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ARTICLE

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION: CHALLENGE AND RESPONSE AFTER 30 YEARS

BY JONATHAN SMITH* AND ALAN PENDLETON**

I. INTRODUCTION

San Francisco Bay¹ is a public resource of incomparable beauty and environmental importance. First discovered by

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1. San Francisco Bay is more properly described as an estuary rather than as a bay. An estuary is an area where fresh water from the land mixes with salt water from the ocean. An estuary is an area of great biological productivity and resource value. In the case of San Francisco Bay, both the Sacramento and the San Joaquin Rivers meet in an area known as "the Delta," which is located immediately east of greater San Francisco Bay and consists of a large area of islands and sloughs through which the fresh water from the two rivers flows into the Bay and eventually into the Pacific Ocean.

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Gaspar de Portola in 1769, the Bay² historically included extensive tidal marshes, mudflats, and open water, and supported extensive populations of fish, shellfish, birds, seals, and other fauna and flora.³ However, beginning with the explosive growth associated with the California gold rush in 1848 and continuing up to the present, human development has transformed the Bay Area into the fourth largest metropolitan region in the United States. As part of its transformation, large amounts of Bay tidal marsh and lesser amounts of mudflat and intertidal and subtidal habitat were diked and either filled to create upland, converted into salt ponds, or otherwise altered from their natural characteristics.⁴ This process accelerated in the late 1950's and the early 1960's. By the early 1960's, developers were reclaiming approximately 2,400 acres of Bay each year, and several very significant reclamation projects were being proposed for Bay property in Berkeley and Emeryville and from South San Francisco south to San Mateo.⁵

In the late 1950's, the U. S. Army Corps of Engineers summarized and documented the historical loss of Bay habitat, the physical and economic factors that encouraged this process, and the accelerating rate of this process.⁶ In response, Kath-

2. San Francisco Bay actually refers to a series of smaller inter connected bays that consist of southern San Francisco Bay, central San Francisco Bay, San Pablo Bay, the Carquinez Strait, and Suisun Bay. Combined, they are approximately fifty miles long and vary from one to twelve miles in width.

3. Various status and trends reports have been prepared for the U.S. Environmental Protection Agency's San Francisco Estuary Project on various subjects, including aquatic resources, pollutants, land use and population, wetlands and related habitats, wildlife, and dredging and waterway modification, published in 1991 and 1992. The San Francisco Estuary Institute in Albany, California has also produced the San Francisco Estuary EcoAtlas, which graphically illustrates historic and current locations of various Bay habitats, such as tidal wetlands, mudflats, and salt ponds.

4. See San Francisco Estuary Project, *State of the Estuary 1992-1997*; San Francisco Estuary Project, *Status and Trends Report on Wetlands and Related Habitats* (Dec. 1991).

5. See RICE ODELL, *THE SAVING OF SAN FRANCISCO BAY* 5-10, 14-17 (1972); MEL SCOTT, *THE FUTURE OF SAN FRANCISCO BAY* 24-40 (Sept. 1963); HAROLD GILLIAM, *BETWEEN THE DEVIL AND THE DEEP BLUE BAY: THE STRUGGLE TO SAVE SAN FRANCISCO BAY* 82-92 (1969); Daniel U. Smith, Comment, *San Francisco Bay: Regional Regulation For Its Protection and Development*, 55 CAL. L. REV. 728, 728-34 (Aug. 1967). See generally U.S. DEPT OF COMMERCE, *FUTURE DEVELOPMENT OF THE SAN FRANCISCO BAY AREA 1960-2020* (1959) (on file with author).

6. See *FUTURE DEVELOPMENT OF THE SAN FRANCISCO BAY AREA*, *supra* note 5.

erine Kerr, Esther Gulick, and Sylvia McLaughlin, wives of the President and two professors at the University of California, Berkeley, joined with other local environmental leaders to form the Save San Francisco Bay Association ("Save the Bay"). Save the Bay and other concerned citizens and groups successfully lobbied the California State Legislature into creating the San Francisco Bay Conservation and Development Commission ("BCDC") to reverse this trend. BCDC developed a general plan for San Francisco Bay, known as *The San Francisco Bay Plan* ("*Bay Plan*"), and assumed permit authority over development projects in the Bay or along its shoreline. Over the next 20 years, BCDC eliminated uncoordinated and haphazard Bay filling, provided an important regional forum for protecting Bay-related resources, substantially increased public access to and along the San Francisco Bay shoreline, and allowed appropriate Bay shoreline development. During this period, BCDC also enjoyed great public support and served as a model for subsequent coastal zone land use regulatory agencies.⁷

However, starting in the mid 1980's and moving into the 1990's, public attitudes toward government in general and land use regulation in particular have undergone significant changes. Moreover, a series of specific environmental and land use problems have arisen in the Bay Area that have proven and continue to prove more complex and intractable. Questions concerning dredging and the disposal of dredged materials, waterfront planning, resource protection, transportation planning, governmental efficiency, endangered species, the efficient use of limited financial resources, appropriate environmental tradeoffs, and the interplay among all of these issues have moved to the forefront. Debate has become more rancorous, and resolution and compromise often are elusive.

BCDC has not been immune from these trends. In 1995, State Senator Milton Marks of San Francisco and then California Governor Pete Wilson attempted to eliminate BCDC. Although these attempts failed, they caused substantial reexami-

7. See, e.g., California Coastal Act, CAL. PUB. RES. CODE §§ 30000-30900 (West 1996) (creating the California Coastal Commission).

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nation and reevaluation of BCDC's goals and procedures both within and without and have resulted in both substantive and procedural changes at BCDC. What these changes and the continuing impact of these forces portend for BCDC in the next 20 years remains uncertain. As BCDC moves into the twenty-first century as a mature agency, public support is now spread more thinly over a large variety of different issues and concerns. Governmental agencies, landowners, development interests, environmental public interest groups, and concerned citizens continue to debate the appropriate goal of regional government and the nature and degree of land use and environmental regulation. The stakes are high: how best to protect San Francisco Bay while promoting appropriate shoreline development.

Part II of this article will summarize BCDC's origins, jurisdiction, major responsibilities, and composition. Part III will examine BCDC's history and successes over its first twenty to twenty-five years of existence. Part IV will examine the attempts to eliminate BCDC. Part V will examine and analyze in detail several different BCDC responses to the attempt to eliminate it. Finally, Part VI will conclude by analyzing the changes that have occurred at BCDC in the last five years and the relationship of these changes to the continuing debate over regional government in the Bay Area and the future protection of San Francisco Bay.

II. BCDC ORIGINS, JURISDICTION, AUTHORITY, MAJOR RESPONSIBILITIES, AND COMPOSITION

A. BCDC'S ORIGIN

Large segments of the land underlying San Francisco Bay are privately owned⁸ and relatively shallow.⁹ In the late 19th century, property owners diked off large portions of the Bay to create farmland, salt ponds, and duck clubs. In the 20th century, landowners and developers placed large amounts of fill in

8. See SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION, SAN FRANCISCO BAY PLAN 2, Part I, Summary, Conclusion 6b (on file with author).

9. See *id.* at 2, Conclusion 6a.

the Bay that resulted in dramatic reductions of the Bay's intertidal mudflats and marshlands and, to a lesser extent, to the Bay's open water areas. Although some Bay lands fell within local governmental land use control, few local governments protected these areas. Most local governments and landowners looked on these lands as more appropriate for expansion and development.¹⁰ Prior to 1980, lands sold by the State Board of Tidelands Commissioners¹¹ into private ownership in the nineteenth century were free of the public trust and therefore unprotected under state law.¹² By the early 1960's, developers and landowners were filling approximately 2,400 acres of Bay each year,¹³ and several massive new fill projects were being planned.¹⁴

The continuous filling of San Francisco Bay caught the attention of many influential Bay Area citizens and of the media.¹⁵ In the early 1960's, concerned citizens¹⁶ joined with other local environmental leaders and groups to form the Save San Francisco Bay Association. The Association in turn lobbied the State Legislature very extensively to create a permanent land use agency to protect Bay resources and assure access to its shores. The Legislature responded positively to the Association's efforts by creating BCDC as a temporary agency charged with studying and developing a comprehensive plan

10. See ODELL, *supra* note 5, at 15-17; see GILLIAM, *supra* note 5, at 31-49; Janine M. Dolezel & Bruce N. Warren, Note, *Saving San Francisco Bay: A Case Study in Environmental Legislation*, 23 STAN. L. REV. 349, 355-58 (1971).

11. See SCOTT, *supra* note 5, at 5-11.

12. See *City of Berkeley v. Superior Court*, 606 P. 2d 362, 370 (Cal. 1980). See CAL. CONST. Art. X §§ 2, 3. Prior to the 1960's, the public trust was the primary legal doctrine protecting water-covered lands in the State. See COASTAL STATES ORGANIZATION, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK, THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE MANAGEMENT OF LANDS, WATER, AND LIVING RESOURCES OF THE COASTAL STATES (Second Ed., June 1997).

