

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

By

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**A Technical Report Prepared for
SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION**

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION
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INFORMATION REGARDING OFFICE OF ADMINISTRATIVE LAW
DETERMINATION CONCERNING THE COMMISSION'S
DIKED HISTORIC BAYLANDS REPORT

On September 3, 1986, the Office of Administrative Law (OAL) ruled that with two minor exceptions, the Commission's Diked Historic Baylands of San Francisco Bay.....Findings, Policies, and Maps (October 21, 1982) (Diked Historic Baylands Plan) does not constitute a regulation under the Administrative Procedures Act (APA). The decision responded to a request from the Bay Planning Coalition to determine if the Commission had acted illegally when it had adopted the Diked Historic Baylands Plan without following the APA.

The two minor exceptions concern the two policies located at the bottom of page six of the Diked Historic Baylands Plan, which deal with development within diked historic baylands that are located partly within the Commission's permit jurisdiction. These two policies essentially indicate that such development should be permitted only if it is consistent with all applicable policies contained in the McAteer-Petris Act and the San Francisco Bay Plan and only if all wildlife values lost or threatened by such development will be fully mitigated. OAL concluded that unlike all the other policies contained in the Diked Historic Baylands Plan, which are only advisory because they apply only to areas outside the Commission's permit jurisdiction, these two policies are regulations because they deal with activities located within the Commission's permit jurisdiction and are therefore enforceable through the Commission's permit process. OAL further concluded that the existence of separate Commission mitigation policies in the San Francisco Bay Plan does not render the possible use and application of the mitigation policies in the Diked Historic Baylands Plan moot.

The Commission acknowledges that the language of the the mitigation policies contained in the Diked Historic Baylands Plan differs from the language of the mitigation policies contained in the Bay Plan. Nevertheless, the Commission believes that the existence of the mitigation policies in the Diked Historic Baylands Plan is irrelevant because the application of either sets of mitigation policies would result in the application of identical mitigation conditions to any given set of facts. Moreover, the Commission believes and fully acknowledges that the Commission must use only the mitigation policies contained in the San Francisco Bay Plan when it reviews permit applications for projects within its McAteer-Petris Act jurisdiction.

SUMMARY OF
ANALYSIS OF POWERS
EXERCISED BY REGULATORY AGENCIES
OVER DIKED HISTORIC BAYLANDS AND RECOMMENDATIONS
A Technical Report

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

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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 bayland 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."

NOTE: An this report the term "diked baylands" is used to mean "diked historic baylands."

An "Analysis of Power Exercised by Regulatory Agencies Over Diked Baylands and Recommendations" has been submitted to the San Francisco Bay Conservation and Development Commission (BCDC). This summary, submitted separately, is an overview of the full "analysis" and contains a brief review of the regulatory process over diked baylands around San Francisco Bay and a summary of the deficiencies in the existing process. Finally, it contains our recommendations to BCDC for actions which could be taken by the Commission and other state agencies to improve the system and provide more permanent protection for diked baylands.

Summary of Existing Regulatory Control Over Diked Baylands

The United States Army Corps of Engineers (Corps) is the agency with the most comprehensive regulatory authority over diked baylands. The authority of most state agencies is limited to the influence they wield with the Corps itself. Cities and counties have extensive power through their planning and regulatory processes, but a survey of their activities indicates that minimal attention has been directed to protection of diked baylands.

Jurisdiction is vested in the Corps through two major federal statutes, section 9 and 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. Sec. 401 and Sec. 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. Sec. 1344). Under the 1899 Act, the Corps exercises jurisdiction over wetlands that have been separated from the Bay by a dike or other obstruction so long as the wetland lies below the plane of what was historically the level of mean high tide. Under section 404 of the Clean Water Act, jurisdiction is exercised by the Corps in a broader manner to include wetlands regardless of whether they are above or below the level of mean high water since the courts have emphasized that the functional purpose of the Clean Water Act is to avoid and control water pollution no matter where the source is located. However, to be a wetland for purposes of section 404, an area must support vegetation typical of areas periodically inundated by water. Also, agricultural activities that do not result in runoff or other direct discharge into the Bay are not subject to a Corps permit requirement under section 404.

A permit from the Corps is required by both federal statutes. The Corps determines whether or not to issue a permit for a given project based on its own criteria contained in its regulations promulgated under the 1899 Act. The regulations promulgated under section 404 of the Clean Water Act are issued by the Environmental Protection Agency (EPA), but administered by the Corps. Thus, the Corps must follow the requirements of both sets of regulations.

