MITIGATION
WHAT YOU NEED TO KNOW

BAY PLANNING COALITION

MITIGATION: WHAT YOU NEED TO KNOW

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I. Mitigation: What Is It?

Webster defines mitigation as an act of alleviating, moderating, abating or lessening in intensity, a quality or condition. In environmental terminology, it is best defined as an attempt to offset the detrimental impact of a project upon a natural resource.

Offsetting or "mitigating: an adverse impact can take various forms and can include a broad range of activities either on or off-site.

Regulatory agencies and other agencies involved in the permit process interpret this definition according to their own perceptions of a detrimental or adverse impact and under the guidance of their enabling legislation.

II. Birth of the Environmental Movement: Setting the Scence for Mitigation

In the past two decades, there has been a strong citizen outcry deploring the degradation of natural resources. This environmental movement has produced much legislation, the thrust of which has been to call for the protection of land, water, air and flora and fauna resources.

Another important aspect to this legislation has been to create better planning and regulatory mechanisms through which protectionist goals can be implemented. A significant feature throughout has been to recognize the importance of allowing growth and development to continue while emphasing more efficient management of that growth through regulation.

Examples of major legislation enacted at the Federal level adopting these environmental goals are: The National Environmental Policy Act (NEPA, 1969), The Clean Water Act, 1972 (this Act amended the Federal Water Pollution Control Act of 1948); the Coastal Zone Management Act, 1972, The Endangered Species Act, 1973, and the Marine Sanctuaries Act, 1972.

Significant California legislation enacted in the last two decades includes the McAteer-Petris Act of 1965 and subsequent amendments embodied in AB 2057, 1969, the California Environmental Quality Act (CEQA, 1970), and the California Coastal Acts, 1972 and 1976.

All of this legislation affects you as an applicant in that its thrust has created the present-day regulatory atmosphere and dominates the thinking of the decision-makers and staffs of the agencies to whom you apply for permits.

III. Mitigation: Description Under Federal Law

Emanating from this environmental movement is the prevailing usage of the word mitigation. Mitigation has evolved as a tool to meet the standards set for natural resource protection. Although it has become fairly commonplace for regulatory agencies to require mitigation of an applicant, not always has there been an explicit definition of authority or a comprehensive statement of policy or criteria with which to guide the process.

Mitigation is not a new concept, however; it was first discussed with the enactment of the Fish and Wildlife Coordination Act of 1934. What is relatively new and untested is its application in the regulatory permit process.

A. Fish and Wildlife Coordination Act (FWCA: 16 U.S.C. 661-667c,1934).

This legislation was conceived originally to protect large wildlife losses in massive Federal projects, particularly water projects where thousands of acres were inundated behind dams. For the first time a statute required that wildlife impacts be considered when planning a project.

To accomplish this, the FWCA requires that a Federal permit authorizing the modification of a body of water be allowed only after proper consultations with the Fish and Wildlife Service of the Department of the Interior and with the head of the agency exercising administration over the wildlife resources of the particular State. The Secretary of the Interior then must make recommendations which include "measures for mitigating or compensating for...damages" resulting from a project.

The FWCA further states that the Federal permitting agency shall give full consideration to the report and recommendations of the Secretary of Interior and the appropriate State wildlife agency. Thus where a project falls within the U.S. Army Corps of Engineers jurisdiction, an applicant can expect mitigation recommendations for possible detrimental impacts on wildlife from the Fish and Wildlife Service. Applicants should be aware, however, that the FWCA did not require mitigation. It only stipulated that the wildlife agencies be consulted.

B. National Environmental Policy Act (NEPA: 42 U.S.C. 4321 et seq.)

NEPA declares that: "It is the continuing policy of the Federal government, in cooperation with the State and local governments...to use all practicable means and measures...to create and maintain conditions under which man and nature can exist in productive harmony..." Additionally, NEPA directs that all agencies of the Federal government shall insure that environmental amenities and values be given appropriate consideration in decision-making.

NEPA requires Federal permitting officials to prepare a detailed statement on:

1. The environmental impact of the proposed action;
2. any adverse environmental effects which cannot be avoided, and
3. alternatives to the proposed action, etc.

