State Lands Commission

MAINTENANCE DREDGING POLICIES

Submitted for Commission
Consideration and Comment
September 25, 1986

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CONTENTS

EXECUTIVE SUMMARY

At their June 26, 1986 meeting the State Lands Commission authorized release of the staff Draft Preliminary Report on State Lands Commission Maintenance Dredging Policies for public review and comment. The report provided an overview of the history, scope, process, and policy of Commission practice for non-commercial dredging.

Staff considered comments received (written comments are contained in the Appendix, page 34) and prepared this final report that responds to public input on dredging policy. A summary of staff recommendations for changes to current Commission policy is presented on page 27. The summary provides a synopsis of suggestions provided in the body of the report. The report illustrates the willingness of the Commission to accommodate changing business and environmental needs in development of policy.

In terms of revenue and permit activity, maintenance dredging is a relatively small but important part of staff workload. A number of dredging activities are conducted in the public interest. The primary focus of the report is to determine an equitable formula in the setting of fees and charges for dredging when it is conducted in conjunction with other lease or permit activities. In developing this staff examined existing policy and practice as well as legal requirements.

Recommended in the report are changes to in-house procedures for a more efficient and streamlined process to provide better service and accountability. One suggestion is to develop new regulations or statutes that better define the responsibilities of permittees.

Another major component of dredging policy is resource utilization and the California Environmental Quality Act (CEQA). The report points out that environmental factors are a critical consideration of all Commission actions and will remain a prominent factor in all dredging policy.

A secondary issue related to dredging is the role of federal agencies in providing for navigation. The paper discusses the inherent conflict between the roles of federal agencies exercising the power to regulate and improve navigation, and the State's right to regulate and control its own property, including the right to examine environmental consequences of dredging and derive revenue from dredging activities.

In addition, staff evaluated procedural practices for leasing and permitting of maintenance dredging. At the time of review, permittees could hold a current lease document and then be asked to separately negotiate a maintenance dredging spoils fee or royalty. The permittee representatives requested development of a streamlined process for leasing and dredging.

HISTORY

State Lands dredging policy was surrounded in controversy as early as 1948, when the U.S. Army Corp of Engineers objected to any activity of the State interfering with what they define as their exclusive jurisdiction for navigation and commerce. This same controversy continues to shape events and policies facing the Commission today.

In 1949 the State enacted SB 662, Chapter 824, an amendment to the Public Resources Code, "relating to state lands and providing for the extraction or removal of minerals, other than oil and gas, and of other material therefrom." This legislation provided for "public benefit" dredging without royalty charges and competitive bidding dredging for commercial purposes.

Using this authority, State Lands staff developed a working policy that remained relatively intact until the late sixties and early seventies. At that time, staff conducted audits of several leases and questioned whether the State received a fair royalty based on market rates. A contract was awarded to Harold B. Goldman, Geological Consultants, San Francisco, to provide a "Market Survey of Sand, Gravel, Shells, and Fill, in California." Goldman submitted a preliminary draft report April 1, 1975. His report indicated a declining resource, greater costs, and an increasing long range market would cause raw material prices to rise.

The report recommended ten percent of sales price (on commercial leases) as the basis for royalties. The consultant noted that transportation distance to a purchase site would reduce profit to the dredger and should be factored into the royalty rate. He also sited local market conditions as an important factor in setting royalties.

Around this time regulation of dredging, particularly timeliness of issuing permits, became a political issue. Senator Marks in SB 2418, 1974 required the Resources Agency to prepare a report to the legislature on permit procedures for all involved jurisdictions, technical problems, overlapping responsibilities, duplication of efforts, and recommendations for improving procedures on a statewide basis. Recommendations were required to be enacted by December 1976. The Agency, under the direction of Secretary Claire Dedrick, delegated the report to the San Francisco Bay Conservation and Development Commission and Frank Goodson of Agency staff.

Staff released the report in 1976. In April, 1976 the Senate Select Committee on Maritime Industry met in San Francisco for

ENVIRONMENTAL CONSIDERATIONS

RESOURCE UTILIZATION

The Commission encourages highest and best utilization of resources, consistent with preservation of water quality and other environmental considerations. **In regulating spoils disposal, staff encourages applicants to find productive uses which are as economically viable as deep water disposal.**

Two papers presented at the November 1984, Battered Coast Conference, sponsored by the Corps of Engineers, the Coastal Commission and the Dept. of Boating and Waterways consider resource utilization and the role of government policy. The first is a California Coastal Commission staff report titled "EVALUATING THE EXISTING APPROACH TO DREDGE DISPOSAL" by Mark Prinz-Delaplaine and the second, "Sand Rights" - A LEGAL SYSTEM TO PROTECT "THE SHORES OF THE SEA," by Katherine E. Stone of BURKE, WILLIAMS & SORENSEN, Attorneys at Law.

Prinz-Delaplaine considered the role of dredging in shoreline protection and beach replenishment. He noted the impacts of upstream activities on sand and sediment production -- particularly dams -- and a growing lack of raw beach material. In addition to riverways (especially during flood conditions) and erosion of coastal bluffs, dredging has become a major source of beach nourishment. Beach disposal of dredge spoils is used regularly and successfully in Santa Cruz, Moss Landing, Morro Bay, Ventura, Channel Islands, Port Hueneme, Santa Barbara, Marina del Rey, Seal Beach/Anaheim Bay, Newport Beach, Oceanside, and Mission Bay.

However, Prinz-Delaplaine finds that beach disposal may not always be the preferred alternative. In areas such as Crescent City Harbor, Humbolt Bay, Noyo Harbor, Bodega Bay, San Francisco Bay, Los Angeles/Long Beach Harbor and San Diego Bay a variety of factors including habitat protection, economics, availability of equipment, wave climate, contaminants in the sediment, and excessively fine particles (which contribute to high turbidity) preclude regular use of dredge spoils for replenishment projects.

