

# BAY PLANNING COALITION BRIEFS

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## Regional Planning For Disposal Sites - Who Pays The Bill?

This was the question posed to a small group of representatives from the U. S. Army Corps of Engineers (USACE) and the port community at a workshop in Virginia. Executive Director Johnck was invited by AAPA to facilitate the 2-day discussion -- the goal of which was to develop a policy on "cost participation" for regional dredged material disposal site management studies.

The USACE traditionally had total financial responsibility for the construction and implementation of Congressionally authorized locally sponsored dredging projects, until the enactment of the Water Resources Development Act (WRDA) of 1986. This act legislated the concept of "cost-sharing" for local projects between local sponsor and the federal government. The formula for apportioning the cost between the two entities varies depending upon the type of project, i.e., a feasibility study to determine the federal interest in a new construction project is cost-shared on a 50-50 basis whereas the actual construction project (dredging) is generally apportioned on a 75-65 (federal) to 35-25 (local) basis.

Although the state and local port communities were dragged unwillingly into "cost-sharing", the concept is now accepted (it is law), but much remains to be fine-tuned for these new "partnership" arrangements.

With barely 3 years of experience with WRDA 1986, a new problem has evolved which was not explicitly covered by the Act. Given the controversy over the environmental acceptability of existing multi-user disposal sites, it has become evident that there is a critical need to initiate a long-term planning process to ensure the availability of a range of sites. Who pays for the studies necessary to develop a regional disposal plan? USACE Civil Works Director Kelly's proposal is that additional affected parties, both non-federal and federal, should participate in the costs for these studies.

The Bay Area port community had been appraised of this new concept of "cost participation" when it received notification by USACE headquarters that the So. Pacific Divisions \$10 million request for the S. F. Bay disposal plan studies was excessive. The USACE headquarters reduced the \$10 million to \$5 million and proposed a cost participation formula as follows: Corps 50%, Navy 20%, organizations that represent the navigation interests of the region (i.e., State, subdivisions of the State, and port authorities) 20%, and EPA 10%.

Notwithstanding the test case specifics of the proposal for the San Francisco Bay region, the AAPA group did not reach consensus on a definition of "cost-participation" nor on a format for cost allocation for regional disposal planning studies that are in the national interest. It tasked the USACE with developing a definition of "cost participation" through a generic contract that the Corps could use to negotiate non-federal participation in regional dredged material management studies.

The important considerations for the ports is that an enforceable agreement (a binding contract) and an equal role in decisionmaking on the necessary study elements and costs are needed. In addition, the essential aspects of a generic contract should include a definition of roles and responsibilities, contractual liabilities, work product review, test protocols, dispute resolution, and a format for cost allocation! □

## High Profile for BPC at Port Seminar

"Dredging and Dredged Material Management" was the subject of a 3-day seminar hosted by the American Association of Port Authorities (AAPA), February 12-14 in Miami.

The resolution of conflicts over the environmental suitability of dredged material disposal sites and the economic necessity of maintaining and deepening channel depths are nationwide problems.

Thus the subject of planning for dredged material disposal at multiple-user disposal sites -- leadership, partnership, public involvement -- was a dominant theme of the seminar.

Executive Director Johnck was invited to describe the work of the BPC and its unique role representing a broad cross-section of business and property concerns in an effort to achieve a fair and reasonable permit process. In particular, Johnck outlined the objectives for the organization's expanded program, the *Open Channels Coalition* project. Johnck also summarized the results of the January AAPA workshop.

There are only a few models of regional disposal planning programs: the Port of Baltimore, New York-New Jersey Port Authority and the Port of Seattle (Puget Sound Disposal Advisory Program was completed about a year or so ago). Thus, the regional planning structure to be established and the work of the Bay Planning Coalition to address San Francisco Bay's dredged material disposal problem are of great interest to the public and private sector maritime community across the nation.

Additional presentations were given on the new federal MOA on mitigation (see article), mitigation banking, the new sediment testing protocol for ocean disposal (the "Green Book"), and an overview of pending federal coastal protection legislation. \*

\*This is the year for reauthorization of the Coastal Zone Management Act (NOAA) and there are amendments proposed to the "federal consistency" provision. More on this later... □

## Varied Scientific Perspectives Aired At Sediment Toxicity Workshop

A highly talented group gathered at the Bay Model earlier this month at a toxicity workshop organized by the US ACE SF District.