Although there is no reference to mitigation in the NEPA, the Regulations, provide that the statement on alternatives "is the heart of the environmental impact statement" and must "include appropriate mitigation measures not already included in the proposed action or alternatives." (40 C.F.R. 1502.14).

C. Legislative Authority for the U.S. Army Corps of Engineers Permit Program

1. River and Harbor Act, 1899 (Section 10) -- this Act requires permits for all structures or work in or affecting the navigable waters of the U.S.

2. Clean Water Act (Section 4040) -- permits are required for discharging dredged or fill materials into the waters of the U.S.

3. Marine, Protection, Research & Sanctuaries Act (Section 103) -- permits are required for transportation of dredged material for ocean disposal.

The word "mitigation" does not appear in these Acts, but the Corps has always considered a project's environmental effect under the FWCA and NEPA guidelines. However, "mitigation" recently appeared in the Corps Regulations adopted in July, 1982 (33 C.F.R. 320). Section 325.4 "Conditioning Permits" states "that Division and District Engineers are authorized to modify or add conditions to proposals when (3) they will avoid or mitigate adverse impacts on fish and wildlife resources."

A Corps permit decision is supposed to reflect the National concern for the protection and use of the Nation's important natural resources, but nowhere do the current Regulations state that the Corps is required to impose mitigation. It remains unclear whether without mitigation the District Engineer would find a project not in the public interest and hence deny the permit.

To grant a permit, the Corps must perform a public interest balancing test. All factors relevant to a proposal must be considered, including: conservation,

economics, aesthetics, general environmental concerns, historic values, wetland values and fish and wildlife values, flood damage prevention, land use classifications, navigation, recreation, water supply, water quality, and in general, the needs and welfare of the people. No permit will be granted unless the Corps finds its issuance would be in the public interest.

The Corps additionally gives special consideration to applications for projects in wetlands. "No permit will be granted which involves the alteration of wetlands...unless the district engineer concludes on the basis of the analysis (public interest balancing test)...that the benefits of the proposed alteration outweigh the damage to the wetlands resource." The Corps is instructed to give "great weight" to the views of the fish and wildlife agencies in evaluating such applications.

Applicants should be aware that the Corps is proposing amendments to their 1982 Regulations which are currently undergoing the public hearing process in Washington, D.C. These amendments are welcome, for the most part, in that they are a result of a Federal Task Force on Regulatory Reform report and seek to streamline and expedite the Corps regulatory process. Of special interest is the proposal to delete the "great weight to fish and wildlife values" factor in the public interest balancing test and to require that fish and wildlife be treated on an equal basis with other factors.

The amendments also expand the use of general or blanket permits and redefine the scope of Corps jurisdiction, particularly as it affects wetlands.

However, the proposed amendments add more definitive language regarding "mitigation" to Section 325.4: District Engineers are authorized to add special conditions to permits when those conditions meet the following requirements:

"are necessary to protect the public interest, or practicable and justifiable to avoid or mitigate other than minor adverse effects on fish and wildlife resources...and can be accomplished on-site or may be accomplished off-site for mitigation of significant losses which are specifically identifiable, reasonably certain to occur, and of importance to the human environment..... (Emphasis added).

IV. Mitigation: Description Under State Law

A. California Environmental Quality Act of 1970.

The CEQA is the Act which is most specific to mitigation within the ambit of the State. CEQA states that it is the duty for State and local agencies, when they are acting as "lead agencies" and or "responsible agencies", to avoid or minimize environmental damages. The lead agency will normally be the agency with general governmental powers, such as a city or county, rather than an agency with a single or limited purpose. It is the agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment.

Under CEQA, the "responsible" agency is a public agency, other than the lead agency, which has additional responsibility for carrying out or approving a project.

When considering a project for permit approval, lead agencies identify the significant environmental effects and then determine whether an environmental impact statement should be prepared. Lead agencies may then require changes in a project in order to avoid the adverse effect.

CEQA specifies that responsible agencies also may require changes to avoid adverse effects, but they have more limited authority than a lead agency. These agencies may require changes in a project to lessen or avoid only the effects of the project.