13. See ODELL, *supra* note 5.

14. See *id.*

15. See *id.* at 26; see GILLIAM, *supra* note 5, at 97-98.

16. The three leaders of this movement were Katherine Kerr, the wife of the then President of the University of California at Berkeley, Esther Gulick, the wife of a professor at the University of California at Berkeley, and Sylvia McLaughlin, the wife of a member of the University of California Board of Regents. For their leadership roles in this movement, they have received numerous awards and substantial recognition, all justly deserved.

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for San Francisco Bay and given temporary permit authority over the placement of fill in the Bay. After four years preparing various reports concerning a very wide variety of Bay-related subjects,¹⁷ holding numerous public hearings, and drafting *The San Francisco Bay Plan*, BCDC submitted the plan to the State Legislature. In 1969, the Legislature enacted new legislation¹⁸ implementing most of the Bay Plan's recommendations and making BCDC a permanent land use planning and regulatory agency.

B. BCDC'S JURISDICTION

BCDC state permit authority derives from the McAteer-Petris Act¹⁹ and the Suisun Marsh Preservation Act.²⁰ Under the McAteer-Petris Act, BCDC has permit jurisdiction over San Francisco Bay proper,²¹ a strip of land extending inland for 100 feet from the upland edge of San Francisco Bay, known as the shoreline band,²² salt ponds²³ and managed wetlands,²⁴ and

17. For example, the subjects studied include tidal movement, sedimentation, pollution, fish and wildlife, marshes and mudflats, flood control, appearance and design, ports, airports, waterfront industry, refuse disposal, ownership, powers, and government. See SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION, SAN FRANCISCO BAY PLAN SUPPLEMENT (Jan. 1969) (executive summaries of the various reports).

18. See Stats. 1969 ch. 713, § 14, p. 1406, codified at CAL. GOV'T CODE §§ 66650-66661 (West 1996).

19. CAL. GOV'T CODE §§ 66600 – 66684 (West 1996).

20. CAL. PUB. RES. CODE §§ 29000 – 29612 (West 1996).

21. See CAL. GOV'T CODE § 66610(a) and CAL. CODE REGS. Tit. 14 § 10121 (1997). The San Francisco Bay Conservation and Development Commission defined its permit jurisdiction over San Francisco Bay as extending to any land that had been touched at any stage of the tide since Sept. 17, 1965, but a California Court of Appeal decision in the mid 1990's limited the San Francisco Bay Conservation and Development Commission's Bay and certain waterways jurisdictions to the mean high tide line in areas that do not contain tidal marsh and up to five feet above mean sea level in areas of tidal marsh. See *Littoral Development Co. v. San Francisco Bay Conservation Development Commission*, 33 Cal. App. 4th 211 (1995).

22. See CAL. GOV'T CODE § 66610(b) (West 1996).

23. See CAL. GOV'T CODE § 66610(c) (West 1996) (defining salt ponds as "all areas which have been diked off from the bay and have been used during the three years immediately preceding the effective date of the amendment of this section . . . for the solar evaporation of bay water in the course of salt production.").

24. See CAL. GOV'T CODE § 66610(d) (West 1996) (defining a managed wetland as "consisting of all areas which have been diked off from the bay and have been maintained during the three years immediately preceding the effective date of the amendment of this section . . . as a duck hunting preserve, game refuge, or for agriculture.").

certain named tributaries that flow into the Bay listed in the Act, known as certain waterways.²⁵ In addition, BCDC's jurisdiction under the McAteer-Petris Act originally embraced most of the Suisun Marsh²⁶ — the largest contiguous wetland remaining in California — as managed wetlands. However, both the McAteer-Petris Act and the *Bay Plan* encourage certain kinds of “water-oriented” development, some of which were considered inappropriate for the Marsh. Therefore, in 1974, the Legislature enacted legislation requiring the Commission to prepare a comprehensive plan to preserve the Marsh. After BCDC submitted the draft Suisun Marsh Protection Plan (“Marsh Plan”) to the Legislature, the Legislature enacted the Suisun Marsh Preservation Act of 1977 (“the Marsh Act”).²⁷ The Marsh Act provides BCDC with special permit and enforcement responsibilities for the Marsh and required BCDC to prepare a map delineating the primary and secondary management areas of the Marsh. This map now defines Marsh jurisdiction within which marsh development permits.

C. BCDC'S AUTHORITY AND MAJOR RESPONSIBILITIES

BCDC has three major areas of authority and responsibility. First, BCDC has an on-going planning function that includes a responsibility to study the San Francisco Bay and to amend the *San Francisco Bay Plan* as needed.²⁸ BCDC's planning function also extends to developing and adopting special area plans as appropriate,²⁹ amending the Suisun Marsh Protection Plan³⁰ as needed, reviewing local amendments to the Suisun Marsh

25. See CAL. GOV'T CODE § 66610(e) (West 1996).

26. See CAL. GOV'T CODE § 66610(d) (West 1996); see ANTHONY ARNOLD, *SUISUN MARSH HISTORY HUNTING AND SAVING A WETLAND* (1996) for a wonderful anecdotal history of the marsh and its many duck clubs.

27. See CAL. PUB. RES. CODE §§ 29000-29612 (West 1996).

28. See CAL. GOV'T CODE §§ 66603, 66630, 66651, and 66652 (West 1996) and CAL. CODE REGS. Tit. 14 §§ 11000–11020 (1997).

29. See CAL. GOV'T CODE § 66651 and CAL. CODE REGS. Tit. 14 §§ 11000–11103 (West 1998). For example, The San Francisco Bay Conservation and Development Commission has adopted special area plans that cover a part of the San Francisco waterfront, the south Richmond shoreline, the Benicia waterfront, and Richardson Bay.

30. See CAL. PUB. RES. CODE § 29202 (West 1998).

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Local Protection Program,³¹ and amending the BCDC Seaport Plan³² as needed. BCDC's planning function also includes reviewing and amending its priority use areas as needed.³³

Second, BCDC has permanent permit authority under both the McAteer-Petris Act and the Marsh Act.³⁴ The McAteer-Petris Act provides that the placement of fill, the extraction of materials worth more than \$20, or any substantial change in use in any land, water, or structure requires a BCDC permit.³⁵ BCDC cannot approve a project unless it is consistent with all applicable policies of the McAteer-Petris Act and the *Bay Plan*³⁶ or unless it is otherwise necessary to the health, safety, or welfare of the entire Bay Area.³⁷

Major McAteer-Petris Act policies that apply to the placement of fill in the Bay include the requirement that the public benefits of the proposed fill clearly exceed the public detriment,³⁸ that the fill be for a water-oriented use,³⁹ that no alternative upland location exist for the proposed fill,⁴⁰ and that the fill be the minimum amount necessary.⁴¹ In addition, the *Bay Plan* contains potentially applicable policies regarding marshes and mudflats, fish and wildlife, and other similar

31. See CAL. PUB. RES. CODE §§ 29400-29424 (West 1998).

32. See CAL. GOV'T CODE § 66652. The Seaport Plan is a component of the San Francisco Bay Plan.

33. See CAL. GOV'T CODE §§ 66602 and 66611 (West 1998) and Commission Resolution No. 16. A priority use area is a segment of the upland immediately contiguous to the Bay that the Commission has determined should be reserved to provide for future water-oriented development, such as for ports, airports, water-related industry, water-oriented recreation and public assembly, and wildlife refuges. CAL. GOV'T CODE § 66611 (West 1998). The purpose of restricting existing upland for such future usage is to minimize pressure for future Bay fill that could otherwise be authorized to provide necessary future sites for such development.

34. See CAL. GOV'T CODE §§ 66604, 66632(a) (West 1996). See also CAL. CODE REGS. Tit. 14 §§ 10310-10660 (regulating the permit process).