Stone advocates in her paper a legislative, judicial, or administrative recognition of the effects of projects on beach erosion in policy and engineering decisions. She cites Marks v. Whitney [(1971) 6 Cal.3d251, 259-60]:

> "the public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another There is a growing public recognition that one of the most important public

In terms of CEQA a "lead agency" is the governmental body that has the primary responsibility for carrying out environmental requirements for a given project. Often that agency will actually carry out a project. (Port Districts often assume this role in maintenance dredging.) Other times a "lead agency" will be the primary permit authority over a project. This is the normal circumstance under which the Commission makes CEQA findings for maintenance dredging.

While a local jurisdiction could be the "lead agency" for dredging activities, the Commission may become involved as a "responsible agency" for the purpose of commenting on possible environmental effects of a project. As such the Commission regularly considers CEQA in all dredging related matters.

Each application is carefully reviewed on its merits for potential impact to the environment. The Commission requires applicants to prepare a thorough statement on project and environmental data (See Exhibit A, page 31). If it is determined a project may possibly have a significant effect on the environment, the lead agency will prepare an "initial study." The initial study is essentially an environmental assessment survey distributed to affected parties and "responsible agencies."

After compiling the initial study the lead agency may require an Environmental Impact Report (EIR) to be prepared if it determines the project will or may have a significant impact on the environment. The lead agency must also prepare an EIR if there is a serious public controversy over the environmental effects of a project or if there is a disagreement between experts over the significance of an effect on the environment. (CEQA Guidelines Section 15064)

If the lead agency finds an EIR does not need to be prepared they may prepare a "negative declaration" when either:

1. the initial study shows there is no substantial evidence the project will have a significant effect on the environment; or

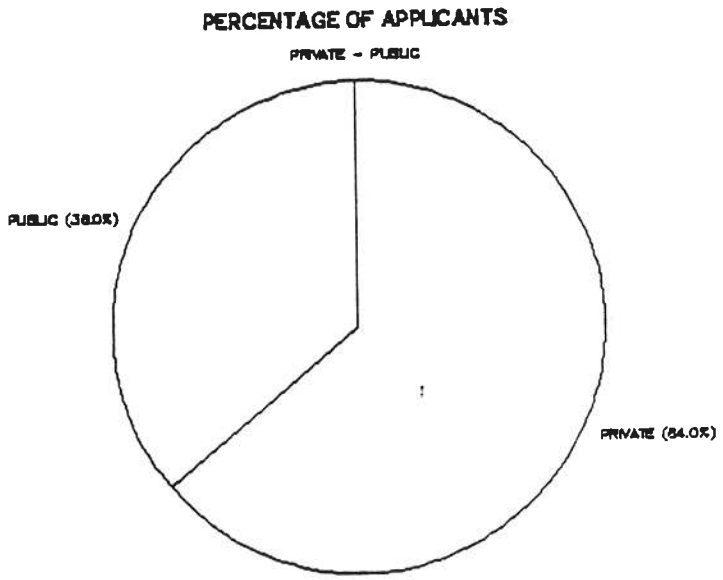
2. the initial study identifies potentially significant effects, but the project will be revised (through agreements with the project proponent and/or as a condition of approval of the project) so that the significant environmental effects are either avoided or mitigated to a point where clearly no significant effects would occur. (CEQA Guidelines Sections 150070 through 15074)

If no significant effects to the environment are apparent, the lead agency may also find maintenance dredging "categorically exempt" from CEQA. CEQA addresses <u>maintenance dredging</u> in the STATE CEQA GUIDELINES under California Administrative Code

SCOPE OF ACTIVITY

The majority of royalty bearing maintenance dredging permits are located in the San Francisco Bay and its tributaries. A few permits are located at inland lake locations. Other maintenance permits are found along the coast; however, they generally fall under the "public benefit" provisions provided to public agencies.

During the period of 1981-1985 the Commission authorized over ten million cubic yards of spoils removal. According to the State Lands Commission records twenty-five dredging permits are in force. Nine of the permits are issued to public agencies. The listing does not include marina leases containing maintenance dredging clauses or expired permits.. (See Exhibit B, pg. 32.)



The actual number of permittees requested to pay fees over the last five years is small. Five year revenues attributed to maintenance dredging totaled $350,463.73. The primary revenue generators were large corporations.

In considering revenues staff examined all dredging leases and permits issued from January 1980 to December 1984 for:

1. Royalty charge;
2. Volume dredged;
3. Amount of royalty collected to date; and
4. Penalties and interest to be collected.

proposal before presentation to the Legislature or the Office of Administrative Law. Staff suggest the following proposals be considered:

1. Aggressive on-site inspection programs.
2. Mechanisms for penalties and damages for deliberate non-compliance.
3. Development of citation authority for on-site inspectors.
4. Stricter contractual requirements for spoils disposal and reporting.
5. Development of a system to verify volume of materials removed.

Staff suspects other unpermitted dredging occurs on State Lands. Unfortunately, without receiving notice from other jurisdictions, or a more active enforcement program, there is no mechanism to monitor activity.

MARKET

Fair-market value (FMV) is frequently described as what a willing buyer will pay a willing seller. This in turn is a function of time, place and the nature of the material.

Although the definition is fairly straightforward, measuring FMV dredge spoils is frequently difficult because it requires numerous conditions which may not be present. For example, it requires an open competitive market which neither buyers nor sellers are able to influence. Because the state holds a large percentage of the resource, it is not a model seller. Model buyers are rare also: because of the location and accessibility of many state resources, a few firms, or even a single firm may constitute the relevant market. Hence competitive comparisons for state resources are not always present.

In addition to market, value can also be clouded by many factors peculiar to firms brokering the resource. Those factors may have little to do with the resource or policy. For example, a firm may offer low prices on a short term basis to establish client relationships or sell off overstocked materials.

Understanding "FMV" limitations for state resources, staff recently attempted to analyze the "market" for the Bay area and Delta region to determine how closely the current flat rates reflect demand and actual prices. The analysis covered various market sources including:

State Reclamation Board
Private sand and gravel suppliers
Army Corps of Engineers
State Lands commercial lessees

The State of California Reclamation Board administers the regional flood control network for the Northern California Flood Control System. This system comprises the series of dams and canals which control the water flow in the Sacramento River drainage basin. Among the flow controls are a series of by-passes and wiers which silt up and must be cleared out. The Reclamation Board offers for sale and removal a material of sand-loam consistency. A recent bid was $0.50 per cubic yard for 1.3 million yards in place. At another site the Reclamation Board offered to sell spoils containing good concrete sand. The latest bid sold at $2.50.