It is important to note that CEQA specifically states that it confers no independent authority on an agency. Rather, CEQA can be used only in conjunction with and to the extent of, the discretionary powers granted to an agency through its enabling legislation.

Thus if an applicant has a project which must receive permit approval from the San Francisco Bay Conservation and Development Commission (BCDC) as well as local government, presumably BCDC has less authority than local government to impose a particular form of mitigation; and each agency must base its authority to require mitigation on its own statutes rather than CEQA.

The CEQA guidelines define mitigation to include: (these are identical to those specified in the NEPA Regulations, 40 C.F.R. 1508.20).

(a) "Avoiding the impact altogether by not taking a certain action or parts of an action;

(b) minimizing impacts by limiting the degree of magnitude of the action;

(c) rectifying the impact by repairing, rehabilitating, or restoring the impacted environment;

(d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action;

(e) compensating for the impact by replacing or providing substitute resources or environments."

No procedures are specified for how a lead or responsible agency are to determine which one or which combination of these possible mitigation measures should be used on any particular project.

B. McAteer-Petris Act (1965) and Subsequent Amendments (1969-AB 2057).

The 1965 Act created the San Francisco Bay Conservation and Development Commission (hereinafter referred to as BCDC) as a temporary State commission. It was assigned two tasks: (1) to prepare a comprehensive plan for the future conservation and development of the Bay and its shoreline, and (2) to regulate filling in the Bay through the granting or denial of permits during the formulation of the Plan. The Act required that the Plan was to be completed by the end of the 1969 legislative session, followed by the termination of the commission 90 days later.

The policies that were presented to the legislature in the final Bay Plan were based on extensive data identifying the harmful effects of Bay fill as well as the public benefits supported by the development of water-oriented industry. The Plan states two central objectives: to protect the Bay as a great natural resource; and to develop the Bay and its shoreline to their highest potential with a minimum of Bay filling.

The Plan called for retaining BCDC as a permanent agency. Numerous bills were introduced in the 1969 legislative session to establish a permanent agency, but with different prescriptions for the new Bay Commission's powers.

AB 2057 was the successful bill which made major amendments to the 1965 Act including new areas of Commission jurisdiction and responsibilities. This bill incorporated the Bay Plan policies and land-use priority maps and added public access to the Bay as a major objective. Further, AB 2057 made the criteria for authorizing fill much clearer and considerably more stringent:

Section 66605 states in part:

> "further filling of San Francisco Bay should be authorized only when public benefits from fill clearly exceed public detriment from the loss of the water areas and should be limited to water-oriented uses..."

Section 66632 was added empowering the BCDC to impose conditions on permit approval:

> "the commission may grant a permit subject to reasonable terms and conditions including the uses of land or structures, intensity of uses, construction methods, and methods for dredging or placing of fill..."

Neither the 1965 Act, nor the 1969 amendments, use the word "mitigate." It is fairly obvious, though, that the examples of "reasonable terms and conditions" specified in 66632 are forms of "mitigation" as defined by Webster. One could justifiably state that these "terms and conditions" are closely akin to the CEQA guidelines for mitigation. But if one refers to these guidelines, it seems that only (b) "minimizing impacts", (c) "rectifying the impact", and (d) "reducing the impact over time" have any direct corollary, while (e) "compensating for the impact by replacing or providng substitute environments" does not.

The language in 66632 remains unclear and ambiguous as to whether it was the intent of the Legislature to impose mitigation in the form of requiring an applicant to provide off-site restoration of baylands to tidal action.

Even if BCDC interprets 66632 to mean that those "conditions" include mitigation in any form, then one needs to look at the interpretation of the word "reasonable." Here again, the 1969 Amendments have no prescription for the definition of the word. Some forms of mitigation are more "reasonable" than others from an applicant's point of view, depending on the nature and scope of the project and an applicant's financial capability.

The possible contention that it was not the intent of the Legislature to require an applicant to provide "off-site mitigation" is further supported by a review of the twenty-three technical reports written as a Supplement to the Bay Plan. In the report on Powers Vol. 1, the author, Dr. Heyman, discussed the possibility of requiring an applicant to open up one new acre of Bay for each acre lost through fill. But he states "it would be highly impractical to attempt to enforce such a requirement"..."it would be practical, however, to specify another type of compensation"...the project sponsor could be required to provide a fixed-dollar amount per acre filled. This suggestion for a so-called "fill tax" was discussed by the Commission in the early days but was not adopted.

