of this state are of increasingly critical economic, aesthetic, and scientific value to the people of California, and . . . there is need for an affirmative and sustained public policy and program directed at their preservation, restoration, and enhancement, in order that such wetlands shall continue in perpetuity to meet the needs of the people."
>
> Cal. Pub. Resources Code § 5811.

"Wetlands" include "streams, channels, . . . bays, estuaries, . . . marshes, and the lands underlying and adjoining such waters, whether permanently or intermittently submerged, to the extent that such waters and lands support and contain significant fish, wildlife, recreational, aesthetic, or scientific resources." Cal. Pub. Resources Code § 5812(a). The Act directs the Department of Parks and Recreation and the Department of Fish and Game to conduct a study to identify wetlands which should be acquired or protected. Cal. Pub. Resources Code § 5814.

d. The Public Trust.

When California was admitted to the Union in 1880, it gained title to all tide and submerged lands and to

the beds of navigable waterways within the state. State ownership ultimately derived from English common law principles whereby the King held such lands in trust for use by the people for navigation and fishing. Likewise, California's title to these lands was impressed with a public trust for commerce, navigation and fisheries. Under modern law, these trust uses encompass a wide range of activities, including commercial navigation, harbor development, hunting, fishing, and preservation of open space. Marks v. Whitney, 6 Cal.3d 251, 259-60 (1971).

Sales of tidelands to private owners pursuant to general sales statutes bewteen 1855 and 1872 passed title subject to the public trust--i.e., subject to an easement in the public for trust uses and the right of the state to prohibit uses inconsistent with the trust. People v. California Fish Co., 166 Cal. 576 598-99 (1913). The public trust may also exist over lands mistakenly sold as "swamp" or "swamp and overflow" lands which were in reality tide and submerged lands.

Many tideland areas in San Francisco Bay were sold to private owners by the Board of Tide Land Commissioners (BTLC) pursuant to special statutes enacted in 1868 and 1870. The extent of the public trust over BTLC lots sold pursuant

to the 1870 act was decided by the California Supreme Court in City of Berkeley v. Superior Court, 26 Cal.3d 515 (1980) (the Murphy case). The Court held that the public trust still exists over submerged lands and lands currently subject to tidal action. "Properties that have been filled, whether or not they have been substantially improved, are free of the trust to the extent the areas of such parcels are not subject to tidal action." 26 Cal.3d at 534. As to diked wetlands which are unfilled yet no longer subject to tidal action, the opinion is unclear. Arguably, the Court's reasons for lifting the trust over filled lands not subject to tidal action (i.e., that (1) the property is no longer useful for trust purposes, and (2) the owner's substantial economic investment will be impaired if the trust exists) do not apply to unfilled diked wetlands, and therefore it could be argued that the public trust still exists over such areas.

e. Local Efforts.

We have been informed that there are 32 Bay Area cities and counties with identified diked wetland sites. The regulatory powers available to those jurisdictions include the familiar general plan requirements, zoning provisions and subdivision controls.

Government Code §§ 65300 et seq., 65860 et seq. and 66400 et seq. Other less often utilized tools such as specific plans are also available. See Government Code § 65450 et seq.

Apparently five or six local jurisdictions have adopted some form of diked wetland protection through their planning and regulatory processes which have the effect of protecting diked wetland areas. Some of these jurisdictions have adopted innovative approaches utilizing, for example, overlay districts and disclosure reporting requirements which are intended to preserve identified wetland values. In other instances diked wetlands are owned by local public agencies and are managed with the objective of preserving them without further adverse alteration. Several local jurisdictions have designated diked wetlands or "marsh" or "salt pond" in their general plans, but without implementing policies that would ensure protection of these sites. Finally some sixteen Bay Area cities and counties have no provisions that would prevent diked wetlands from being filled or otherwise greatly altered.

II. DEFICIENCIES IN EXISTING REGULATORY CONTROL OVER DIKED WETLANDS.

The regulation of diked wetlands is not as complete, secure, and consistent as it could be. Some of the problems with the existing system are inherent in the current regulatory structure, and others would become apparent if the Corps of Engineers were to take a less aggressive stance in regulating wetlands. In large part, the current regulatory scheme protects wetlands because its very complexity discourages potential project applicants and because of the weight the Corps has accorded the opinions of the Department of Fish and Game. In our view there is a definite need for more uniformity, consolidation of authority, and creation of a system that would protect diked wetlands through the uniform application of environmentally sensitive standards. Some of the major deficiencies of the current process are discussed below.