Highlights of the discussion were:

**Doug Segar** (Romberg Tiburon Center) stated that the effects of toxicity are derived from the impact of suspended sediments on the fishery resources and bioaccumulation in the food chain rather than from the accumulated sediment at the Alcatraz disposal site.

**Bob Spies** (Lawrence Livermore Lab) warned against making assumptions about toxic impacts of chemical constituents in sediments. A wide number of variabilities can occur in the testing process which can lead to different interpretations.

**Sam Luoma** (USGS) said that environmental science is a very young science compared to medical science and that what is needed is a systematic monitoring study to analyze health or non healthy symptoms of the Bay.

**Norm Rubenstein** (EPA) reminded everyone that sediments are the sink - not the source of the problem, and that the matter of toxicity starts at what comes out at the end of the pipe. However, a very real issue is the exposure of the fishery resources to the sediment.

He emphasized that timely, cost-effective decisions are needed with the best available science so that essential dredging projects can move ahead.

**Joe O'Conner** (Aquatic Habitat Institute) stated that our goal is the maintenance of successful fish populations. Therefore, there are variables involved in a particular organism's response to a given situation. Therefore, it is necessary to derive more precise methods to determine adverse effects of sediments and their exposure to fish populations.

**Mike Carlin** (S.F. Bay Regional Water Board) emphasized that more information is needed on sediment dynamics. □

## **Decisionmakers Conference Attracts Large Audience**

The Coalition successfully staged its 4th Decisionmakers Conference -- our annual forum to engage the public and private sectors in a dialogue on regulatory matters. Having rescheduled the event due to the October 17 Loma Prieta earthquake, the Coalition drew almost 250 participants to the Fleet Admiral Nimitz Conference Center on Treasure Island. The Conference, co-sponsored by *The San Francisco Business Times* and KPIX-Channel 5, focused on building consensus for regional solutions to the dredged material disposal issue and wetland values assessments. Each topic was addressed from two perspectives: a lecture component, termed "Insight", and a TV-talk show format, termed "Inquiry". The presentations as well as the questions and answers were provocative and informative.

Highlights of the Conference were the remarks by Doug McConnell, KPIX News Reporter, and lunchtime comments on the "Southern Crossing" by State Senator Quentin L. Kopp. The Conference also resulted in the registration of 11 new Coalition members. We would like to welcome these members and thank all those who attended, particularly speakers and the agency representatives who manned the information stations. □

## **New BCDC Permit Application Approved and Sent to OAL Despite Unresolved Item**

During the last few months, BCDC staff resolved most of the outstanding issues raised by the Coalition on the new permit application. The

two issues which received the most scrutiny were the requirements for water quality information and for receiving all local government discretionary approvals.

The water quality information requirement relates to dredging projects. Under the original proposal, BCDC would not consider a permit "filed" until it had been officially notified by the SF Bay Regional Water Board that a dredging project would have insignificant water quality impacts. However, the Water Board would not issue this notice until the Army Corps of Engineers issued a public notice - which the Corps could not do until BCDC had acted on a permit. After much discussion among BPC, BCDC, the Water Board, and the Corps, the following procedure was finalized: the Corps will act first by issuing a Public Notice upon receipt of an application; the Regional Board's water quality certification process will then be triggered, and finally, BCDC will consider a permit filed when it receives water quality certification notice.

The Coalition advised BCDC that it is possible to have a concurrent approval process and an applicant should not be forced into a "Catch 22" by having BCDC add new requirements to a permit after completion of the entire local permit process. At a meeting in November, BCDC staff requested that the Coalition draft regulatory language that would require an applicant to submit sufficient information for BCDC to act on a permit while some local approvals were outstanding. The Coalition submitted 3 proposals to BCDC - all were rejected. The Coalition's proposal to form a special ad hoc group to resolve this issue also was rejected. Over the Coalition's objection, the BCDC approved the permit application at its February 15, 1990 hearing. The application now will be reviewed by the Office of Administrative Law. □

## **EPA and Corps Issue MOA On Wetland Mitigation**

On February 7, 1990, the EPA/Army Corps Memorandum of Agreement (MOA) on Wetland Mitigation became effective. There are some modifications to the MOA, which was originally released November 15, 1989. Many of the objections and concerns raised by the Coalition were addressed in this revised version. According to a notice attached to the MOA, the Memorandum is intended to "increase the effectiveness of the Section 404 program by reducing delays in permit processing, minimizing ambiguity in the regulatory program and by providing agency field personnel with a clear understanding of the procedures for determining appropriate and practicable mitigation." The notice also states that the MOA does not establish any new mitigation requirements beyond those currently found in the Section 404(b) (1) Guidelines nor does it modify the Guidelines; nonetheless, the Coalition will carefully scrutinize the implementation of the MOA to ensure the validity of these statements.