V. Authority of Regulatory Agencies to Impose Mitigation Conditions and Limitations on That Authority

Although existing Federal and State legislation and regulations contain policies that mandate protection of natural resources and often contain references to "mitigation", it is essential that we look directly and more in-depth to the enabling legislation of the Bay permitting agencies for identification of specific authority to impose mitigation in whatever form.

It has been pointed out that NEPA and CEQA provide only guidelines for the application of "mitigation" and are supposed to be used ONLY in conjunc-

junction with an agency's own permitting authority. These laws do not confer any independent authority or additional authority over and above what is stated in that agency's enabling legislation.

Regulatory agencies have the authority, by virtue of their existence, to intepret their enabling legislation. This interpretation carries with it a presumption of correctness. A legislatively delegated power to make rules and regulations is an administrative power. It is only the power to adopt regulations to carry out the will of the legislature as expressed by the enabling legislation and not the power to alter or extend such legislation.

Thus we study the question of authority to impose mitigation, we must look at two concepts: express authority (i.e., explicit wording in the enabling legislation or regulations) and implied authority (i.e., lack of express wording but with discretionary powers granted through the enabling legislation.

Authority, whether it be express or implied, is further limited by other factors and includes general concepts of the due process of law; additional limiting language in law, and by an agency's geographical permit jurisdiction. For example, BCDC jurisdiction is confined to the Bay waters from the line of highest tidal action and to a 100' shoreline band, to salt ponds and managed wetlands; the U.S. Army Corps of Engineers' jurisdiction is confined to projects in "navigable waters"; and local government jurisdiction is confined to shoreline projects within their chartered boundaries.

What muddies the water, so to speak, is that more often than not an applicant must secure permits from more than one agency. Thus the question of authority may be one consideration, but in the case of overlapping jurisdictions, the issue is whether additional mitigation shall be imposed on the same applicant

by another agency. If local government imposes a mitigation condition, acting as a lead agency, does BCDC have the authority to impose additional mitigation acting as a responsible agency? According to the Corps Regulations, the Corps is presumably not authorized to apply additional mitigation conditions if other Federal, State, or local programs exist which "achieve the objective of the desired condition." (Section 325.4) -- U.S. Army Corps of Engineers Authority.

Assuming an applicant has a project that falls exclusively under Corps permit jurisdiction, does the Corps then have the authority to require mitigation? According to the current 1982 Corps regulations (not the proposed amendments) the District Engineer is authorized to impose mitigation conditions. But the meaning of Section 325.4 is unclear as to whether the District Engineer is required to impose mitigation in order to make a finding that the project is in the public interest. Conceivably Section 325.4 could be interpreted to mean that he must consider mitigation but he does not necessarily have to require it. This decision would depend on the identification of the extent of a detrimental impact and on the outcome of the public interest balancing test. The limiting wording in Section 325.4 is:

> "District Engineers will ensure that any modification or conditions imposed on applicants are:
>
> 1) Directly related to the impacts of the proposal; and
>
> 2) commensurate in scope and degree with the impacts of concern; and
>
> 3) reasonably enforceable..."

---BCDC

Assuming a project falls exclusively within BCDC jurisdiction (after local government approval), does BCDC have the authority to require mitigation?

Earlier this reported noted that the Coalition's staff could not find any express authority, via specific wording, in BCDC's enabling legislation. However, BCDC has imposed mitigation conditions on project approval since 1970 in various forms including marsh restoration and dedication of off-site lands to tidal action. Although relatively few applicants (and these have been, for the most part, public agency applicants) have been required to dedicate parcels to tidal action, BCDC is increasing its emphasis on applying this form of mitigation to private applicants as reflected in recent permit actions.