A. Multiplicity of Laws, Regulations, and Agencies.

Currently, both diked and undiked wetlands in San Francisco Bay are subject to a maze of sometimes conflicting jurisdictions and regulatory bodies. A proposed project that affects a wetland in the Bay is subject to either direct federal regulation or some form of federal comment from the U.S.

Army Corps of Engineers, the U. S. Fish and Wildlife Service, the Secretary of Interior, the National Historic Preservation Advisory Council, the National Oceanographic and Atmospheric Agency, the Environmental Protection Agency, the Department of Transportation, the Coast Guard, the National marine Fisheries Service, the Secretary of Housing and Urban Development, and the Secretary of Commerce. At the state level, regulatory control or comment may come from the Department of Fish and Game, BCDC, the State Water Resources Control Board, the Regional Water Quality Control Board or the Department of Parks and Recreation. All of these agencies are in addition to whatever authority is exercised by local governmental entities or special districts.

These federal and state agencies administer a large number of applicable laws, regulations, and policies. Often more than one agency will interpret or apply a given law, and conversely, a single agency may operate under several laws and sets of regulations simultaneously.

The Corps of Engineers operates under both sections 9 and 10 of the Rivers and Harbors Act of 1899, and section 404 of the Clean Water Act of 1972 and 1977. The Corps may also operate under or be influenced by the Coastal Zone Management Act of 1972, the National Environmental Policy

Act, the Fish and Wildlife Act of 1956, the Migratory Marine-Game Fish Act and the Fish and Wildlife Coordination Act, the Federal Power Act of 1920, the National and Historic Preservation Act, the Preservation of Historical and Archeological Data Act of 1974, the Interstate Land Sales Full Disclosure Act, the Endangered Species Act of 1973, the Deep Water Port Act of 1974 and the Water Conservation Fund Act of 1975. The Marine Mammal Protection Act of 1972 may also be applicable.

At the state level agencies operate under the McAteer-Petris Act, the Porter-Cologne Act, various sections of the Fish and Game Code, the Keene-Nejedly Wetlands Preservation Act, and various administrative policies such as the Resources Agency Basic Wetlands Protection Policy of September, 1977.

Finally, regulation of wetlands in the Bay is subject to various doctrines that have been developed by the judiciary including legal definitions of navigable waters and waters of the United States, and the public trust.

We believe this multiplicity of agencies, laws, regulations, doctrines and policies is untenable from a regulatory perspective over the long run. It may have the temporary effect of slowing development in wetlands, but over time it discredits the regulatory process. It also creates a situation where different wetland areas are treated in a disparate manner, not necessarily justified by the location, biology or wetland values, such that different applicants may be treated unequally with no objectively justifiable reason. Finally, and perhaps most importantly, none of these agencies is authorized to utilize comprehensive planning policies in acting on development proposals in diked wetlands.

B. Lack of Uniformity at the State Level.

The current regulatory system results in the possibility of the State of California speaking with more than one voice. For example, on a given project, the State may express its position through the State Water Resources Control Board issuing or denying certification that a given project will not result in a violation of water pollution control standards, the Department of Fish and Game reviewing possible diversions of the course of a stream, BCDC exercising its jurisdiction over the 100-foot shoreline band, or by

all three agencies together with other State agencies simultaneously presenting their positions through the Resources Agency to the Corps of Engineers for its consideration when the project proposal is at the federal level. The Resources Agency in coordinating State comments does its best to ensure that comments do not conflict, but the potential for conflict remains since many of the agencies involved are legally independent of the Resources Agency. And even when comments do not conflict, the Corps and the permit applicant are still faced with a wide variety of comments from individual agencies, each based on that agency's particular perspective, and each of which usually has to be individually resolved.