Private sellers range from direct dredger-suppliers to suppliers who buy from a contracting dredger up to 20 miles away. A sampling was derived from markets in the East Bay, Contra Costa County, Rio Vista, Petaluma and Santa Rosa reflecting a breadth of prices.

These definitions, while useful, in no way reflect what markets may actually exist. A fine loam may be more valuable if intended disposition is a clean fill site.

If a private properly owner benefits from dikes, non-engineered fill or some other use, failing to charge full royalties would likely constitute a gift of public funds, even though the permittee stands no immediate financial reimbursement.

Industry representatives asked staff to consider the benefit of dredging to the lease premises, and to determine if enhancement of the trust property could constitute adequate reimbursement for the spoils.

Staff found this argument directly tied to the "value" of the spoils in terms of improvement of the trust.

In the case of property improvement, staff finds the industry argument reasonable when no ready market exists for the spoils. (For example, when the most economically viable disposal is in an approved deep water site.) While future value of the resource is of concern to the Commission (See Lost Opportunity, page 18), staff appraisers find the immediate benefit to the property outweighs the value of the spoils. However, when a ready market does exist (as demonstrated by economic benefit to a private party as a result of receiving dredge spoils) the Commission is required by the Constitution to receive compensation. (See Legal Issues, page 22.)

There are a few cases where dredging occurs off the lease premises. Under those circumstances staff will separately evaluate market and fees. Because the improvement is not occurring on the lease site, it is not possible for compensation to be considered satisfied by the basic lease terms. Where no ready market appears to exist (as evidenced by deep water disposal) a nominal fee based on the amount to be dredged will be imposed.

Along the same lines, the industry asked if improvement to navigation constituted a trust benefit that could offset spoils value.

In general (see Legal Issues, page 22) the Commission is not obliged to create or improve navigation. Navigation is one of many trust uses. As such, improved navigation may enhance a trust property and therefore fall under criteria discussed above; however, if it is the only consideration, and the activity is occurring off the lease premises, the "benefit" may not offset the value of the spoils.

Dredging industry representatives point out that economically viable alternatives to deep water disposal are not often available -- for instance when willing sellers have no knowledge of willing buyers but still must dispose of the spoils. In this case a ready market does not exist and the enhancement of the project premises has a greater value than the spoils themselves.

IN CASES WHERE NO READY MARKET EXISTS -- AS EVIDENCED BY AN ECONOMIC REQUIREMENT FOR DEEP WATER DISPOSAL -- STAFF SUGGESTS THAT ROYALTIES FOR MAINTENANCE DREDGING MAY BE WAIVED.

STAFF RECOMMENDS RESEARCH OF LEGAL FACTS REGARDING THE CORPS' FAILURE TO COME UNDER PERMIT OR COMPENSATE THE STATE FOR DREDGING ACTIVITY. THIS MAY INCLUDE REVIEW OF ANY ACTIONS TAKEN BY THE STATE OF TEXAS IN ACHIEVING RELIEF.

Litigation would require involvement by the Office of the Attorney General as well as Commission sanction.

PUBLIC COMMENT

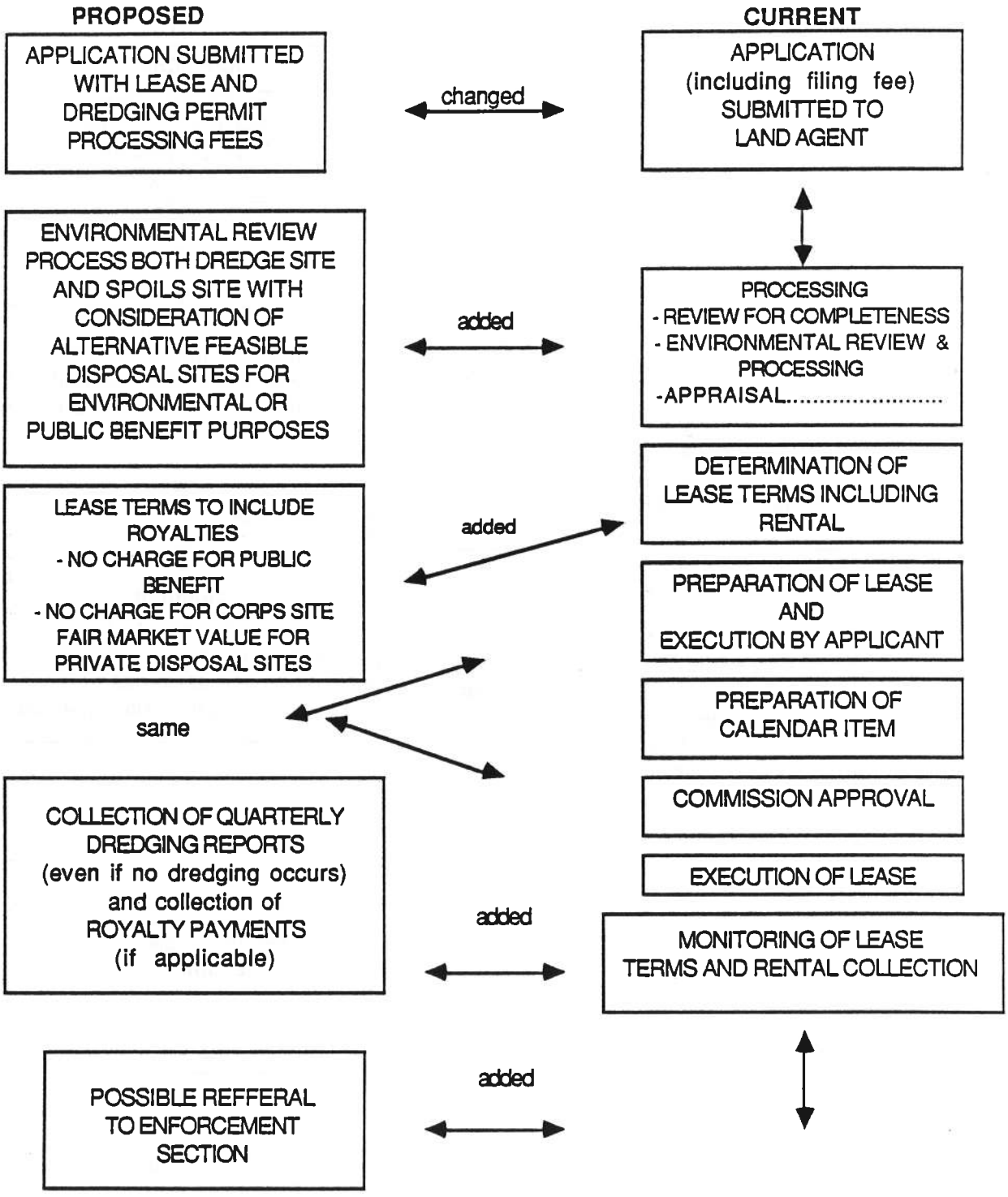
Some permittees indicated that some public benefit dredging was occasionally performed by non-public agencies or parties. They suggested that provisions be made for a waiver of royalties when there is an overriding public benefit in the placement or removal spoils.