Under the 1899 Act the District Engineer must subject the proposed project to a "public interest review" having two aspects. The first includes a review of such factors as economics, aesthetics, general environmental concerns, historical values, fish and wildlife values, flood damage prevention, water quality, etc. Quite obviously, this evaluation allows for considerable discretion on the part of the Corps. The second component of the review is more restrictive and requires that the proposed project be "water dependent" and that no feasible alternative sites are available.

The EPA regulations under section 404 administered by the Corps establish a related test, but employ a significant presumption which has the effect of making those regulations stronger than the Corps regulations.

Specifically, if a project is proposed in a wetland and does not require access or proximity to the wetland to fulfill its basic purpose, practicable alternatives that do not involve use of the wetland sites are presumed to be available. This provision is probably the most significant in the entire body of regulations administered by the Corps. The effect of the presumption is to place the burden upon applicants to make what would normally be a difficult showing that other sites are not available. This burden must be satisfied before a project may be approved in a wetland.

The Corps is also required to consult with interested federal and state agencies. This requirement is significant because it is one of the primary means by which California agencies have influence over activities proposed in diked baylands. In fact, the Corps consults the California Department of Fish and Game on all applications affecting wetlands and gives the recommendations of that department great weight.

Of some significance, the Coastal Zone Management Act (16 U.S.C. Sec. 1451 et seq.) is also involved, since the 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 and that the appropriate state agency has given that certification. The section 404 regulations provide that if an approved Coastal Zone Management Program indicates that practical alternatives have been identified and evaluated, such evaluation shall be considered by the Corps as part of the consideration of alternatives. (40 C.F.R. Sec. 230.10 (a) (5)). Thus, to the extent a Coastal Zone Management program deals with possible alternative locations for projects which might be proposed on wetlands, the Corps would utilize that information in determining whether a project proposed in a wetland could in fact be placed on an alternative site.

Other federal statutes and policies are applicable in diked baylands as well. The National Environmental Policy Act (42 U.S.C. Sec. 4321 et seq.) overlays the Environmental Impact Statement process on all major federal actions. Also, Executive Order No. 11990 42 Fed. Reg. 26961 (May 24, 1977) imposes the requirement that a project in a wetland may not be approved unless there is "no practicable alternative."

Numerous state laws and policies bear on development in diked baylands. However, none of them give any state agencies the degree of authority that is vested in the Corps of Engineers. For example, the State Water Resources Control Board and the Regional Water Quality Control Board (RWQCB) exercise water quality review pursuant to the Clean Water Act (33 U.S.C. Sec. 1251 et seq.), and the Porter-Cologne Water Quality Control Act, (Water Code Secs. 13000 et seq.). Specifically, the RWQCB administers the National Pollutant Discharge Elimination System (NPDES) under the Clean Water Act (Sec. 402) and also administers waste discharge requirements under the water pollution provisions of California law. The basic thrust of the water quality control under these statutes is over discharges that may impair water quality or biologically sensitive areas (including wetlands). The Department of Fish and Game has several responsibilities which may affect projects in diked baylands. These include streambed alteration agreements (Fish and Game Code Secs. 1601 and 1603) and native plant protection (Fish and Game Code Sec. 1904). However, the most significant involvement of the Department of Fish and Game is through its prerogative to comment to the Corps on permit applications pursuant to the Fish and Wildlife Coordination Act. The

Department reviews project applications and proposals in accordance with its responsibility for protection of fish and wildlife resources and habitat. The Department's general policy is dependent upon a waterfront site, no less damaging alternatives exists and loss of existing or potential fish and wildlife habitat is offset by restoration of an area of comparable size and value.

There are several other state laws or legal doctrines which bear peripherally on diked baylands projects. For example, the California Environmental Quality Act (Pub. Res. Code Secs. 21000 et seq.), the Resources Agency Basic Wetlands Protection Policy (September 19, 1977), the Keene-Nejedly California Wetlands Preservation Act (Pub. Res. Code Secs. 5810 through 5818) authorizing the Departments of Parks and Recreation and Fish and Game to conduct a study to identify wetlands which should be acquired or protected, and the Public Trust Doctrine pursuant to which the State has retained an interest in tidelands which have been patented into private ownership.