C. The Lack of Direct State Control over Wetlands in the Bay.

Even with all the various applicable federal and state laws and policies, no California agency has substantial control over diked wetlands in the bay. It is true that the Corps of Engineers may not grant a permit unless the required state and local permits have been granted. However, as discussed below, local regulatory

efforts are uneven and often ineffectual. Also, no state agency has direct control over many of the activities which could seriously impair a wetland's biological value. Certain state agencies do have jurisdiction, but it is often peripheral to the major issues which a project poses for the survival of a wetland area.

For example, BCDC has some jurisdiction, but only over fill in the Bay itself and within a 100-foot shoreline

band (generally for public access only). Activities in diked wetland areas rarely fall within meaningful BCDC jurisdiction. The State Water Resources Control Board and the Regional Water Resources Control Board may have jurisdiction over a project if it results in direct pollution to the waters of the Bay, but many projects and activities proposed in wetlands have no direct polluting effect on the Bay. Similarly, the Department of Fish and Game may have authority if specific endangered species are threatened or if a stream or lake is directly impacted, but there are many activities proposed for wetland areas which do not trigger this jurisdiction. The Resources Agency Basic Wetlands Policy provides a useful general guide, but since agencies which apply the policy usually do not have direct regulatory control, the policy cannot be applied directly.

Thus, for most activities in diked wetlands, the only way that State agencies may influence the most important aspects of a proposed project or activity is through submission of comments to the Corps of Engineers. The Corps is required to give "great weight" to state regulatory laws or programs for the protection of wetlands, and in this regard it currently depends heavily upon comments by BCDC and the Department of Fish and Game. However, the concept of

"great weight" is not defined further in the regulations, nor could it be with any practical effect. If the Corps were to alter its current sympathetic stance, there is no guarantee that it would continue to observe with the same care it does now the particular policies and reactions of state agencies.

In sum, to the extent that the current regulatory process is successful, its success depends upon a series of interpretations of existing Corps of Engineers' regulations as they pertain to comments by relevant state agencies. These interpretations are not memorialized effectively in any law or regulation, and could prove transitory, given the current trend in federal enforcement of environmental regulations.

D. Existing and Potential Omissions in the Current Regulatory System.

One of the major problems with the current regulatory system is the absence of an agency with an effective land use planning capacity. Although the Corps has done an acceptable job of evaluating individual projects for their impact on individual wetlands, its traditional regulatory authorization and experience does not, and probably should not, involve land use planning.

Nor does it have access to a single plan at the State or Federal level that deals comprehensively with development pressures on diked wetlands throughout the Bay region. Thus, for example, in evaluating whether there are "alternative locations" for a given proposed activity, the Corps must rely on a project-by-project ad hoc analysis. By contrast, if there were an overall plan for diked wetlands such evaluations could be made in the context of the Bay as a region.

Another major problem with the Corps' jurisdiction is its potentially transitory nature. The Rivers and Harbors Act of 1899 merely requires that structures and work below the level of mean high water be subject to a permit requirement. Similarly, section 404 of the Clean Water Act is limited to requiring a permit for the deposit of dredged or fill material in or adjacent to the Bay. Wetlands are not mentioned in the Rivers and Harbors Act and they are not treated with any detail in the Clean Water Act. Thus, the entire structure of federal regulation as we now know it is contained in the various regulations issued by the Corps of Engineers and EPA. These regulations are subject to change. There is nothing to prevent the

Corps or EPA from eliminating the presumption that activities in wetlands could be performed elsewhere with less damage to the environment, or for that matter, eliminating the special treatment given to wetlands throughout the regulations generally.

If the Corps were to regulate projects in wetlands less aggressively or if its regulations were amended in such a way to eliminate the current level of protection, there would be no other public agency currently authorized to serve this purpose. The authority of the Corps under sections 9 and 10 of the Rivers and Harbors Act is not delegable to the states at all. The authority of the Corps under the Clean Water Act is potentially delegable, but only to a limited extent. Section 404 of the Clean Water Act provides a means of delegating administration of individual and general permit programs to the states, but not for those waters which are in their natural condition inter-state waters, including the Bay and adjacent wetlands. 33 U.S.C. § 1334(g)(1). Thus, any retreat by the federal government in the area of wetland protection would result in a regulatory vacuum with no state agency currently having jurisdiction to regulate where the Corps would not.