STAFF RECOMMENDS THAT APPLICANTS BE PERMITTED TO APPLY FOR A WAIVER OF ROYALTIES WHERE THERE IS AN OVERRIDING PUBLIC BENEFIT IN THE PLACEMENT OR REMOVAL OF SPOILS. Such as Delta levee rehab -

The public trust provides the framework for the responsible protection and proper use of sovereign lands

A tandem factor to resource condsiderations is the role of navigation in trust responsibilities. Although the Commission is not obligated to provide for navigation through dredging, it may wish to promote it through encouragement in proper areas and locations. Thus, a balanced approach to competing demands for resources and land use can be achieved.

CURENT & PROPOSED APPLICATION PROCESSING PROCEDURES THAT INVOLVE LEASES AND MAINTENANCE DREDGING



SUMMARY OF RECOMMENDATIONS

A variety of suggestions to improve existing maintenance dredging policy evolved from the study. Some involve only procedural changes. Where possible those changes have or will be made by staff. Other changes will require action by the Commission or some other body such as the Legislature, the Attorney General, or the Office of Administrative Law. Staff will prepare the appropriate documents to permit those bodies to review and act upon the suggestions. Following is a discussion of the staff recommendations and the anticipated required actions to implement them.

1. THE OVERIDING CONSIDERATION IN DETERMINING DREDGING ROYALTIES WILL BE THE BENEFIT OF DREDGING TO THE PUBLIC TRUST.

2. DREDGING FOR THE PUBLIC BENEFIT MAY BE ELIGIBLE FOR A WAIVER OF ROYALTIES OF THE PUBLIC BENEFIT OUTWEIGHS THE VALUE OF THE SPOILS.

Action Recommended:
None. This is existing policy.

3. WHERE POSSIBLE STAFF WILL INCORPORATE THE APPLICATION PROCESS FOR NON-COMMERCIAL DREDGING AND MARINA, PIER, OR OUTFALL LEASES. DREDGING ROYALTIES WILL BE INCORPORATED INTO THE MASTER LEASE FEE.

Action Recommended:
Staff implemented a process for consideration of new leases that allows maintenance dredging to be incorporated as part of the same project. Staff is requesting a change to the standard lease documents and application forms to better incorporate the new policy. The Office of the Attorney General will review new forms and the Commission must approve any new format.

Existing lessees may request that their current documents be amended or they may continue with the previous practice of applying for dredging permits as needed. All new leases or negotiated renewals will follow the new procedure.

4. DREDGING OCCURRING OFF THE LEASE PREMISES WILL CONTINUE TO BE TREATED UNDER SEPARATE PERMIT. APPLICANTS WILL BE OFFERED AN OPPORTUNITY TO NEGOTIATE BOTH THE LEASE AND ASSOCIATED DREDGING AS ONE PROJECT.

Action Recommended:
None. The process will be the same as outlined in recommendation 3.

8. STAFF WILL DEVELOP GUIDELINES FOR MORE EFFECTIVE ENFORCEMENT OF DREDGING REGULATION. THEY MAY INCLUDE MORE STRINGENT PENALTIES FOR CONTRACT VIOLATIONS.

Action Recommended:

At the June 26, 1986 regular meeting the Commission authorized development of an enforcement unit. That unit will work with dredging staff in achieving compliance with permit terms and bringing unpermitted activity under contract. As a result of enforcement activity ther are currently no delinquent accounts.

In addition to the above, staff may develop recommendations for legislation and/or new administrative law. The Commission would review any such proposals before presentation to the Legislature or the Office of Administrative Law.

9. STAFF RECOMMENDS LEGAL RESEARCH OF THE AUTHORITY OF THE ARMY CORPS OF ENGINEERS FOR FAILURE TO OPERATE WITHOUT PERMITS OR COMPENSATE THE STATE WHEN GAIN IS RECEIVED FROM DREDGE SPOILS.

Action Recommended:

Litigation would require involvement by the Office of the Attorney General as well as Commission sanction. Staff will provide further information to the Commission after investigation of alternatives.

10. STAFF WILL TO THE EXTENT POSSIBLE COMPUTERIZE ALL BILLING, REPORTING, AND MARKET REVIEW. AUTOMATION WILL ALSO INCLUDE A METHOD TO ALLOW CROSS REFERENCE OF LEASES AND DREDGING ACTIVITY.

Action Recommended:

Automation may require new equipment or access to equipment in other divisions. Purchases would be subject to the budget process. Other agencies may be consulted to offer guidance in bringing computer assistance to the existing process.

PART II

PROJECT AND ENVIRONMENTAL DATA

Form 33.45c (5/84)

SECTION A: PROJECT INFORMATION

Please answer all questions and provide the following information on separate sheet(s) of paper. Please respond in detail. The information is needed to process the application. If any question is inapplicable or otherwise inappropriate to the application, please state the reasons for so concluding.