35. See CAL. GOV'T CODE § 66632(a). The McAteer Act defines the term "fill" very broadly to include solid fill, pile-supported fill, floating fill such as boat docks and houseboats, and vessels moored for an extended period of time. *Id.*

36. See CAL. GOV'T CODE §§ 66632(f), 66653 (West 1996).

37. See CAL. GOV'T CODE § 66632(f) (West 1996).

38. See CAL. GOV'T CODE § 66605(a) (West 1996).

39. *Id.*

40. See CAL. GOV'T CODE § 66605(b) (West 1996).

41. See CAL. GOV'T CODE § 66605(c) (West 1996).

ecological and environmental concerns. The *Bay Plan* also requires appropriate mitigation under certain circumstances.⁴²

The Act also provides that BCDC can deny an application for a project in the shoreline band only if the project will not provide maximum feasible public access consistent with the proposed project,⁴³ or if the proposed project will occur within a water-oriented priority use area, and is not consistent with the priority use area designation. The Act and the *Bay Plan* also contain findings and policies with which projects proposed in a salt pond must be consistent.⁴⁴ The Act also provides that certain classes of projects are exempt from the need to obtain a BCDC permit.⁴⁵ The Act provides that *Bay Plan* policies that apply outside of the BCDC's jurisdiction are advisory only.⁴⁶

The Marsh Act divides the Suisun Marsh into primary and secondary management areas.⁴⁷ Development projects in either area require a marsh development permit.⁴⁸ Sponsors of projects located within the secondary management area must

42. See BCDC, BAY PLAN, *supra* note 8, at 38, Part V. Carrying Out the Plan, Control of Filling and Dredging in the Bay, Section h, mitigation (on file with author).

43. See CAL. GOV'T CODE § 66632.4 (West 1996).

44. See CAL. GOV'T CODE § 66602.1 (West 1996) and BCDC, BAY PLAN, *supra* note 8, at 25-26, findings and policies on salt ponds and other managed wetlands (on file with author).

45. See CAL. GOV'T CODE § 66632.1 (exempts diking and filling projects in San Francisco Bay where all required local and Corps of Engineer permits had been obtained and work had commenced prior to the San Francisco Bay Conservation And Development Commission coming into existence; also exempts on-going maintenance dredging projects); § 66632.2 (exempts certain types of work, including emergency repairs, within public service facilities and public roads); § 66654 (exempts ongoing uses within San Francisco Bay Conservation and Development Commission's shoreline band, salt pond, and managed wetlands jurisdictions so long as no substantial change occurs and allows determination of additional land needed for such ongoing uses for fifteen years); § 66655 (exempts projects located within San Francisco Bay Conservation and Development Commission's shoreline band, salt pond, or managed wetlands jurisdictions so long as vested right to finish project existed prior to the San Francisco Bay Conservation and Development Commission coming into existence and no substantial change in the project occurs); and § 66656 (requires claim of exemption under preceding sections to be filed with San Francisco Bay Conservation and Development Commission by a specified date and establishes procedure for determining validity of claim).

46. See CAL. GOV'T CODE § 66653 (West 1996).

47. See CAL. GOV'T CODE §§ 29501, 29502 (West 1996).

48. See CAL. PUB. RES. CODE § 29500 (West 1996).

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generally obtain a marsh development permit from the local government with jurisdiction over the area.⁴⁹ The issuance of such locally-issued marsh development permits can be appealed to the Commission under appropriate circumstances.⁵⁰ Within the primary management area of the Marsh, the Commission issues the marsh development permit.⁵¹ The Commission or the appropriate local government can issue a marsh development permit only if the project complies either with the Marsh Act and the Marsh Plan or with the Marsh Local Protection Program.⁵²

These basic state authorities are subject to the limitations imposed by the "takings provisions" of the Fifth Amendment to the United States Constitution's prohibition against the taking of private property without just compensation⁵³ and analogous provisions of the California Constitution.⁵⁴ The last ten years has seen an explosion of property rights litigation that has led to a significant body of new case law that governs BCDC permit authority, especially the nature and scope of BCDC's authority to condition its permits.⁵⁵

In addition to its state permit authority, BCDC also exercises authority through the federal Coastal Zone Management Act ("CZMA") over federal projects and nonfederal projects that require a federal permit or license or are supported by federal financial assistance.⁵⁶ The federal consistency provisions of the CZMA⁵⁷ provide that any federal activity, including a federal development project, that affects the coastal zone must be conducted in a manner that is "consistent to the maximum extent

49. See CAL. PUB. RES. CODE § 29502 (West 1996).

50. See CAL. PUB. RES. CODE § 29504 (West 1996).

51. See CAL. PUB. RES. CODE § 29501(a) (West 1996).

52. See CAL. PUB. RES. CODE § 29501(b) (West 1996).

53. See U.S. CONST., amend. V; see also CAL. GOV'T CODE § 66606 (West 1996).

54. See CAL. CONST., art. I, § 19 (West 1996).

55. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *First Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987).

56. See 16 U.S.C. §§ 1451 - 1464 (1996).

57. See § 307(c), codified at 16 U.S.C. § 1456(c) (1996) and 15 C.F.R. §§ 930.1 et seq. (1996).

practicable” with a state’s approved coastal management program.⁵⁸ In addition, the federal consistency provisions provide that any nonfederal activity that requires either a federal permit or license or is supported by federal financial assistance must be conducted in a manner that is fully consistent with an approved management program.⁵⁹

Since the mid 1970’s, BCDC has used its federally-approved Management Program For the San Francisco Bay Segment of the California Coastal Zone (“BCDC Management Program”) to exercise its federal consistency authority. The BCDC Management Program consists of a narrative section that meets the programmatic requirements of the CZMA and, among other things, explains how the Commission will exercise its federal consistency authority. The BCDC Management Program defines the BCDC segment of the California coastal zone as being coextensive with BCDC permit jurisdiction under state law,⁶⁰ incorporates many of the BCDC laws and plans and other related state laws,⁶¹ and provides that BCDC will generally follow its procedures for processing a permit application when it reviews a consistency determination for a federal project or activity or a consistency certification for a nonfederal project subject to consistency review.⁶²

Third, BCDC has enforcement authority to ensure that anyone who is required to obtain a BCDC permit does so, and that anyone who has obtained a BCDC permit complies with all of

58. See § 307(c)(1)(A) and (c)(2), codified at 16 U.S.C. § 1456(c)(1)(A) and (c)(2). See also 15 C.F.R. §§ 930.30-930.44 (1996).

59. See § 307(c)(3), codified at 16 U.S.C. § 1456(c)(3) (1996). See also 15 C.F.R. §§ 930.50-930.86 (1996).

60. See SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION, MANAGEMENT PROGRAM FOR SAN FRANCISCO BAY, 12-23 (amended 1977) (on file with author) [hereinafter “BCDC, MANAGEMENT PROGRAM”].

61. The Management Program incorporates the McAteer-Petris Act, the *Bay Plan*, all special area plans, the Marsh Act, the Marsh Plan, the California Environmental Quality Act, and the Porter-Cologne Act, which regulates water quality in California. Interestingly, the Management Program does not incorporate the Suisun Marsh Local Protection Program.

62. See BCDC, MANAGEMENT PROGRAM, *supra* note 60, at 37-45. See generally 15 C.F.R. § 930 for the U. S. Department of Commerce, National Oceanic and Atmospheric Administration regulations on federal consistency.

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the permit's terms and conditions.⁶³ BCDC can enforce its laws and permits either through seeking an appropriate judicial order,⁶⁴ the judicial imposition of a civil penalty,⁶⁵ the administrative issuance of a cease and desist order,⁶⁶ the administrative imposition of a civil penalty,⁶⁷ or a combination of some of these potential remedies.⁶⁸ If someone fails to comply with a BCDC cease and desist order, BCDC can seek judicial enforcement of the order and additional penalties for noncompliance with the order.⁶⁹ In addition, anyone who fails to obtain a required BCDC permit prior to commencing the activity that requires the permit is guilty of a misdemeanor and can be so prosecuted.⁷⁰ BCDC has a standing enforcement committee that hears enforcement cases and submits a recommendation to the full Commission.⁷¹

D. BCDC'S STRUCTURE

BCDC consists of twenty-seven members. Those members include one county supervisor from each of the nine Bay Area counties;⁷² four representatives of the Bayside cities chosen by the Association of Bay Area Governments;⁷³ five public mem-

63. See CAL. GOV'T CODE §§ 66637 - 66641.9 (West 1996) and 14 CAL. CODE REGS. §§ 11300 - 11386.

64. See CAL. GOV'T CODE § 66640 (West 1996).

65. See CAL. GOV'T CODE § 66641.5 (West 1996).

66. See CAL. GOV'T CODE §§ 66637, 66638. Cease and desist orders issued by the Executive Director are valid for only ninety days and are usually prohibitory only. However, the Executive Director can issue a mandatory cease and desist order if needed to avoid irreparable injury pending BCDC action.

67. See CAL. GOV'T CODE §§ 66641.5 - 66641.9 (West 1996).

68. San Francisco Bay Conservation and Development Commission cannot impose a civil penalty administratively and also seek the judicial imposition of a civil penalty for a violation of the McAteer-Petris Act.

69. See CAL. GOV'T CODE §§ 66640, 66641 (West 1996).

70. See CAL. GOV'T CODE § 66632(j) (West 1996).

71. See 14 CAL. CODE REGS. §§ 11310(b), 11330 - 11332 (West 1996) and Commission Resolution No. 93-9 (June 17, 1993).

72. See CAL. GOV'T CODE § 66620(h) (West 1996). If county supervisors are elected by district, the supervisor who represents the county on the San Francisco Bay Conservation and Development Commission must come from a district that includes Bay shoreside property.