Even under existing authority and practice, the Corps does not have the ability to regulate activities in

wetlands above the line of mean high water, which involve mainly farming. Farming may be appropriate in many of these areas, but at the moment there is no federal or state regulatory interest in such activities.

E. Deficiencies in Local Control.

As previously enumerated some five or six of the thirty-two Bay Area cities and counties having identified diked wetland sites have adopted regulatory measures which operate to provide a fair degree of protection to those sites. About half of the local jurisdictions have not addressed the problem of diked wetland protection at all. There is no discernible pattern in the approaches taken by local government unless inattention to the subject by about one-half of the cities and counties is taken as the norm.

It appears to us that from a regional perspective the protection currently being accorded to diked wetlands can be substantially attributed to the Corps procedures elaborated upon in this report and not to efforts of local jurisdictions in the Bay Area. If the Corps' regulatory posture weakens, it is not reasonable to expect that protection for diked wetlands will be accorded a high priority by local jurisdictions. If this conclusion is correct, it provides an additional reason for

efforts to streamline and simplify the Corps process, or, alternatively, to provide mechanisms for delegations of portions of that process to state agencies.

III. RECOMMENDATIONS.

Our recommendations are based on the following principles:

1. There is a need to approach the problem of diked wetlands on a regional level that includes the entire Bay system.

2. Such an approach should utilize planning principles so that appropriate policies and land uses for diked wetlands can be derived comprehensively and on a regional basis.

3. The regulation of wetlands in the Bay Area should be simplified and consolidated as much as possible so that one set of policies, definitions, and procedures are applicable to proposed projects. In this regard the present process should be modified to consolidate efforts by state agencies.

4. The regulatory process should be designed to avoid further duplication or the creation of an additional and unnecessary layer of regulatory control.

5. Steps should be taken to insure that if the regulatory presence of the Corps of Engineers is reduced, the regulation of diked wetlands by state agencies is increased such that a regulatory vacuum is avoided.

Accordingly, the following recommendations are submitted:

A. A Plan for Diked Wetlands.

In close cooperation with the Resources Agency, the Department of Fish and Game, and the U.S. Fish & Wildlife Service, BCDC should prepare and adopt a plan for diked wetlands as an amendment to the existing San Francisco Bay Plan. This plan should contain definitions, policies and maps applicable to all diked wetlands in and adjacent to the Bay. It should address the issue of competing land uses for wetland areas on a regional level for the entire Bay system.

The purpose of such a plan would be to provide guidance to individual applicants and to the regulatory agencies to assist them in evaluating individual development

proposals. Thus, the plan could serve as a guide to project applicants by assisting them in making initial determinations as to whether their land is subject to regulation as a diked wetland, etc. It would assist the Corps of Engineers in determining whether a given proposed project is within a "special aquatic area" under the section 404 regulations and whether the area is a "wetland" within the definitions in the Corps regulations. Of great importance, such a plan would provide guidance to the Corps in determining whether a proposed project is water-dependent, whether feasible alternatives were available for projects which are not water dependent, etc. The plan could also supplement and refine the Resources Agency Basic Wetlands Policy which in its current form is quite general. This would be of assistance to the Regional and State Water Quality Control Boards and other state agencies which currently must apply the Wetlands Policy in an informational vacuum. Such a plan would also serve to unify the position of the State of California in regulatory proceedings involving diked wetlands. The involved state agencies would have one plan to refer to for a given project in the Bay Area when submitting comments to the Corps or exercising any regulatory authority.

Finally, the plan would provide a comprehensive, land-use-oriented basis for BCDC comments to the Corps as discussed below.

B. Submission of the Plan to the Office of Coastal Zone Management.

Once the plan is formulated and adopted by BCDC, it should be submitted to the Coastal Zone Management Agency for adoption as an amendment to the BCDC Coastal Zone Management Plan. This would insure that the Corps of Engineers would utilize the plan in making determinations on individual projects pursuant to its authority under the Rivers and Harbors Act and the Clean Water Act. Existing Corps regulations require the Corps to withhold permits for non-federal applicants until certification has been provided that the proposed activity "complies with the coastal zone management program and the appropriate state agency has concurred with the certification." In the case of federal projects, the Corps must at least determine the consistency of such projects with the Coastal Zone Management Program "to the maximum extent practical." Section 320.4(h). Thus, if the BCDC diked wetlands plan were incorporated in the Coastal Zone Management Plan for the Bay, the Corps would probably require BCDC certification of non-federal projects before issuing a permit.