1. *Project Location.* Submit the following maps and/or drawings: (a) a small-scale (topographic) map or drawing showing the general vicinity of the proposed project including nearby landmarks, roads and other features that would make clear its relationship to the general vicinity, and (b) a large-scale (topographic) map or drawing showing the project location in detail and such features as existing structures, fills, dredged areas and public access. On one of these maps, indicate the property(ies) that are adjacent to the State lands in question and that are owned, leased or otherwise available for use by the applicant. Include copies of all conveyances, leases, permits, easements or other documents that show the extent of the applicant's interest to use or have access to the property(ies) adjacent to the State lands in question.

2. *Existing Zoning and General Plan Designation of Project Site.* Submit all zoning information and include (to the extent available and applicable) the project's street address, city, county, Assessor's parcel number, quad sheet name, section, township, range, base and meridian designation, and/or legal description of the property.

3. *Existing Land Use of Project Site.* Describe the current land use of the area (e.g., residential, commercial, agricultural).

4. *Project Description and Proposed Use of Site.* Describe fully and in detail the proposed activity, its purpose and intended use.

5. *Other Permits Required.* Identify other public agencies having approval authority over the proposed project (e.g., Corps of Engineers, Coastal Commission, county and city agencies) and submit copies of all acquired approvals relating to this project.

SECTION B: ENVIRONMENTAL SETTING

The data and degree of specificity required in this section shall correspond with the data and degree of specificity involved in the underlying activity. Typically, larger projects require more data and a greater degree of specificity, and smaller projects require less data and a lesser degree of specificity.

1. Describe the project site as it exists before commencement of the project. Include information such as topography, soil stability, plants and animals, and any cultural, historical or scenic aspects. Describe any existing structures on the site, the use of the structures, and whether they will be retained or removed. Include photograph(s) of the site, if available.

SECTION B (Continued)

2. Describe the surrounding properties. Include information such as topography, soil stability, plants and animals, and any cultural, historical or scenic aspects. Indicate the type of land use (e.g., residential, commercial, agricultural), intensity of land use (e.g., one-family dwellings, apartment buildings, shops, department stores) and scale of development. Include photograph(s) of the area, if available.

3. Include a statement of the proposed liquid, solid or gaseous waste disposal methods necessary for the protection and preservation of existing land and water uses.

SECTION C: ASSESSMENT OF ENVIRONMENTAL IMPACTS

All phases of a project, such as planning, acquisition, development and operation, shall be considered when evaluating its impact on the environment. Please answer the following questions by placing a check in the appropriate box. Discuss all items checked "yes" or "maybe" on additional sheet(s).

Will the project involve:	YES	MAYBE	NO
1. A change in existing features of any bays, tidelands, beaches, lakes or hills, or substantial alteration of ground contours?	[ ]	[ ]	[ ]
2. A change in scenic views from existing residential areas or public lands or roads?	[ ]	[ ]	[ ]
3. A change in pattern, scale or character of the general area of the project?	[ ]	[ ]	[ ]
4. Significant effect on plant or animal life?	[ ]	[ ]	[ ]
5. Significant amounts of solid waste or litter?	[ ]	[ ]	[ ]
6. A change in dust, ash, smoke, fumes or odors in the vicinity?	[ ]	[ ]	[ ]
7. A change in ocean, bay, lake, stream or ground water quality or quantity, or an altering of existing drainage patterns?	[ ]	[ ]	[ ]
8. A change in existing noise or vibration levels in the vicinity?	[ ]	[ ]	[ ]
9. Construction on filled land or on a slope of 10 percent or more?	[ ]	[ ]	[ ]
10. Use or disposal of potentially hazardous materials such as toxic or radioactive substances, flammables or explosives?	[ ]	[ ]	[ ]
11. A change in demand for municipal services (e.g., police, fire, water, sewage)?	[ ]	[ ]	[ ]
12. Increase in fossil fuel consumption (e.g., electricity, oil, natural gas)?	[ ]	[ ]	[ ]
13. A larger project or a series of projects?	[ ]	[ ]	[ ]

EXHIBIT C

DEPARTMENT OF THE NAVY
NAVAL COMMUNICATION STATION
STOCKTON
STOCKTON CALIFORNIA 95203-5000

IN REPLY REFER TO
11000
Ser 31/ 0852
26 MAR 1985

State of California
State Lands Commission
Attn: Mr. Jacques Graber, Land Agent
1807 13th Street
Sacramento, CA 95814

Gentlemen:

Reference is made to your letter, File Reference PNCE SAC 85-8840 of 27 February 1985 concerning Corps of Engineers Public Notice No. 8840 covering the Navy's project for dredging the waterways and the replacement of riprap at the Naval Communication Station Stockton.

Paragraph 2 of your letter advises that it will be necessary for the Navy to obtain a permit from the State Lands Commission for the use of State-owned lands involved in the project.

The Commerce Clause, Article 1, Section 8 of the United States Constitution, creates an exclusive power in the Federal Government with regard to navigable water. This power confers a "dominant servitude" in the Government by which it can assert requisite control over the navigable waters of the United States used in Commerce. Inclusive within the scope of the servitude is regulation of both navigable waters and the underlying land below ordinary high water mark. Hence, exercise of the Constitutional power is not an invasion of any private property rights in the waters or underlying lands and is not taking of property from adjacent land owners within the meaning of the Fifth Amendment.

In view of the foregoing, it is the policy of the Department of the Navy that in the construction of off-shore facilities, the Government is exercising its dominent navigational servitude and is under no obligation to enter into agreements with the owners of beds of navigable waters. Accordingly, the Navy will not apply to the State Lands Commission for a lease or permit. We are cooperating with the Sacramento District Engineer to obtain an Army Corps of Engineers permit as required by Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act.

Sincerely,

D. M. HAYDOCK, JR., CDR, CEC, USN
Public Works Officer
By direction of the Commanding Officer

Copy to:
U. S. Army Corps of Engineers, Sacramento District
WESTNAVFACENGCOM

July 22, 1986

Ms. Lisa Beutler
Sate Lands Commission
1807 13th Street
Sacramento, CA 95814

Dear Ms. Beutler:

Your Draft Preliminary Report, State Lands Commission, Maintenance Dredging Policies, file reference: W23636, dated June 30, 1986, was received missing page seven.