73. See CAL. GOV'T CODE § 66620(i) (West 1996). The four Association of Bay Area Governments (ABAG) appointees represent the north, east, south, and west Bay cities of the Bay Area.

bers chosen by the Governor, including the Chair and the Vice-Chair; one public member chosen by the Speaker of the State Assembly; one public member chosen by the President Pro Tem of the State Senate;⁷⁴ five state agency members who represent the State Resources Agency, the State Finance Director, the State Lands Commission, the San Francisco Bay Regional Water Quality Control Board, and the State Director of Business, Transportation, and Housing;⁷⁵ and two federal members who represent the U. S. Army Corps of Engineers and the U. S. Environmental Protection Agency.⁷⁶ Each commissioner may appoint an alternate, subject to confirmation by his or her appointing authority, who has the same authority as the commissioner when attending BCDC meetings.⁷⁷ In addition, the State Senate Rules Committee can appoint one member of the State Senate and the Speaker of the State Assembly can appoint one member of the State Assembly, both of whom can participate in BCDC meetings to the extent that such action is not incompatible with their duties as State legislators and also act as a joint interim investigating committee.⁷⁸

BCDC appoints an executive director, who serves at the pleasure of BCDC.⁷⁹ He or she appoints other members of the staff, subject to BCDC confirmation.⁸⁰ The executive director represents BCDC, directs staff work, and acts on applications for administrative, emergency and regionwide permits.

BCDC also relies on several advisory boards. The Design Review Board ("DRB") reviews projects which affect public access and advises the Commission on the adequacy of the proposed access and on the design and appearance of the project.⁸¹

74. See CAL. GOV'T CODE § 66620(j) (West 1996).

75. See CAL. GOV'T CODE § 66620(c)-(g) (West 1996).

76. See CAL. GOV'T CODE §§ 66620(a), 66620(b) (West 1996).

77. See CAL. GOV'T CODE §§ 66622 (West 1996).

78. See CAL. GOV'T CODE § 66621 (West 1996).

79. See CAL. GOV'T CODE § 66635 (West 1996).

80. *Id.*

81. The DRB consists of no more than seven members and includes at least one architect, one landscape architect, and one engineer. CAL. CODE REGS. Tit. 14 § 10270; See also, BCDC, SAN FRANCISCO BAY PLAN findings and policies on public access and on appearance, design, and scenic values (on file with author).

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The Engineering Criteria Review Board ("ECRB") reviews fill projects to assure that adequate soils research has been done and that the design of the fill will meet appropriate public safety criteria, especially seismic safety criteria.⁸² BCDC also has a Citizen's Advisory Committee and a Scientific and Technical Advisory Committee.

III. BCDC SUCCESS AND ACHIEVEMENTS

During its first twenty to twenty-five years, BCDC achieved substantial success preventing unnecessary filling of the Bay, protecting Bay resources, increasing public access, and encouraging appropriate shoreline development. From 1970 through 1995, BCDC approved 448 major permits and 2,584 minor permits that resulted in the creation of 1,360.5 acres of new Bay surface area.⁸³ These permits authorized over \$4 billion in construction.⁸⁴ During this period, BCDC denied only twenty-three major permits and eleven minor permits.⁸⁵

During its early existence, BCDC also studied many aspects of San Francisco Bay as part of its preparation of the *Bay Plan*.⁸⁶ Subsequent to the adoption of the *Bay Plan* by the State Legislature in 1969, BCDC prepared reports on a variety of subjects, including fill controls and mitigation,⁸⁷ recreational boating,⁸⁸ houseboats and live-aboard boats,⁸⁹ commercial

82. The ECRB consists of no more than eleven members and includes at least one geologist, one civil engineer specializing in soils, one structural engineer, and one architect. CAL. CODE REGS. Tit. 14 § 10271 (1987).

83. See SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION, 1995 ANNUAL REPORT 4 (1995) (on file with author).

84. *Id.*

85. *Id.*

86. See *supra* note 16.

87. See BCDC, STAFF REPORT ON FILL CONTROLS (Oct. 1984) (on file with author); BCDC, STAFF REPORT ON COMMISSION MITIGATION PRACTICES (Mar. 1987) (on file with author); BCDC, STAFF REPORT ON MITIGATION (Mar. 1988) (on file with author) (analyzing tideland restoration projects in San Francisco Bay); and SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION, MITIGATION PRACTICES GUIDEBOOK (May 1987).

88. See BCDC, STAFF REPORT ON RECREATIONAL BOATING FACILITIES (July 1982) (on file with author).

89. See BCDC, STAFF REPORT ON HOUSEBOATS AND LIVE-ABOARD BOATS (revised July 1985) (on file with author).

fishing,⁹⁰ water-related industry,⁹¹ water quality,⁹² sea level rise,⁹³ dredging,⁹⁴ and shoreline erosion.⁹⁵ During this time, BCDC also amended the *Bay Plan* on many occasions, often in response to the conclusions and recommendations contained in the reports,⁹⁶ and adopted and amended several special area plans, including the San Francisco Waterfront Special Area Plan,⁹⁷ the San Francisco Waterfront Total Design Plan,⁹⁸ the Richardson Bay Special Area Plan,⁹⁹ and the BCDC Seaport Plan.¹⁰⁰ During this time, BCDC also studied extensively the San Francisco Bay diked historic baylands.¹⁰¹

90. See BCDC, STAFF REPORT ON COMMERCIAL FISHING (May 1986) (on file with author).

91. QED RESEARCH INC. AND SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION STAFF, AN ANALYSIS OF THE ECONOMIC DEMAND FOR LAND TO SUPPORT THE NEEDS OF WATER-RELATED INDUSTRY AROUND SAN FRANCISCO BAY (Oct. 1986) (on file with author).

92. BCDC, STAFF REPORT ON WATER QUALITY IN SAN FRANCISCO BAY (Jan. 1987) (on file with author).

93. BCDC, STAFF REPORT ON SEA LEVEL RISE: PREDICTIONS AND IMPLICATIONS FOR SAN FRANCISCO BAY (Dec. 1987) (revised Oct. 1988) (on file with author).

94. See San Francisco Bay Conservation And Development Commission, *Briefing Report, Status of Bay Dredging*, (Nov. 1988) (on file with author).

95. See BCDC, STAFF REPORT ON PROTECTING SHORELINE PROPERTY FROM TIDAL EROSION, AN ANALYSIS OF THE EFFECTIVENESS AND ENVIRONMENTAL IMPACTS OF ADMINISTRATIVELY AUTHORIZED PROTECTIVE STRUCTURES (Nov. 1988) (on file with author).

96. See, e.g., Bay Plan Amendment No. 1-88 (concerning port policies); Bay Plan Amendment No. 3-88 (concerning sea level rise); Bay Plan Amendment No. 5-88 (concerning the protection of the Bay shoreline); Bay Plan Amendment No. 3-91 (concerning dredging); Bay Plan Amendments No. 1-93, 2-93, and 2-95, (revising port priority and marine terminal designations at the Ports of Oakland and San Francisco respectively).

97. BCDC, SAN FRANCISCO WATERFRONT SPECIAL AREA PLAN (adopted Apr. 1975) (amended Jan. 1985).

98. BCDC, SAN FRANCISCO WATERFRONT TOTAL DESIGN PLAN, PIERS 7-24 (1980). See also Bay Plan Amendment No. 1-90 (Aug. 16, 1990) (amending SAN FRANCISCO WATERFRONT TOTAL DESIGN PLAN, PIERS 7-24).

99. BCDC, RICHARDSON BAY SPECIAL AREA PLAN (Apr. 1984).

100. BCDC, SAN FRANCISCO BAY AREA SEAPORT PLAN. See also Bay Plan Amendment No. 3-95 (July 31, 1996) (amending SAN FRANCISCO BAY AREA SEAPORT PLAN).