Mosquito Abatement Districts, known as Vector Control Districts, are single- or multi-city or county districts formed under state law to control the growth of mosquitos, flies, and other insects. They have an interest in baylands because among the powers they possess are the power to construct and to maintain dikes, canals, and ditches needed to eliminate breeding areas and the power to abate as a public nuisance breeding places for mosquitoes, flies, or other insects created by any use of land or artificial change in the natural condition of the land. (California Health and Safety Code Secs. 2200 through 2426.)

Finally, in the regulatory area there is the role of cities and counties. There are 32 Bay Area cities and counties with identified diked baylands. Of those, apparently five or six have adopted some form of diked baylands protection. In some other instances, diked baylands are owned by local public agencies and managed with the objective of preserving them. However, some sixteen cities and counties have no provisions that would prevent diked baylands from being filled or otherwise greatly altered.

Deficiencies in Existing Regulatory Control Over Diked Baylands

The regulation of diked baylands is not as secure and consistent as it could be, especially in view of the large number of public agencies which have some role to play. In fact, one of the problems is the multiplicity of laws, regulations, and public agencies that are involved in the process. Some of those agencies administer more than one law, as for example the Corps of Engineers (discussed previously). We believe that this multiplicity of agencies, laws, regulations, etc., is untenable from a regulatory perspective over the long term. It may have the temporary effect of slowing development in diked baylands, but over time it discredits the regulatory process and also creates a situation where different wetland areas may be treated in a disparate manner not necessarily justified by location, biology or wetland values such that different applicants may be treated unequally with no objectively justifiable reason.

A second difficulty is the possibility that the State of California could speak with more than one voice in its comments to the Corps of Engineers or in its actions on a project proposed in a diked bayland. For example, the state may express its position through the State Water Resources Control Board issuing or denying certification regarding water pollution control standards, the Department of Fish and Game reviewing possible diversions in the course of the stream, BCDC exercising its 100 foot shoreline band jurisdiction, or all three agencies together with other state agencies simultaneously presenting their comments to the Corps when a project is at the federal level.

A further difficulty is that even with all the various federal and state laws and policies, no California agency has substantial control over diked baylands in the Bay. Thus, while the Corps of Engineers may not grant a permit unless the required state and local permits have been granted, local control is uneven and often ineffectual (discussed below) and state agency jurisdiction is often peripheral to the major issues which a project poses for the survival of a wetland area. In the same vein, the Corps has given great weight to state comment. However, there is nothing to prevent the Corps or EPA from amending their various regulations to reduce the level of protection to diked baylands. If this were to occur, there would be no other public agency currently authorized to serve this purpose.

Finally, of great significance, certainly from the BCDC perspective, is the fact that no agency currently has any form of land use planning authority at a regional level and the decisions made by the Corps regarding permits are made in the total absence of any comprehensive plan containing land use criteria. While local agencies have the authority to plan comprehensively, they are not required to plan on a regional basis, and about half of the Bay Area cities and counties with diked baylands sites have not addressed the problem at all.

Recommendations

Our recommendations are based on the following principles:

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

- b2. Such an approach should utilize planning principles so that appropriate policies and land uses for diked baylands 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 creation of an additional and unnecessary layer of regulatory control; and
 5. Steps should be taken to ensure that if the regulatory presence of the Corps of Engineers is reduced, the regulation of diked baylands by state agencies is increased such that a regulatory vacuum is avoided.

Accordingly, the following recommendations are submitted:

A. A Plan for Diked Baylands

In close cooperation with the Resources Agency, the Department of Fish and Game, and the U. S. Fish and Wildlife Service, BCDC should prepare and adopt a plan for diked baylands as an amendment to the existing San Francisco Bay Plan. This plan should contain definitions, policies and maps applicable to all diked baylands 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 bayland, 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 greater 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 baylands. 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 ensure 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." (33 C.F.R. Sec. 320.4(h)).* Thus, if the BCDC diked baylands plan were incorporated into 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 Corp consider the applicable Coastal Zone Management Program in determining whether "practicable alternatives" are available to a proposed project in the baylands. (40 C.F.R. Sec. 230.10(a)(5)). By its very nature, the baylands 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 National Oceanic and Atmospheric Administration (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 Basis for BCDC
Comment on Proposed Projects in Diked Baylands

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 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 baylands plan. It would be the only information available to the Corps which is based on comprehensive criteria formulated on a regional basis.

*These references refer to Corps regulations that were in effect from July 19, 1977 to July 22, 1982. Current Corps regulations were published in July 22, 1982 at 47 Federal Register 31794 through 31834.

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 the diked baylands 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 baylands 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 ensure that if the federal government were to abandon regulations of baylands, 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 baylands 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.