Upon reviewing your draft material, I recommend that you consider the impact of the proposed dredging on coastal areas and beaches. As you know, the beaches of California are dependant in part on supplies from materials that move from mountains, lands and bays to the coast, without these precious beach building materials normally supplied episodically, hinterland dependent beaches will be reduced or eroded.

In addition to obvious recreational and environmental losses of, the loss of beaches often reduces coastal protection afforded by wave energy tisipation of beaches during storms and periods of high coastal wave attack. Thus, triggering or in part causing erosion to coastal property. This erosion resulting from the mining or reduction of coastal sediment supply often triggers financial or economic losses which are of course a form of income redistribution and perhaps not a function of your commission.

I recommend that your commission study this complex problem. In my perception a new body of regulations and perhaps laws must be formulated that will be coincide with the movement of beach and related sediments from the mountains, coastal lands, and bays to the shores nearshore and offshore areas.

I have previously proposed that such a body of laws be called "Sand Rights" and would include a long shore or littoral sand movements as well as sand movements from landward.

These comments do not reflect my position in the American Shore and Beach Preservation Association, the American Society of Civil Engineers or Coastal Zone '87. A good reference on this subject was presented by Ms. Katherine Stone of Burke, Williams and Sorenson in Los Angeles, during the California Battered Coast Conference.

Cheers,

Orville Magoon
Chairman

OTM:167:ce

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*PROFESSIONAL CORPORATION

July 30, 1986

Lisa Beutler
State Lands Commission
1807 13th Street
Sacramento, California 95814

Re: Draft Preliminary Report, State Lands Commission, Maintenance Dredging Policies

Dear Lisa,

I thought might be interested in the latest version of My "sand rights" paper which was presented at a land use conference in England this month.

Very truly yours,

KATHERINE E. STONE
of BURKE, WILLIAMS & SORENSEN

KES:sme
Enclosure

Sand rights integrates two natural laws. One is physical -- the natural transport of sand within the greater littoral cell. The other is societal -- involving property rights based on natural law concepts dating back to early Roman times. Although the focus is on California, the basic legal doctrine can be applied within the legal system of any coastal state and also of the many nations which recognize the same natural laws. Sand rights, like water rights and property rights, are state law questions which vary from state to state. (State Land Bd. v. Corvallis Sand & Gravel Co. (1977) 429 U.S. 363.) A theory of sand rights would require that new water projects be designed and existing projects be reevaluated to mitigate interference with the system which transports sand to the beach. It would also provide a legal basis for funding sand replenishment through fees, taxes and assessments.

II.

FACTUAL BACKGROUND

The State of California contains over 1,000 miles of coastline, not including the various islands which are a part of the State. Much of this coastline is either highly developed or is consciously being preserved in a natural state for recreational purposes. The coast is clearly one of the most valuable resources of California, as well as most coastal states.

Shoreline erosion presents a major problem in California and many other states. While the shoreline has historically never remained static, over the last hundred years the erosion problem has become exacerbated by man's efforts to tame the waters of the State and to divert them for his own use. This phenomenon only becomes recognized as a problem when valuable resources which have been placed near the shoreline become threatened by storms as their buffer of sand erodes. The scenic road along Carmel beach, for example, is now threatened by coastal erosion, and State Highway 1, washed out in the winter of 1982, was recently reopened at great expense. Without the establishment of roads and structures near beaches, the ebb and flow of the shoreline would be little noticed.

There are numerous causes of shoreline erosion. The effect of the interaction of these complex causes is not completely understood. Without presenting an exhaustive list, the following are some of the most important impacts on the shoreline:

(1972) Proceedings 13th International Conference on Coastal Engineering Vol. 2, p. 1571 [hereinafter "Magoon"].)

In addition, public works projects such as dams and flood control channels have drastically diminished the flow and turbulence of the water flowing in the rivers and streams. It has been estimated that hundreds of millions of cubic yards of sand are stored behind dams in the Los Angeles area. (See, Potter, "Sluicing the San Gabriel River," (1985) Proceedings of California's Battered Coast Conference.)

C. Interference With Littoral Flows. Large amounts of sand are carried by littoral or longshore currents. The waves approaching the coast normally approach the beach at an angle, which leads to a littoral or longshore current parallel to the beach. This littoral current transports sediments parallel to the beach. (Ross, Opportunities and Uses of the Ocean (1978) Chapter 8.)

However, human interference with the longshore transport of sand has caused increased erosion in some locations and deposits in others. Coastal structures have been built to solve local problems which result in erosion on the downstream side of the structure and accretion on the upstream side. The effect may be compounded by the construction of an entire series of structures, a result that generally occurs because the owner of a downstream property is forced to take some action to prevent the increased erosion to his or her beach. The most common types of coastal structures built to prevent erosion are groins, seawalls, and breakwaters. (Bascom, Waves and Beaches (2d Edition 1980) pp. 304-308.)

D. Sand Mining. Sand mining accounts for a significant loss of beach nourishment. Large scale commercial sand mining takes place on various beaches (e.g. Monterey) and in various stream beds (e.g. San Juan Creek) of the State. This sand mostly goes for construction purposes, but it is also used in less familiar ways such as for making glass and pottery. (Magoon, supra, at p. 1576.) Non-commercial sand mining also takes place in California. A staggering amount of sand is removed from the State's beaches every summer weekend caught in beach towels or in sand pails bound for the cat box.

The result of man's interference with coastal processes is a net deficit in sand moving to and along the coast.

filed the lawsuit, seven years after the completion of the breakwater, the beach in front of the hotel was completely denuded of sand.

While the Court agreed that a littoral owner may have a right against an individual who interrupts the flow of sand carried by ocean currents, it found that the State or City has an absolute right to build coastal structures that aid commerce, navigation or fishing even though the device leads to the erosion of the plaintiff's property. The Court based its ruling on a finding that the withdrawal of the accretions was merely an incidental consequence of the State's use of navigable waters for a public interest and that this public interest was superior to any private littoral right.

This case, and others like it, rest in part upon the principle that the State holds the tidelands and navigable waters of the State in trust for all the people; this is known as the public trust doctrine. Therefore, under the public trust doctrine, public improvements made in furtherance of the public trust (traditionally for commerce, navigation or fishing) have been upheld by courts in the face of claims by beachfront property owners that the State's action diminishes the value of their property. While California has developed the doctrine of public trust to a far greater extent than almost any other state, other states with a significant body of public trust law include Massachusetts, Wisconsin, and Maryland.