101. The diked historic baylands refer to those areas that had historically been part of the Bay but had been diked off from tidal action and converted to an upland use prior to the establishment of the San Francisco Bay Conservation and Development Commission. See SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION, DIKED HISTORIC BAYLANDS OF SAN FRANCISCO BAY (Apr. 1 1982) (Staff Report). The findings and policies contained in these reports are advisory only because the diked historic baylands lie outside of San Francisco Bay Conservation and Development

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During its first twenty to twenty-five years in existence, BCDC also enjoyed strong legislative, executive, and judicial support. Although BCDC has not been involved in a large amount of litigation, appellate courts supported BCDC's position in several significant cases, including a challenge to the constitutionality of the McAteer-Petris Act,¹⁰² a major issue concerning the application of the exemption provisions of the McAteer-Petris Act,¹⁰³ and questions concerning the extent of the Commission's jurisdiction and authority.¹⁰⁴ In fact, with only one significant exception,¹⁰⁵ the Commission has ultimately been upheld against all legal challenges to its actions.¹⁰⁶

Bay Area legislators have followed the Commission's activities with interest. Several legislators were former Commissioners who had a working knowledge of the Commission's procedures, policies and record.¹⁰⁷ Nor was the Commission perceived as partisan. The bill creating the Commission was signed by then Governor Ronald Reagan, and Governors Jerry

Commission's permit jurisdiction. San Francisco Bay Conservation and Development Commission also decided not to incorporate the diked historic baylands findings and policies into its coastal zone management program so that San Francisco Bay Conservation and Development Commission cannot use its federal consistency authority to require compliance with these findings and policies. San Francisco Bay Conservation and Development Commission has considered informally on several occasions whether to seek legislation to extend its state permit authority to these areas but has not taken any action.

102. See *Navajo Terminals Inc. v. San Francisco Bay Conservation and Development Commission*, 51 Cal. App. 3d 961 (1975); *Candlestick Properties Inc. v. San Francisco Bay Conservation and Development Commission*, 11 Cal. App. 3d 557 (1970).

103. See *People ex rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville*, 446 P. 2d 790 (1968).

104. See *People ex rel. San Francisco Bay Conservation and Development Commission v. Smith*, 26 Cal. App. 4th 113 (1994); *Save San Francisco Bay Assn. v. San Francisco Bay Conservation and Development Commission*, 10 Cal. App. 4th 908 (1992); *People ex rel. San Francisco Bay Conservation and Development Commission v. Gianulias*, 188 Cal. App. 3d 520 (1986); *Acme Fill Corporation v. San Francisco Bay Conservation and Development Commission*, 187 Cal. App. 3d 1056 (1986); *Leslie Salt Co. v. San Francisco Bay Conservation and Development Commission*, 153 Cal. App. 3d 605 (1984); *People ex rel. Younger v. F.E. Crites, Inc.*, 51 Cal. App. 3d 961 (1975); *Blumenfeld v. San Francisco Bay Conservation and Development Commission*, 43 Cal. App. 3d 50 (1974).

105. See *Littoral Development Co. v. San Francisco Bay Conservation and Development Commission*, 33 Cal. App. 211 (1995), modifying 24 Cal. App. 4th 1050 (1994).

106. *Id.*

107. These include U.S. Senator Dianne Feinstein, State Senator Quentin Kopp, State Assemblyman Byron Sher, and Congresswomen Jackie Spier and Anna Eshoo.

Brown and George Deukmejian supported the Commission's mission with reasonable budgets, good communication, and prompt appointments. While budgetary constraints occurring as a result of California's recession limited the Commission's financial resources during both the Brown and Deukmejian administrations, it generally fared as well or better than other state level resource management agencies.

IV. EFFORTS TO ELIMINATE BCDC

A. INCREASING CONTROVERSY AND CHALLENGES TO BCDC AUTHORITY

Several issues arose in the mid-1980's through the early 1990's that led to increased controversy over BCDC's authority and helped to create a climate in which BCDC's future was itself jeopardized. These issues involved the potential conversion of diked baylands to urbanized uses, the diminution of the Port of San Francisco's maritime market share and resultant pressure to convert Port finger piers to non-water-oriented uses,¹⁰⁸ BCDC's adoption and application of a mitigation policy, major concerns over the impact of dredging and the disposal of dredged material into San Francisco Bay,¹⁰⁹ and several Caltrans permit applications to redesign Interstate Highway 80, to redesign the eastern approach to the Bay Bridge, and to retrofit various Bay bridges for seismic safety.¹¹⁰ These matters raised complex issues that could not easily be resolved and often found BCDC opposed to powerful, politically influential, and well-financed organizations. These problems also arose when California's economic situation was poor, the environmental movement was less influential than it had been in the 1960's and 1970's, and significant segments of the population had started questioning the role of government in general and of government regulation in particular.

108. See text accompanying footnotes 183 - 93.

109. See text accompanying footnotes 151 - 67.

110. See text accompanying footnotes 168 - 82.

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B. CALIFORNIA SENATE BILL 1933

Prior to 1994, although the level of controversy and the economic stakes surrounding BCDC issues had increased, BCDC's continued existence seemed secure. No one had suggested abolishing BCDC. However, on February 25, 1994, State Senator Milton Marks introduced Senate Bill 1933, which would have abolished BCDC and transferred its responsibilities to the California Coastal Commission. BCDC's response was immediate. On March 17, 1994, it voted unanimously to oppose the proposed legislation.¹¹¹ Other opposition to the Marks proposal surfaced quickly, including statements of support for BCDC from other governmental agencies, environmental groups, owners of Bay and shoreline properties, and private nonprofit groups.¹¹²

In response to this negative reaction, State Senator Marks amended SB 1933 in May 1994 to direct the legislative analyst to study potential overlap between BCDC and the San Francisco Bay Regional Water Quality Control Board and to transfer all overlapping functions to the Regional Board. Public opinion still ran strongly in favor of BCDC and in opposition to the Marks bill.¹¹³ SB 1933 was amended several times in committee and several more times on the Senate Floor to eliminate the proposed abolition of BCDC and instead to create a task force to review planning and regulatory responsibilities in San Francisco Bay, to provide for the membership of that committee, and to fund the task force out of California Envi-

111. San Francisco Bay Conservation and Development Commission, Meeting Minutes 2-3 (Mar. 17, 1994).

112. See Letter from William C. Britt, Vice-President, Cargill Salt Division, to State Senator Mike Thompson, Chair, Senate Natural Resources and Wildlife Committee (Mar. 30, 1994); letter from Angelo Siracusa, President, Bay Area Council, to State Senator Milton Marks (Mar. 29, 1994); letter from Gary Patton, Santa Cruz County Supervisor, to Senator Mike Thompson (Mar. 29, 1994).

113. See Editorial, *SAN FRANCISCO BAY GUARDIAN*, May 11, 1994; Editorial, *MARIN INDEPENDENT JOURNAL*, May 18, 1994; letter from Owen Byrd, Policy Director, Greenbelt Alliance/People For Open Space, to State Senator Mike Thompson (June 9, 1994); letter from Jennifer Jennings, General Counsel, Planning and Conservation League, to State Senator Milton Marks (June 8, 1994); letter from John Briscoe, Secretary, Bay Planning Coalition, to State Senator Mike Thompson (June 11, 1994).

ronmental License Plate Fund.¹¹⁴ Nevertheless, due to continuing strong continued opposition, Senator Marks placed SB 1933 in the Senate Inactive File where it died at the end of the legislative session.

C. PROPOSED 1995-1996 STATE BUDGET

Efforts to eliminate BCDC did not cease with the death of SB 1933. In October 1994, the State Business, Transportation, and Housing Agency and the California Department of Transportation considered proposing legislation that would abolish BCDC. Ironically, the proposal suggested State Senator Nicholas Petris¹¹⁵ as a possible author. In November 1994, BCDC wrote to the State Resources Secretary Douglas Wheeler to oppose this proposal.¹¹⁶ Substantial opposition to this proposal came from the environmental community.¹¹⁷ Nevertheless, on January 11, 1995, Governor Pete Wilson released his proposed 1995-96 state budget, which called for BCDC's elimination by January 1, 1996, with most of its current functions being assumed by the California Coastal Commission and the remaining functions being assumed by the San Francisco Bay Regional Water Quality Control Board.¹¹⁸

Again, public response was swift and extensive. Groups and organizations as disparate as the Berkeley City Council, the Pier 39 Limited Partnership, the *San Francisco Bay Guardian*,

114. Senate Rules Committee Bill Analysis For SB 1933, Third Reading, (amended on Aug. 11, 1994) (on file with author).

115. In the 1960s, then State Assemblyman Petris was largely responsible along with the late State Senator Eugene McAteer for the passage of the law that now is referred to by their names, the McAteer-Petris Act.

116. See Letter from Robert Tufts, Chair, San Francisco Bay Conservation and Development Commission, to Douglas Wheeler, California Secretary For Resources (Nov. 29, 1994).

117. See Letter from Marc Holmes, Program Director, Save San Francisco Bay Association, to Governor Pete Wilson (Jan. 5, 1995); letter from Barbara Salzman, Chair, Conservation Committee, Marin Audubon Society, to Governor Pete Wilson (Jan. 6, 1995).

118. Governor Wilson's Proposed 1995-96 State Budget, Resources Agency, Section 3820 San Francisco Bay Conservation and Development Commission (Jan. 10, 1995); Memorandum from Alan Pendleton, Executive Director, San Francisco Bay Conservation and Development Commission, to Commissioners and Alternates Re: Governor's Proposed 1995-96 Fiscal Year Budget (Jan. 13, 1995).