Thus, we conclude that BCDC has interpreted its legislation to imply that such power does exist by virtue of its discretionary authority. While BCDC may have the discretionary authority to impose mitigation, it could be pursuing a non-statutory objective which reflects only the policy predisposition of staff and commissioners. Evidence supporting this statement is the non-existence of guidelines and criteria for the imposition of mitigation conditions which could support a specific interpretation under its discretionary authority.

Thus the question: What are the limitations to BCDC's discretionary authority? One of the limiting factors is the interpretation of the term "reasonable." Section 66632 allows BCDC to impose only "reasonable terms and conditions."

Generally "reasonable" reflects a concern for the due process of law, i.e., a government agency cannot act arbitrarily, capriciously or indiscriminately in the exercise of its authority. When an applicant is required to restore a certain number of acres to tidal action, does that amount to a "reasonable" condition as authorized under Section 66632?

Another limiting factor is the interpretation of the term "public benefits" under Section 66605. Should projects in priority use areas, that provide substantial public benefits, be required to mitigate to the same extent and degree as projects providing something less than substantial benefits?

---CEQA

Under CEQA "lead" and "responsible" agencies have the duty to mitigate or avoid significant environmental effects. If local government determines that it is necessary to impose mitigation conditions, they must look to their own planning code for authority to impose conditions. CEQA also contains language which limits how local government or any other agency applies mitigation conditions.

CEQA allows agencies to consider whether such mitigation is "feasible." In deciding whether changes in a project are feasible, an agency may consider specific economic, environmental, legal, social, and technological factors. Section 15021 (d) states:

> "CEQA recognizes that in determining whether and how a project should be approved, a public agency has an obligation to balance a variety of public objectives, including economic, environmental, and social factors... An agency shall prepare a statement of overriding considerations to reflect the ultimate balancing of competing public objectives..."

VI. Mitigation: Its Implementation in the Permit Process/Agency Interaction

It does not make any difference where you filed your permit application, a myriad of agencies will have an influence on the final permitting agency decision through both formal and informal mechanisms.

Formally, the Federal and State fish and wildlife agencies have no permit jurisdiction, but these are the agencies where a recommendation for mitigation will first be introduced through the consultation and "comment" process.

This report has already discussed how under the FWCA, the Corps must fully consider the comments from the U.S. Fish and Wildlife Service, the California Department of Fish and Game (as the principal State agency responsible for fish and wildlife), and where applicable from the National Marine and Fisheries Service. If the Corps is to comply with NEPA in good faith, it must additionally consult with other agencies such as the Environmental Protection Agency, the Endangered Species Office, the State Water Resources Control Board, and BCDC. Through the circulation of the Corps "Public Notice" for all pending permit applications, other agencies, groups, and individuals become involved. All of these agencies rely on the numerous statutes enacted in the past decade to provide force and substance to their comments.

The scope of a mitigation requirement can mushroom depending on the varying agencies' perception of a detrimental impact. In fact, there is a tendency by the commenting agencies to pressure the permitting agency to ask for mitigation beyond what the permitting agency would consider "reasonable" or required by that agency's legislation or regulations.

On the State level, BCDC's regulations state that local government must notify BCDC of a pending permit application at the local level which will eventually come before BCDC. During the local hearing process and the later submittal of an environmental impact statement, BCDC can influence the determination of a mitigation condition before the application even is "filed" with BCDC. Agencies tend to bid each other up.

The State Water Resources Control Board and the regional water boards issue several different permits that may be required for a project in a wetland or associated habitat area. These include National Pollution Discharge Elimination Permits for any pollutant that might be discharged into navigable waters. All of the water boards receive comments on their permit process from Federal and State agencies and mitigation may be introduced at any point along the way.

The State Lands Commission becomes involved in the permit process when a project is proposed on land that is State-owned. This Commission reviews these projects and makes an environmental assessment which includes the comments from other agencies before issuing a permit, lease, or other document.

In sum, the issue has become a question of whether single-purpose commenting agencies are exerting undue and unauthorized influence on the final permitting agency decision. By law, regulatory agencies must consider the total public interest. Conditions imposed must be reasonable, feasible, and consistent with the nature of the project.