The MOA provides guidance to agency field personnel by setting out a preferred sequence of wetland mitigation: avoidance, minimization, and compensatory mitigation. At each step in the sequence, appropriate and practicable measures should be taken to offset unavoidable impacts to wetlands. These measures should be "appropriate" to the scope and degree of the impacts and "practicable" in terms of cost, existing technology, and logistics in light of overall project purposes.

If compensatory mitigation is not practicable, feasible, or would result in only inconsequential environmental benefits, mitigation may not be required. Yet, the MOA states that compensatory mitigation, at a minimum, should provide at least 1 to 1 acreage replacement while emphasizing that 1 to 1 functional values replacement (with an adequate margin of safety) is the MOA's objective. Restoration will be favored over creation as a means of compensatory mitigation.

Also mitigation banking at an EPA/Corps approved bank site will be an acceptable form of compensation. Any mitigation plan should include a program for long-term monitoring, reporting and remedial action.

While the MOA acknowledges President Bush's pledge for a no net loss of wetlands functions and values, it recognizes that this may not be achieved in each and every permit action. It also recognizes that the President's Task Force is the most appropriate body to determine how this policy will be implemented. In the near future, this Task Force will travel around the country holding public hearings and taking comments on the development of a comprehensive no net loss policy. The MOA will be reconsidered in light of this policy. For copies of the MOA, please contact the Coalition or Suzanne Schwartz of the EPA (202.475-7799). □

## **DFG Proposes Mitigation Banking Guidelines**

The Department of Fish and Game recently issued draft guidelines for mitigation banks. The Coalition is pleased that the Department has endorsed mitigation banking. However, the draft program is extremely restrictive. The main component of the program is that DFG would be granted regulatory authority over the establishment and management of all publicly or privately owned and/or operated wetland mitigation banks. There are many burdens placed upon the bank operator to establish a bank. Some of them are that the bank must be: 1) created from uplands, 2) equipped with buffer areas, 3) at least 50 acres in size, 4) no further than 40 miles from the altered wetlands, 5) approved by the DFG, all before it is operational.

The project proponent also has a large share of burdens. First, and most importantly, a permittee must satisfy all federal and state requirements/policies for wetland alteration and associated mitigation at a federally approved bank. If this is accomplished, then the project proponent subjects him/herself to the additional

requirements of the DFG. The DFG will approve use of the bank only if the proposed project is the least environmentally damaging feasible alternative and no available mitigation option is superior to use of the bank. The wetland habitat must be "in-kind", or the same as that being altered. Credits will be determined using the Fish and Wildlife Service's HEP (Habitat Evaluation Procedure), subject to DFG approval. The purchase price of credits will be either the appraised market value of the wetland parcel following permit approval or the cost of creating at least 300% of the wetland habitat values being lost (plus a prorata share of the cost for bank establishment and perpetual operation and maintenance) - whichever is greater. This cost structure may conflict with the U.S. Supreme Court decision in Nollan which requires a rational nexus to exist between permit conditions and project impacts. Moreover, the guidelines themselves may conflict with the State's Administrative Procedures Act.

Additional obligations are placed upon those projects that might disturb habitat of federally and state-listed endangered, threatened and rare species as well as candidate species (referred to as "sensitive species"). A special set of rules also has been developed for vernal pool mitigation banks. One rule would require a project proponent to purchase the watershed area (including the vernal pools) necessary to maintain 300% of the acreage and values of the displaced vernal pools. The banking program guidelines will be the subject of a DFG Commission hearing -- date to be announced. □