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the East Bay Municipal Utility District, the Sierra Club, and the California Waterfowl Association opposed Governor Wilson's proposed elimination of BCDC.¹¹⁹ Some groups, however, supported Governor Wilson's proposal.¹²⁰ On February 16, 1995, BCDC held a public hearing at which many members of the public supported BCDC.¹²¹ Significantly, Save the Bay and the Bay Planning Coalition announced their intention to join to study BCDC operations and to seek common, consensus-based solutions to the problems of Bay governance that had led to the Governor's proposed elimination of BCDC.¹²² In response, Governor Wilson put aside his proposed elimination of BCDC pending the preparation of a report by State Secretary of Resources Douglas Wheeler on the future governance and conservation of Bay-related resources. In turn, Secretary Wheeler asked Joseph Bodovitz, the President of the California Environmental Trust and the first Executive Director of both BCDC and the California Coastal Commission, to prepare a report for Secretary Wheeler.

During the next several weeks, Mr. Bodovitz spoke to many different persons with knowledge of BCDC, BCDC-related issues, Bay resources, and Bay governance. On March 13, 1995, Mr. Bodovitz wrote to Secretary Wheeler and concluded that

119. See Letter from Michael R. Lozeau, Program Director, BayKeeper, to Alan Pendleton, Executive Director, San Francisco Bay Conservation and Development Commission (Feb. 16, 1995); letter from Christopher Martin, The Cannery, to Governor Pete Wilson (Feb. 15, 1995); letter from John M. Gioia, President, East Bay Municipal Utilities District Board of Directors, to Douglas Wheeler (Feb. 11, 1995); letter from Pat O'Brien, General Manager, East Bay Regional Park District, to San Francisco Bay Conservation and Development Commission (Feb. 16, 1995); letter from Bill Gaines, Director of Governmental Affairs, California Waterfowl Association, to Pete Wilson (Feb. 28, 1995); letter from James P. Royce, Chairperson, Dredging Task Force, Sierra Club, San Francisco Bay Chapter, to Pete Wilson (Feb. 20, 1995); letter from Arlene Gemmil, Chair, Wetlands Subcommittee, Sierra Club, San Francisco Bay Chapter, to Robert Tufts, San Francisco Bay Conservation and Development Commission Chair (Feb. 15, 1995).

120. See Letter from Margot Brown, Commodore, Pacific InterClub Yacht Association, to Pete Wilson (Feb. 24, 1995); letter from Richard C. Tipton, President, Recreational Boaters of California, to Pete Wilson (Feb. 28, 1995).

121. See San Francisco Bay Conservation and Development Commission, Meeting Minutes 16-28 (Feb. 16, 1995).

122. See Letter from Roy Gorman Representative from Save the Bay, and John Briscoe, Representative of the Bay Coalition, to California Resources Secretary Douglas Wheeler (Mar. 30, 1995).

the need to govern San Francisco Bay as a single body of water remained as important in 1995 as it was in 1965, that some question remained as to the most effective way to do so, that merging the BCDC into the Coastal Commission and the Regional Water Quality Control Board would not be an improvement but would increase costs and delays, and that the BCDC's size was a strength and not a weakness and should not be casually discarded.

Mr. Bodovitz acknowledged that federal and state laws enacted after the McAteer-Petris Act have unintentionally contributed to some overlapping and duplication in Bay regulation, but he also recommended that the assignment of the BCDC's responsibilities to local governments would probably result in additional costs to local government without any commensurate improvement in Bay governance. Mr. Bodovitz suggested that local government could contribute some financial support to BCDC but also recognized that such a proposal would incur substantial local government opposition due to their existing fiscal difficulties.¹²³

Mr. Bodovitz also concurred with the State Seismic Safety Commission's¹²⁴ conclusion that the Bay Commission's Engineering Criteria Review Board was not redundant or unnecessary in light of local review of the seismic aspects of development projects but in fact was justified by the level of accountability brought about by peer review of projects by this Board.¹²⁵

Finally, Mr. Bodovitz concluded that

[n]one of the merger or other alternatives to BCDC yet proposed offer anything better than the current BCDC. At the same time, it's important that Bay planning and regulation be continually reviewed for their efficiency as

123. See Letter from Joseph E. Bodovitz, President, California Environmental Trust, to Douglas P. Wheeler (Mar. 13, 1995) [hereinafter "Bodovitz/Wheeler letter"].

124. See CAL. GOV'T CODE §§ 8870 *et seq.* for the basic statutory authority of the California Seismic Safety Commission.

125. See Bodovitz/Wheeler letter, *supra* note 123.

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well as their effectiveness. With that in mind, accelerating current efforts to streamline the review of projects requiring local, state, and federal permits offers the greatest potential for immediate improvement. And the efforts of the Bay Planning Coalition with the Save San Francisco Bay Association, a joint program of economic and environmental organizations to review Bay regulation, deserve strong encouragement.¹²⁶

On May 22, 1995, Governor Wilson formally dropped the proposal to eliminate BCDC.

V. BCDC'S RESPONSE

A. PERMIT STREAMLINING AND REGULATORY REFORM

In reviewing BCDC programs and processes, both the Save San Francisco Bay Association/Bay Planning Coalition joint review and the Bodovitz report identified a series of proposed reforms in the process by which the Commission reviews and acts on permit applications as offering a substantial chance for the immediate improvement in BCDC operations. Save the Bay and the Bay Coalition recommended changes to Commission Regulation Sections 10120,¹²⁷ 10125,¹²⁸ 10130,¹²⁹ 10422,¹³⁰

126. *Id.*

127. All references to Commission regulations can be found at Title 14 of the California Code of Regulations, Division 5, Chapters One through Chapter 18. The change to Section 10120 would clarify the meaning of the term "emergency" as used in the issuance of an emergency permit.

128. The change to Section 10125 would increase the threshold for an activity to constitute "a substantial change in use" from \$100,000 to \$250,000 and add a substantial increase in the intensity of an existing use to the categories of activities that constitute a substantial change in use.

129. The change to Section 10130 would exclude the extraction of materials for either environmental or seismic testing purposes from the types of activities that require a Commission permit.

130. The change to Section 10422 would eliminate the requirement that the Commission must hold another public hearing on a permit application when more than five weeks will have elapsed between the close of the public hearing and the scheduled vote on an application.

and 10510.¹³¹ BCDC quickly concurred with these recommendations for so-called “permit streamlining” and directed BCDC staff to commence the formal rulemaking process needed to implement these recommendations.¹³² BCDC adopted these proposed changes on April 18, 1996.¹³³

Paralleling BCDC’s efforts to streamline its regulations, Governor Wilson initiated his own broader regulatory reform program that applied to all state agencies.¹³⁴ On September 8, 1995, BCDC offered a broad range of the interested public an opportunity to propose changes to Commission regulations. BCDC received 128 comments concerning more than forty separate regulations.¹³⁵ During November and December of 1995 and January and February of 1996, BCDC held four public hearings to respond to these comments and recommendations.¹³⁶ On February 15, 1996, BCDC adopted a full regula-

131. The change to Section 10510 would allow the Commission to vote on an application at the same meeting as it closes the public hearing unless the application raises a major issue.

132. The rulemaking process is established in the Administrative Procedures Act, CAL. GOVT. CODE §§ 11340-11359. It generally takes approximately 14 or more weeks to adopt a state regulation through approval by the State Office of Administrative Law (“OAL”) and another four weeks to incorporate the regulation change into BCDC’s Management Program for the San Francisco Bay segment of the California Coastal Zone.

133. OAL approved these changes on April 18, 1996, and the Office of Ocean and Coastal Resource Management, U.S. National Oceanic and Atmospheric Administration approved them in October and November 1996 for inclusion into the Management Program.

134. See Executive Orders No. W-127-95, issued on Sept. 20, 1995 and W-131-96, issued on Feb. 8, 1996. Initially, Governor Wilson established a Regulatory Review Working Group. In March 1995, in response to a request from the Working Group, the California State Resources Agency asked all member agencies, including the San Francisco Bay Conservation and Development Commission, to review its regulations and to categorize them according to those that regulate business, organizations, or individuals outside of state government, those that regulate how state services are provided, and those that regulate how state government operates internally. Subsequently, all state agencies were directed to review all state regulations that affect the public for possible repeal or amendment.

135. These comments and recommendations came from the Port of San Francisco, the Port of Oakland, the Bay Planning Coalition, the Alameda County Flood Control and Water Conservation District, Save the Bay, and the Strawberry Recreation District among others.