VII. Problems with Mitigation: Burdens on Applicants

Agencies have yet to establish explicit policies and procedures for applying mitigation conditions. Thus a great deal of uncertainty and unpredictability exists. An applicant needs to know what to expect and needs to have a set of policies established by law and regulation on which to rely when planning a project. How will mitigation be determined, by whom, and in what form: Is it contribution of funds, donation of land off-site or no-site, modifications to the proposed project, or changes in construction methods? Is donation of land to be on a 1:1 basis or, since permit issuance implies that a project is in the public interest, should any projects be viewed as self-mitigating? Identified significant adverse impacts

should be minimized, but they should be minimized to the extent feasible and consistent with the nature of the project.

The report has pointed that CEQA and NEPA provide that mitigation may take several different forms. What has become commonplace is for agencies, especially at the insistence of fish and wildlife personnel, to seek compensation ONLY either in land or money. Full replacement value for habitat loss or zero habitat loss are terms you may often hear. The insistence on this form of mitigation does not result in equitable treatment of applicants, since their projects differ. This lack of flexibility, moreover, prevents the use of alternatives.

Practically, the achievement of zero habitat loss means acquiring land offsite and enhancing those lands beyond their existing state to a point where the improvement balances the loss of the resource from the project. This creates a burden on applicants who often have to shop for land. Further, parcels are not always available or are extremely costly; and there is a finite amount of land available for this purpose. The time and money spent shopping for land is an added burden.

It is generally recognized that mitigation "in-kind" or an acre-for-acre policy of replacement is arbitrary, although this is the prevailing standard. This approach is simple and workable, but more equitable and reasonable procedures are necessary.

The USFWS has made a first attempt at developing such criteria. Their technique is called HEP or Habitat Evaluation Procedure.

The problem with using HEP in mitigation negotiations is that it is useless until both the project site and an appropriate mitigation site are identified and

analyzed for their respective wildlife habitat values. Further, the methods for rating the habitat value are still based on subjective judgment and may be entirely infeasible to achieve. Fish and wildlife personnel often disagree in their rating methods. Even though HEP is biased, it still remains a useful tool. It provides at least a start in negotiating habitat tradeoffs as contrasted to a more arbitrary 1:1 replacement which may not achieve the desired habitat objective.

The semantics and jargon surrounding the use of the term mitigation are an ever-increasing problem. Agency staff and decision-makers seem to use the word capriciously to mean any number of different things.

At one recent BCDC meeting, it was stated that the applicant was being required to provide additional public access to "mitigate" for the adverse effect of amending their marina project application to provide for the sale rather than the rental of berths. There is nothing in the McAteer-Petris Act or the Regulations which state that public access conditions are a form of mitigation. Additionally, it could be argued that the perceived adverse effect was wholly miscalculated and improperly identified such as to warrant extra conditions. Requiring public access is not a traditional form of mitigation as currently understood and according to NEPA and CEQA. Perhaps public access could be considered as a form of mitigation in any future discussions of BCDC mitigation procedures. But it should be remembered that BCDC is required, under the law, to impose public access conditions on all permit applications.

VIII. How Can Mitigation Objectives Be Better Achieved?

The objectives for requiring mitigation are multifold. An inherent problem with trying to achieve these goals through the permit process is that decisions

are made on a case-by-case basis -- this is piece-meal mitigation. Some will say that this is better than nothing, but are there additional alternatives and approaches --- a combination of the permit and planning process which could result in a more viable Bay?

What is needed is for the Bay government agencies and applicants to arrive at a mutually agreed upon set of priorities. We can all agree that restoration of some baylands to tidal action may be important; as well as the preservation of wetlands and marshes. How can these goals best be achieved? If priorities are established, then a more appropriate link could be made to plan for pursuing these objectives. As mitigation requirements stand now, the process is haphazard and confusing.

One possible solution to the problem of shopping for land and site identification for habitat value is the "mitigation land bank" idea. An appropriate non-profit agency would buy a parcel(s) and hold it in a "bank." Permit applicants could buy into the bank as needed to fulfill a mitigation requirement. Depending on what agency was administering the land bank, conceivably this solution would have the advantage of keeping "mitigation cost" down. The concept of a land trust is not new, but the idea of using a land trust to fulfill mitigation requirements is untested, and the conditions surrounding the administration of such a bank merits a great deal of attention. (The Nature Conservancy, the Trust for Public Land, the Mid-Peninsula Open Space District, and POST, the Peninsula Open Space Trust are all examples of operating land trusts).