Similarly, the California Supreme Court has ruled that a downstream landowner has no right, as against a city, to the continued flow of sand and gravel in suspension in the waters of the stream. In Joslin v. Marin Municipal Water District (1967) 67 Cal.2d 132, the plaintiffs' rock and gravel business depended upon sand and rock being carried downstream by the Nicasio Creek and deposited upon their property. The City constructed a dam in 1962 which reduced the flow of water and thus impeded the replenishment of gravel and sand upon which plaintiffs' business relied. The Court rejected plaintiffs' claim based on California's longstanding riparian rights doctrine. That doctrine (California Constitution Article XIV, Section 3) declares that:

* The right to the use of flowing water is limited to the amount of water which is reasonably required for the beneficial use to be served;

cumulative effect of revetments along the California coast placed a burden on public access to and along state tides and submerged lands making the corresponding compensation by means of public access reasonable.

The subject of this paper picks up where Whaler's Village Club left off. Large parts of California's coastal beaches are public. They are used for the public benefit. Erosion of beaches has proceeded in some areas to the extent that entire communities are threatened by, for example, the loss of tourist based revenues. Unlike the situation in Miramar or Joslin, where only individual interests were affected, depriving coastline beaches of sand needed to replenish them will result in an injury to the interests of the public at large. In short, unlike the situations in the reported California decisions on this topic, in the larger picture the continued supply of sand to the coastline beaches of the State confers a significant public benefit which is difficult, if not impossible, to quantify.

2. Federal Law and Other States

(a) Federal Law.

One question which had historically caused great confusion was whether lawsuits concerning riparian or littoral rights presented issues of exclusively state law, or whether federal law was determinative. This issue was eventually resolved by the United States Supreme Court in 1977 in a case involving sand rights. (State Land v. Corvallis Sand and Gravel (1977) 429 U.S. 363.) The lawsuit began when the State of Oregon sued the Corvallis Sand and Gravel Co. in an attempt to stop the company from dredging sand from certain lands beneath the Willamette River. The company had been digging in the disputed part of the riverbed for between 40 to 50 years under a federal patent but without a lease from the State. This case, like many other cases involving the continued appropriation of sand by a private party, was filed by the State which, in a more environmentally enlightened period, repented of its previous generosity in allowing Corvallis Sand to remove this sand from the overall littoral cell.

The Court examined the venerable case of Pollard's Lessee v. Hagen (1845) How. 212, 11 L.Ed. 565, which established the principle that:

> "[T]he shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were

fill would destroy navigation, the project should not be allowed. The Court took a position seemingly at odds with that taken by California courts, such as the Miramar decision. Although the project would reduce fish production and destroy navigation in the four acres actually filled, the Court balanced this taking against the fact that the project would provide for a more substantial bathing beach and better park facilities.

(c) Maryland Law.

In Department of Natural Resources v. Ocean City (1975) 274 Md. 1, 332 A.2d 630, the Maryland Court was faced with the question of the extent of the rights which neighboring owners and members of the public have in the beach at Ocean City, Maryland. Ocean City granted the owner of beach property the right to develop, whereupon the State sued, stating that the area above the mean high tide line was held in trust for the people of the State of Maryland. The Court was forced to examine the Charter of Maryland, granted in 1632 by King Charles I to Lord Baltimore. Article XVI of that Charter prohibits fish from being salted or dried on, or cabins or huts constructed on, or twigs and branches gathered from the beaches of the State. The State argued that this Charter granted the public a right to picnic and sunbathe on the dunes on which the developer sought to build his project. The Court held that, based upon an exception in the Charter, which prevented "notable damage or injury in anywise to be done . . . to the residents and inhabitants of the same provence in the . . . shores aforesaid . . .", no public right existed to deny to the developer a right to use his property in an otherwise lawful manner (i.e., his right under Ocean City ordinance to build the project).

(d) Massachusetts Law

In Lummis v. Lilly, an unreported decision, the reasonable use doctrine, a water law concept, was applied in the coastal erosion context. The defendant property owner had been granted a permit for, and constructed, a stone groin in front of his property abutting the shore. A groin is a solid structure which lies generally perpendicular to the shoreline and extends from the backshore and across the foreshore of the beach, and its function is to interrupt the littoral drifting of sand along the shore, thereby producing deposition of sand on the updrift side of the structure and widening the beach. Because the littoral drifting continues on the downdrift side of the structure, and because the sand which is transported away is not replaced by sand from the

rights of the public over the tidelands, providing that there was some legitimate public purpose asserted. It has been written that "[i]t is part of the prerogative and duty of the Crown to preserve the realm from the inroads of the sea and to protect the land from the inundation of the water for the benefit, not of an individual, but of the whole commonwealth." (Wisdom, The Law of Rivers and Watercourses, 4th ed., (1979) Shaw & Sons Ltd., p. 32, indicating that the public trust doctrine continues to exist in England.)

These two sources of the public trust doctrine have produced a degree of confusion as both were carried over into American law. However, despite its obscure origins and confusing application, the public trust doctrine is firmly established in the United States and in the State of California. (For excellent discussions of the evolution of the public trust doctrine from Roman times, see Stevens, The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right (1980) 14 U.C. Davis L.R. 195; Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention (1970) 68 Mich. L.R. 471, and Sax, The Public Trust In Tidal Areas: A Sometime Submerged Traditional Doctrine (1970) 79 Yale L.J. 769.)

Historically, California and other states have recognized the public trust doctrine. In one early, seminal case, the Supreme Court of California held, where a statute authorizing the conveyance of tidelands for private use did not explicitly do so clear of the public trust, the grantees do not acquire absolute title. (People v. California Fish Co. (1913) 166 Cal. 576.) Instead, the grantees hold the land subject to the right of the State to interfere for public trust purposes which the State may do without paying compensation to the grantee.