136. San Francisco Bay Conservation and Development Commission, Meeting Minutes 9-13 (Nov. 16, 1995), San Francisco Bay Conservation and Development Commission, Meeting Minutes 11-15 (Dec. 7, 1995); San Francisco Bay Conservation and De-

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tory reform program to respond to Governor Wilson's directives and to direct BCDC staff to commence rulemaking on those proposals that BCDC deemed appropriate while rejecting those proposals deemed inappropriate.¹³⁷

Public comment on existing Commission regulations and practices focused on the following areas of concern: permit processing,¹³⁸ enforcement,¹³⁹ the operations of the Design Review Board and the Engineering Criteria Review Board,¹⁴⁰ dredging,¹⁴¹ Executive Director and staff discretion,¹⁴² exemptions from the need to obtain a Commission permit and their transferability,¹⁴³ the status of historic ships,¹⁴⁴ the imposition

velopment Commission, Meeting Minutes 12-20 (Jan. 18, 1996), San Francisco Bay Conservation and Development Commission, Meeting Minutes 13-24 (Feb. 15, 1996).

137. However, San Francisco Bay Conservation and Development Commission responded to continued interest in this area and the concerns of BCDC Commissioners that the Commission might have rejected some proposals for change too rapidly. BCDC decided to hold a workshop to consider further those proposals that the staff had recommended for rejection. With a single exception, BCDC staff recommended that the Commission reject all of those proposals that the Commission had tentatively determined to reject subject to the results of the workshop. At BCDC's first workshop on June 6, 1996, the Commission rejected all of the remaining proposals except for eleven that raised the most significant legal issues or the most difficult policy concerns. In September and October, 1996, the Commission held additional workshops and rejected six of the eleven remaining proposals and directed the staff to commence rulemaking on four of the five proposals and to respond to the remaining proposal at a later date. The San Francisco Bay Conservation and Development Commission has published a chart that summarizes all of the proposed changes to BCDC regulations by subject matter and section and the final BCDC action on each proposal; it is too large to reproduce here but is available from BCDC.

138. See Memorandum From Will Travis to San Francisco Bay Conservation and Development Commission Commissioners (Mar. 8, 1996); Memorandum From Will Travis to the San Francisco Bay Conservation and Development Commission Commissioners (May 24, 1996).

139. See *id.*

140. See *id.*

141. See *id.*

142. See *id.*

143. Although the McAteer-Petris Act generally requires that a person obtain a permit prior to placing fill, extracting materials worth more than \$20, or making a substantial change in use in any land, water, or structure within the Commission's jurisdiction, the McAteer-Petris Act provides an exemption from that requirement in certain circumstances. The Act subsequently was amended to require that a person who claims an exemption under either Section 66632.1 or 66655 must submit a claim of exemption to the Commission within ninety days of January 1, 1974. The Commission received thirty-four claims of exemption. The Commission granted one claim, granted in part and denied in part three claims, and denied seven claims. Twenty claims were withdrawn, and three are still pending. Commission policy, as memorialized in Regu-

of conditions when the Executive Director or the Commission approves a permit amendment,¹⁴⁵ and the interplay of the McAteer-Petris Act, CEQA, and the Permit Streamlining Act.¹⁴⁶ Ultimately, BCDC adopted changes in regulations that include streamlining the processing of permit applications,¹⁴⁷ creating a 30-day “grace period” during which an alleged violation could be resolved without the administrative imposition of a civil penalty,¹⁴⁸ allowing the transference of an exemption from the need to obtain a BCDC permit,¹⁴⁹ and clarifying the interplay between the McAteer-Petris Act, CEQA, and the Permit Streamlining Act.¹⁵⁰

lation Section 10920, had provided for many years that an exemption was personal only to the person who had obtained the exemption and that the exemption was not transferable. This position was based on informal legal advice that the Commission had received in 1981. As a result of the request that this regulation be modified, the Commission again sought informal advice from the Attorney General's Office. The Attorney General's Office advised that an exemption was transferable. Therefore, the Commission changed Section 10920 to reflect this current advice.

143. See *supra* note 138.

144. See *id.*

145. See *id.*

146. See *id.*

147. See 14 CAL. CODE REGS. Div. 5 §§ 10310, 10315, 10601, 10602, Appendix D, and Appendix F (West 1996).

148. See 14 CAL. CODE REGS. Div. 5 § 11386 (West 1996).

149. *Id.* at §10920.

150. The interplay of the McAteer-Petris Act, CEQA, and the Permit Streamlining Act offers one of the more complicated and arcane areas of land use law involving the San Francisco Bay Conservation and Development Commission, but it nevertheless can involve a significant practical import for an applicant for a BCDC permit in some situations. The circumstances that surrounded a proposed development some years ago at Bahia offers a concrete example of this application.

Bahia is located off of the Petaluma River north of State Highway 37. Residential development exists at the site coupled with wetlands and an artificial hydrological regime. The developer wanted to increase significantly the number of homes at the site and mitigate the adverse impacts of the development by improving the condition of the existing wetlands. However, in order to commence developing a mitigation package, the developer needed a Corps of Engineers approved wetlands delineation for jurisdictional purposes. The difficulty arose because the Corps of Engineers would not commence a permit application review process until BCDC had determined whether or not to issue a permit, as required by the Coastal Zone Management Act. San Francisco Bay Conservation and Development Commission cannot issue a permit until a permit applicant has obtained all required local discretionary approvals, and typically, local governments do not issue a local discretionary approval without substantial and costly documentation having been prepared and submitted.

In addition, a project like that proposed at Bahia could arguably have one or more substantial adverse environmental impacts so that the lead agency, usually the local

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BCDC has completed its review of existing regulations. Many of them have already been approved by the Office of Administrative Law and are in effect. The few remaining changes should be in effect soon.¹⁵¹ The Commission's regulatory processes have been significantly improved by the changes made in the regulatory review process.¹⁵²

B. DREDGING

Dredging and the disposal of dredged material have occurred in San Francisco Bay since the period of early development along the San Francisco waterfront following the gold rush.¹⁵³ Much of San Francisco Bay is shallow, and many ex-

government, would have to prepare either an environmental impact report or a mitigated negative declaration before the Commission could act on a permit application, which must occur before the Corps of Engineers could act. Thus, the Port of San Francisco, the Port of Oakland, and the Bay Planning Coalition all recommended that the Commission eliminate a certified copy of an environmental document as a filing requirement when applying for a Commission permit. Initially, the staff resisted this proposal for several reasons. First, the Commission could have been forced to act on the application without a final environmental document if the lead agency were either another state agency or a local agency where no local permit were required.

This potential problem arises because the McAteer-Petris Act requires the Commission to act within ninety days of the filing of an application without reference to the date that the lead agency either certifies an environmental impact report or adopts a negative declaration. The staff believed that this could lead to having to deny an application and forcing an applicant to resubmit a permit application after waiting ninety days and forcing the applicant to pay additional filing fees. However, the Attorney General's Office advised that recent amendments to the Permit Streamlining Act prohibit any agency such as the Commission from requiring the submittal of an environmental document as a permit filing requirement nor does the McAteer-Petris Act allow the Commission to demand that a permit applicant agree in advance to waive Commission action on the application within ninety days if a certified environmental document is not available. However, the Commission can certainly ask that an applicant waive the right for Commission action within ninety days if an environmental document will not be available. If the applicant does not waive that right, then the Commission can and indeed must deny the application, so that any reasonable applicant would take the option of waiving the ninety-day requirement. Based on this advice, the Commission has agreed to modify this permit filing requirement.

151. The status of all Commission regulation changes is summarized in a table of changes that is available from the Commission. It is too long for reproduction here.

152. Regulatory reform continues as a high-priority matter in state government. Governor Wilson's Executive Order No. W-144-97, issued Jan. 10, 1997, directs the development of a Consolidated Regulatory Program and a sunset review of all existing regulations by 1999 and requires all state agencies to appoint a regulatory ombudsman.

153. AQUATIC HABITAT INSTITUTE & PHILIP WILLIAMS & ASSOCIATES, LTD., SAN FRANCISCO ESTUARY PROJECT STATUS AND TRENDS REPORT ON DREDGING AND

isting navigation channels must be dredged regularly to maintain their depth. In addition, the use of larger oil tankers and container ships has necessitated the dredging of deeper channels to accommodate those deeper-draft ships. Dredging is also needed to allow recreational boating at many of the marinas located around the San Francisco Bay shoreline.¹⁵⁴ In addition to the actual dredging, the disposal of the dredged materials has also created significant regulatory problems during the last 12 years and has raised many important issues, including the mounding of dredged materials at the Alcatraz disposal site, turbidity impacts,¹⁵⁵ and pollutant impacts.¹⁵⁶ These concerns have in turn affected a number of important deepening and maintenance dredging projects in San Francisco Bay, including several major projects at the Port of Oakland.¹⁵⁷

WATERWAY MODIFICATION IN THE SAN FRANCISCO ESTUARY (Mar. 2, 1990); BCDC, STATUS OF BAY DREDGING, (Nov. 1988); BCDC STAFF, DREDGING AND NAVIGATION SAFETY (Feb. 1, 1994); BCDC STAFF, ET AL., LONG-TERM MANAGEMENT STRATEGY DRAFT POLICY ENVIRONMENTAL IMPACT STATEMENT/PROGRAMMATIC ENVIRONMENTAL IMPACT REPORT (on file with author).