In addition, EPA regulations governing Corps permits under section 404 of the Clean Water Act expressly require that the Corps consider the applicable Coastal Zone

management program in determining whether "practicable alternatives" are available to a proposed project in wetlands. 40 C.F.R. § 230.10(a)(5). By its very nature, the wetlands plan adopted by BCDC would be the most useful tool possible in assisting the Corps in making such a survey of "practicable alternatives" and evaluating their feasibility.

It should be noted that approval of the plan as part of the Coastal Zone Management Plan may be difficult to obtain. For example, currently there is no Assistant Administrator for Coastal Zone Management; it may be that the coastal zone management program will be severely reduced, reorganized, merged into other departments of NOAA, or eliminated entirely. However, the advantages of potential inclusion in the BCDC Coastal Zone Management Plan are sufficiently great to warrant an attempt, and there is no disadvantage in trying.

C. Immediate Utilization of the Plan as a Basis for BCDC Comment on Proposed Projects in Diked Wetlands.

Immediately upon adoption, even before the plan is submitted to or accepted by the Coastal Zone Management Agency, BCDC should utilize the plan as a basis for comments to the Corps of Engineers on proposals within

areas designated in the plan. This could be accomplished through BCDC comments under the National Environmental Policy Act or in response to Corps Public Notices. The purpose of such comments would be to inform the Corps of the factors it should consider, and to discuss the relationship between the proposed project and the diked wetlands plan. It would be the only information available to the Corps which is based on comprehensive criteria formulated on a regional basis.

D. Coordinate with the Resources Agency and the Department of Fish and Game.

BCDC should enter into discussions with the Department of Fish and Game and the Resources Agency to insure that State comments submitted to the Corps of Engineers uniformly reflect the relevant portions of the diked wetlands plan. It may be appropriate for BCDC to enter into either informal agreements or memoranda of understanding with these agencies. It may even be appropriate for BCDC to take on the role of coordinating agency for the submission of State comments to the Corps.

E. Amendments to Existing Federal Regulations.

It may be appropriate for BCDC to propose an

amendment to existing Corps and EPA guidelines. As discussed above, these guidelines currently direct the Corps to carefully consider existing coastal zone management plans and existing state policies in making the determination of whether a particular project is consistent with the applicable coastal zone management plan. This accords a certain amount of protection, but it leaves considerable discretion to the Corps. To accord even better protection it could be suggested to EPA or the Corps that the guidelines be amended to defer completely to approved coastal zone management plans which are developed with enough particularity to allow site specific evaluation. This could constitute a form of delegation from the federal level to the state.

F. Proposed New Legislation if Appropriate.

1. The federal government is attempting to delegate to the states existing federal regulatory power in various areas. In this context, the federal government may consider delegating to appropriate state agencies the authority currently vested in the Corps of Engineers under section 404 of the Clean Water Act or even perhaps under sections 9 and 10 of the Rivers and Harbors Act. This would require congressional action. In the meantime, BCDC could ask the California Legislature to enact a bill giving BCDC the power

to accept a delegation of authority over diked wetlands in the Bay when and if it is authorized by Congress.

The advantage of such an approach is that it would avoid adding an additional level of regulatory authority since BCDC jurisdiction would not exist until and unless federal authority were abandoned by Congress. At the same time, it would anticipate a current trend, and insure that if the federal government were to abandon regulation of wetlands, an agency with an appropriate plan would be in place to insure that protection continues.

2. If the Corps of Engineers reduced significantly its commitment to the protection of wetlands, or if its regulations or the EPA section 404(b) guidelines were amended so as to weaken regulatory control over diked wetlands in the Bay, BCDC might consider requesting the California Legislature for direct permit authority over activities in these areas. There are obvious political problems presented by such an approach. However, BCDC would be the only agency with a comprehensive plan and experience in the type of regulation involved.

This is perhaps a recommendation of last resort.