## **Contra Costa Co. Formulating Broad Wetland Definition and Ordinance**

The Contra Costa Board of Supervisors is formulating a unique wetlands definition and ordinance. Under the proposed program an area will be considered a wetland "if any agency who has jurisdiction over the classification, use,

protection or preservation of wetlands or endangered species which may inhabit wetlands, designates the areas as a 'wetland' ". Contrary to the U.S. Fish and Wildlife Service's policy and the new federal manual on identifying jurisdictional wetlands, the County will use the National Wetland Inventory maps to designate and regulate wetlands. However, the County's proposal states that site-specific analysis should occur due to changes caused by rainfall variation and the rise in sea level. (The Coalition wonders whether areas may be delisted during drought years.) The ordinance also would make the current wetland buffer setback of 50 feet more stringent. For more information contact any of the County Supervisors at County Administration Building, 651 Pine Street, 11th Floor, Martinez, 415-646-2371. □

## **State Water Board Adopts Sediment Disposal Policy But Remands Moratorium**

In January the State Water Resources Control Board approved the following policy amendments to the S.F. Bay Basin Plan:

1. Sets monthly and yearly volume targets on dredged sediment disposal from maintenance work at the three in-Bay disposal sites.
2. Exempts small projects from the monthly and annual volume targets (a small project is a project for which the design depth does not exceed 12 feet below Mean Lower Low Water and the dredging yardage is less than 20,000 CY in one year but not to exceed 50,000 CY over five years).
3. Restricts dredging or disposal activities within the Bay during specific periods to protect fishery use.
4. Declares that for each disposal activity in the Bay, the Board will require a demonstration that there are no significant or irreversible impacts to the Bay.

5. Affirms that the Regional Board will continue to require sediment testing of each applicant according to the "Interim Testing Procedure for Evaluating Dredged Material Suitability for Disposal in San Francisco Bay."

6. Encourages land and ocean disposal alternatives whenever practical.

The State Board, in its instructions to the Regional Board, remanded the in-Bay disposal moratorium for new work and required the Board to convene a workshop to develop "firm funding commitments and work schedules for designating ocean and upland disposal sites." Following the workshop, the State Board will provide further instructions regarding the moratorium. □

## **Habitat Protection Plan for San Francisco Bay Waterfowl Released**

The U.S. Fish and Wildlife Service recently released the Concept Plan for Waterfowl Habitat Protection - SF Bay which was used to defend the expansion of the SF Bay National Wildlife Refuge. The report compiles substantial information on waterfowl and wetlands in the SF Bay zone, yet some of the the conclusions drawn are self-justifying. The report does, however, reveal some interesting findings. The figure for the acreage of historic tidal marsh that has been lost is 83% - not the 90 or 95% commonly quoted. (Note that "lost" does not mean that these areas are no longer functioning wetlands, rather, it means that they are something other than tidal wetlands. This might include salt ponds and non-tidal wetlands. In the South Bay, for example, it is estimated that only 17% of the historic tidal marsh has been converted (no longer exists) to "upland" uses, which include open space, agriculture, and urban development.) There are 62,740 acres of preserved and protected wetland habitat in San Francisco Bay (excluded Suisun Marsh). The acreage protected in the South Bay (the area receiving the most scrutiny) is 26,138 acres or 42% of the protected wetland habitat.

The total number of waterfowl wintering in San Francisco Bay has increased since 1987. There also are interesting population figures for canvasback ducks that winter in the Bay, considered the most important wintering habitat for this species in the Pacific Flyway. The 1985 population was larger than the population has been since 1968, and the 1989 population of canvasbacks is larger than the population from either 1960 or 1961. What do these figures indicate? Waterfowl populations are subject to fluctuations that may not be tied as directly to wetland acreage as we are led to believe. □

## **BCDC Seeks Bay Plan Amendment To Deny Proj- ects In Shoreline Band If Sea Level Rises And Seismic Safety Are Not Addressed**

The BCDC staff is proposing legislation that would amend the Bay Plan to allow the Commission to deny a project in the shoreline band if it does not adequately address seismic safety or sea level rise concerns. It is unclear what criteria would be used to determine if a project "fails to provide reasonable protection... against the hazards of unstable geologic or soils conditions or of flood or storm waters." At its January 4, 1990 meeting, BCDC requested that the staff return to the Commission with more specific legislative language. It appears that a BCDC proposal will be incorporated into seismic safety legislation already introduced by Assemblyman Dominic Cortese of San Jose. Draft language is expected to be reviewed at the March 15 BCDC meeting. ✻