BCDC recently adopted a Memorandum of Understanding with the East Bay Regional Park District which specifies that the Commission and the District will cooperate in the establishment and operation of an in-lieu mitigation program

to be administered by the Park District. The District presently owns approximately 200 acres of land on the Hayward shoreline that it would like to restore and enhance for wetland habitat. Buying into the District's land bank is now one option that applicants have when they are required to satisfy a mitigation requirement.

Even though the land bank idea is basically a sound one, there is concern over the costs which the District has projected. Cost per acre would be around $10,000 - $15,000 which includes acquisition, restoration, planning and design, and 15 to 25 years of operation and maintenance. The question that an applicant should ask is whether this is a reasonable mitigation cost, especially the inclusion of a contribution towards long-term operation and maintenance.

The State Coastal Conservancy is another agency that could administer a land bank program, either by directly buying parcels and restoring the land, or by providing a grant to a land management agency. The Coalition is presently working with the Conservancy and Bay government agencies to explore how the administration of a "mitigation land bank" might best and most effectively be achieved.

IX. How To Plan For Incorporating Mitigation Into Permit Applications

Mitigation, in some form, is here to stay. Thus an applicant should begin planning at an early stage for incorporating mitigation into the project. Although the principle of mitigation is undisputed, it remains an art to negotiate an acceptable arrangement.

Some general rules to follow are:

a) The applicant should allow for lengthy negotiations and never be subject to a time constraint. An applicant should have a reasonable idea of what he is getting into when embarking on a project so he can make appropriate economic projections. Know what your "bottom line" is.

b) Early consideration alleviates later problems with a potential acquisition of property, thus avoiding delays at a critical point in the application process. Moreover, it allows flexibility in negotiations for the purchase of land and eventually in negotiations with the pubic agency requiring the mitigation.

c) In preparing for mitigation applicants, applicants should be aware of the time and money involved in land acquisition but also in potential restoration costs. Some restoration projects may be a simple matter of breaching a dike. However, another type of restoration may involve creating more of an "instant" marsh and, depending on land elevations, the applicant may be asked to move a lot of earth, dredge channels for better tidal flow, transfer wildlife, plant certain grasses, and even create a public access trail.

d) Spend the necessary funds to obtain accurate environmental data in relation to your project.

e) Always respond to any agency comment promptly.

f) Request a formal meeting with the permitting agency and commenting agencies as part of a pre-application process.

g) Take the time to study the law, regulations, and procedures of the permitting agencies.

h) Ask for the agency's policy on mitigation and ask that it be defined in writing.

i) Insist that the review of your application address public benefits and public interest factors and not solely biological factors.

j) Explore all alternatives and options on a mitigation plan but know what is feasible for you and what you think is reasonable.

AND LAST BUT NOT LEAST.....JOIN THE BAY PLANNING COALITION!