In a more recent California public trust case, Marks v. Whitney (1971) 6 Cal.3d 251, the California Supreme Court, perhaps in response to the growing environmental movement, included a discussion of the flexibility of the public trust doctrine in a case which actually concerned a boundary dispute between two private property owners on a bay in Marin County. The Court held that the public trust extends beyond the traditional purposes of navigation, commerce and fisheries to the protection of environmental and recreational values.

California Fish Co. and Marks v. Whitney both involved grants of tidelands. While it has been clear since Roman times that the public trust applies to tidelands, California at least has extended the doctrine's application

The Court noted that the most important facet of the public trust doctrine is the State's power and duty as the sovereign to exercise continuous supervision and control over the navigable waters of the State and the lands underlying those waters. The State's responsibility for supervision continues notwithstanding any previous contracts or transfer of property rights concerning the uses of the water in question or the land underlying the water. The State cannot abrogate the trust by merely authorizing a use which is inconsistent with the trust.

This critical holding of the Supreme Court of California means that no person or party can ever gain a vested right in continued unreasonable use of waters or lands underlying the waters of the State. While a property owner may have a vested right in the use of his or her property subject to the trust, no vested right can be asserted, despite the passage of long periods of time, to bar the recognition of the trust or of State action to carry out trust purposes.

D. Application of The Public Trust Doctrine to Protect Sand Replenishment Along the Coast.

There are several indications, in the California Supreme Court's Mono Lake decision, that the Court would not look unfavorably upon an argument that its analysis should be applied to the diversion of sand from the beaches of the Coast. For example, the Court recognized that the public trust extends to non-navigable tributaries where extraction of waters harms public interest in navigable waters. It could similarly be argued that diversion of sand by action on a shoreline or a non-navigable stream is protected under the public trust doctrine because it damages the public interest in the tidelands.

The Court also recognized that traditionally the public trust doctrine has been applied to only three uses -- navigation, commerce and fishing. In language which is crucial not only to any legal argument in favor of sand rights but also to any policy argument in support of the necessity of creating a system of sand rights, the Court stated:

> "the public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the State is not burdened with an outmoded classification

rights. The need for such a doctrine and the failure of current law to recognize sand rights, has also been discussed. This section will deal with mechanisms through which the doctrine of sand rights could be integrated into the existing legal system.

There are at least three potential legal avenues for integrating into the decision-making process a recognition of the effect of a project on beach erosion. First, the courts could do so by recognition of sand rights as an interest to be protected under the California Constitution by the public trust doctrine. Second, the State Legislature and Congress could mandate consideration of the effect of a project on sand supply. Third, public agencies could administratively recognize and deal with the problem.

Conferences such as this are a vital component in any process leading to recognition of sand rights. When the California Supreme Court discusses, as it did in the Mono Lake case, the evolving list of purposes which are protected by the public trust doctrine, it must be realized that the recognition of these new purposes comes from the statements and papers of people such as the presenters at this conference, not just from arguments made in court by attorneys. Thus, the major purpose of this paper is to initiate or further a discussion among experts of whether a doctrine of sand rights should exist.

Without a recognition of the effect of projects on beach erosion, policy decisions and engineering decisions will continue to be made without adequate consideration of the effect of these decisions upon the flow of sand to coastal beaches. It is not the argument of the authors that recognition of sand rights would require the abandonment of projects which have an adverse effect on supply of sand to the coast. But the need for a continued supply of sand to our coastal beaches should be considered along with all of the other factors which are currently considered before a decision is made to proceed with a project.

An example of an administrative approach to dealing with beach erosion is found in a 1984 decision of the Massachusetts Department of Environmental Quality Engineering (DEQE) approving the construction and maintenance of a revetment for ten years provided that the applicants agree to undertake a comprehensive beach renourishment program to insure sufficient quality of downdrift sediment. The approval was also conditioned on the applicants, through a consultant, providing the DEQE

In relevant part, the Coastal Protection Act provides that notice must be given, by publication, of all proposed coastal construction, other than ordinary maintenance or repair, to be authorized by a coastal protection authority. Such proposed construction must be confirmed by the Minister and only after persons objecting to the construction have been given an opportunity to voice their concerns. The Minister has authority to impose reasonable conditions on the approval to further the public interest. Similarly, no person may construct any barrier or other improvements on the shore, or excavate or remove any materials from the shore, without first obtaining approval from the Coastal Protection Authority. Notice of the proposed construction must be given to all other coastal authorities adjoining the subject property, and if objections are raised, a hearing may be held before the Minister, who will either approve, conditionally approve or deny permission to construct the proposed development. Recognition and protection of the public's interest in preserving the shores of the sea is easily achieved through the administration of the Coastal Protection Act.

Public agencies could impose the consideration of a project's effect on beach nourishment upon themselves through regulation. Cities, counties, and special districts (to a limited extent) have the ability to do this legislatively through their reserved police power, and many state and federal agencies may do so under their broad grant of statutory authority. For example, the Corps of Engineers has wide discretion to take measures to mitigate erosion damage caused by new or existing navigational structures (33 U.S.C. Section 4261; Save the Dunes Council v. Alexander (7th Cir. 1978) 584 F.2d 158, 165) and to investigate and reverse beach erosion (33 U.S.C. Sections 426-426h).

Under existing statutory authority (California Public Resources Code Section 30233(b)), the California Coastal Commission has conditioned its approval of the San Juan Creek project, to require that sand excavated in a dredging project be transported to a beach. However, the California Coastal Act only applies to decisions made within the coastal zone. Many large projects which have major effects upon the delivery of sand to beaches are constructed outside of the coastal zone, and are thus beyond the jurisdiction of the Coastal Act.

Public agencies could use their existing powers to fund erosion control projects. One method to obtain funding for beach stabilization projects, such as groins, breakwaters, artificial fill, and artificial sea-grass and

purposes and as a buffer to prevent storms from causing severe property damage. A theory of sand rights could be recognized as part of the existing public trust doctrine; it could be created legislatively, or even administratively in the form of regulations which must be complied with before a project could be carried out. It is not the authors' intent that a doctrine of sand rights be used to halt development or improvements to the State's navigable waters. However, the authors firmly believe that careful consideration must be given to those proposed or existing projects that interfere with the delivery of large amounts of sand to our coastal beaches and, when new projects are approved, measures should be taken to mitigate the damage to one of our nation's most important resources.