to Sacramento
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Berkeley
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San Francisco
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Oakland
to Stockton
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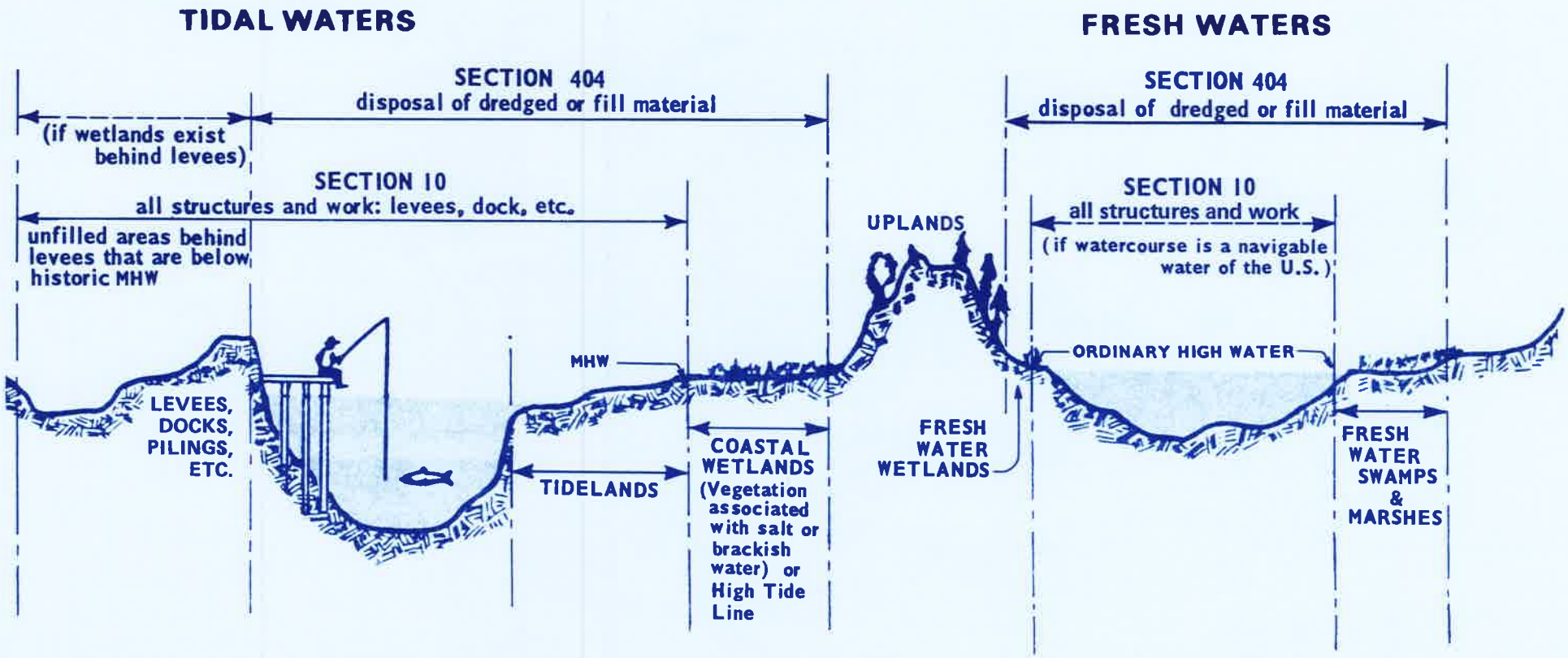

NOTE:

IN ADDITION TO SECTIONS 10 AND 404 JURISDICTIONS, THE CORPS REGULATES THE TRANSPORTATION OF DREDGING MATERIAL FOR THE PURPOSE OF DISPOSING INTO OCEAN WATERS (SECTION 103).

United States Army
Corps of Engineers
...Serving the Army
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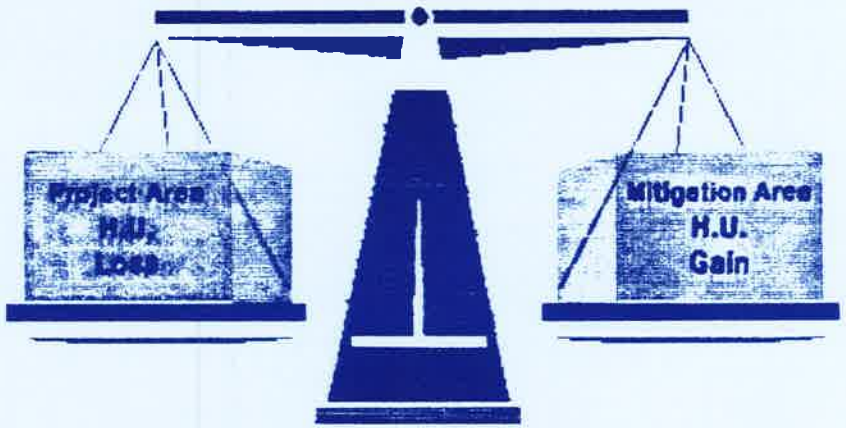
San Francisco District

HEP BALANCING ACT



HU = Acres X H.S.I.

H.U. - HABITAT UNIT
H.S.I. - HABITAT SUITABILITY INDEX