154. Prior to the early 1980's, disposal of dredged material occurred at many different disposal sites within San Francisco Bay. The most important site was and continues to be located near Alcatraz Island in central San Francisco Bay. Conventional anecdotal wisdom held that most of the material disposed of at the Alcatraz site would wash out of the Bay system on the out-going tide. However, in 1982, the U. S. Army Corps of Engineers, who managed the site, discovered that not all of the material disposed of at the site was being dispersed. Conversely a mound had formed that decreased the depth of the site from 120 feet deep to 25 feet deep at mean lower low water and could threaten commercial navigation in the near future if not addressed. The Corps responded in the short-term by evening out the peaks of the mound and by requiring a more even distribution of material at the site, requiring the disposal of all material in an unconsolidated or slurried state to promote greater dispersion, and requiring the submittal of post-project reports of dredging amounts.

155. Although other factors such as natural conditions and weather can also contribute to Bay turbidity, commercial and sportfishermen believe that dredging and dredged material disposal constitute a very significant source of turbidity and contribute significantly to the decline in sport and commercial fisheries in the Bay.

156. Much of the Bay mud is contaminated to some degree by various agricultural and industrial pollutants that have been discharged into the Bay and have become incorporated into the Bay muds. In some areas, the level of contamination is relatively low while other "toxic hot spots" are highly contaminated with one or more contaminants. Both the excavation of these materials and the disposal of the dredged materials are part of the dredging process and provide opportunities for these contaminants to be released into the water column and become available for organisms to ingest. These pollutants can then become bioaccumulated as they move up the food chain.

157. Since 1970, the Port of Oakland has pursued a modernization plan that includes the deepening of its access channels to accommodate the newer, larger generation

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In response, BCDC joined the U. S. Army Corps of Engineers, the State Water Resources Control Board, the San Francisco Bay Regional Water Quality Control Board, and the U. S. Environmental Protection Agency to participate in the Long Term Management Strategy ("LTMS").¹⁵⁸ The purpose of LTMS is to prepare a long-range management plan for dredging and the disposal of dredged materials over the next fifty years. LTMS is studying a range of disposal options in the Bay, the coastal ocean, the Delta, and at various upland sites.¹⁵⁹ The LTMS process has also resulted in the creation of a dredged material management office ("DMMO"). The DMMO is intended to provide a more consistent and efficient processing of dredging and disposal permit applications to the member agencies and a more consistent application of policies. DMMO

of container ships. During this period, container ships have grown eight times as large, and ports must accommodate these changes to remain competitive. The Port of Oakland pursued a plan to deepen its channels from a depth of -35 feet mean lower low water datum to a depth of -38 feet and then to a depth of -42 feet. Phase I, which increased the depth to -38 feet and created a new turning circle, involved dredging approximately 440,000 cubic yards of material from the Oakland Inner Harbor. Phase II, which would increase the depth to -42 feet, would involve dredging approximately 6.5 million cubic yards from the Inner and Outer Harbors. In fact, the Port now is planning to increase the depth of the channels to -50 feet to accommodate continued increases in container ship draft. Deepening the channel from -42 feet to -50 feet would involve the dredging of approximately 16 million cubic yards. Initial plans called for the Port to dispose of the Phase I dredged materials in San Francisco Bay. Environmental concerns led to changing the proposed disposal site to an EPA-approved site located 11 miles off of Half Moon Bay. However, legal action by commercial fishing interests prevented this plan from progressing. This complex tangle of interests and opposed concerns led to what the port industry referred to as "mudlock."

158. Interim accomplishments of LTMS include interim sediment quality testing guidelines, refinements of Bay Plan policies concerning dredging and the disposal of dredged material, the production of various studies concerning potential upland disposal sites, various Dredging and Disposal Road maps, several dredging-related publications, the establishment of a Pilot Dredged Material Management Office (DMMO), a type of "one-stop" permit office to which an applicant for a dredging permit can submit a single application, and the preparation and circulation for comment of a draft environmental impact statement and environmental impact report for LTMS.

159. LTMS has prepared and circulated for comment a draft programmatic environmental impact statement/environmental impact report ("draft EIS/EIR"). The LTMS staff is in the process of analyzing the comments and responding, after which it will prepare a final programmatic EIS/EIR and develop revised strategies and policies for regulating future dredging and disposal of dredged materials.

does not, however, supplant the basic authorities or requirements of each member agency.¹⁶⁰

BCDC's involvement in LTMS has emphasized BCDC's preference for upland beneficial reuse over aquatic disposal where feasible¹⁶¹ and has led to BCDC's involvement in several large and a number of smaller upland reuse projects. The four major upland disposal projects, all of which are currently at different stages of development, are the Sonoma Baylands project,¹⁶² the Hamilton Air Force Base project,¹⁶³ the Monte-

160. The DMMO program has been generally positive to date. DMMO has reduced the time to process an application and has fostered consistency and reduced redundancy among the participating agencies. DMMO appears to provide a workable model to resolve concerns over the processing of permit applications for complex projects by multiple agencies while allowing the DMMO agencies to interpret and apply their own laws and policies. However, DMMO has identified some procedural problems that need to be addressed, including (1) timeline and process delays, (2) public concerns over DMMO process and accessibility, and (3) an inability to track project-specific DMMO data. This has resulted in a number of recommendations for improvements in the DMMO process.

161. See SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION, AN ANALYSIS OF THE BENEFICIAL USES OF DREDGED MATERIAL AT UPLAND SITES IN THE SAN FRANCISCO ESTUARY (June 1994); LTMS Status Report (July 1995); U.S. ARMY CORPS OF ENGINEERS, SAN FRANCISCO DISTRICT, ET AL., EXECUTIVE SUMMARY, DRAFT POLICY ENVIRONMENTAL IMPACT STATEMENT/PROGRAMMATIC ENVIRONMENTAL IMPACT REPORT, LONG-TERM MANAGEMENT STRATEGY (LTMS) FOR THE PLACEMENT OF DREDGED MATERIAL IN THE SAN FRANCISCO BAY REGION (Mar. 1996).

162. See Laurel Marcus and Marcia Grimm, *The Sonoma Baylands Project: Creating An Environmental Benefit Out of the San Francisco Bay Dredging Crisis*, 2 HASTINGS WEST-NORTHWEST J. ENVTL. L. & POL'Y, 121 (Winter 1995). The Sonoma Baylands project concerns the tidal restoration of 348 acres of former baylands that had been diked off from tidal action and converted to agricultural use around the turn of the century. The site is located east of the Petaluma River and south of State Highway 37 in Sonoma County along the north San Pablo Bay shoreline. The land for the project and the project itself was developed by the California State Coastal Conservancy and the Sonoma Land Trust. The wetland project was designed and constructed by the Corps of Engineers. Construction began in June 1994. The project consists of using 2.8 million cubic yards of dredged material from the Port of Oakland to restore intertidal elevations that will result in the restoration of tidal wetlands at the site. Total project cost equals \$8.5 million with the federal government responsible for 75% and the local partner paying 25%. A 39-acre pilot unit received dredged material from the Petaluma River Navigation Channel in San Pablo Bay in October, 1994. Placement of material from the Port of Oakland Harbor project began in May, 1995, and was completed in November, 1995. The result of the project is mixed so far although it is too early to reach any final conclusions concerning the success of the project.

163. The proposed Hamilton Wetlands Restoration Project (HWRP) reflects a substantial increase in the size and scope of proposed shoreline wetlands restoration projects. This project consists potentially of four land parcels: the 700-acre Hamilton Army Airfield, the 20-acre Navy ballfields, the 400-acre former antenna field, and the 1,600-

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zuma Wetlands project,¹⁶⁴ and the Port of Oakland outer harbor project.¹⁶⁵

acre Bel Marin Keys Unit 5. The project would create a total of 2,700 acres of wetlands, tidal emergent wetlands, seasonal wetlands, and transitional brackish marsh wetlands. The project would involve the restoration of the principal habitats of several endangered fish, wildlife, and plant species including the fall, winter, and spring-run Chinook salmon, steelhead trout, splittail, striped bass, green sturgeon, salt marsh harvest mouse, California clapper rail, and the California black rail. LTMS studies indicate that the airfield alone could accommodate up to 7 million cubic yards of dredged material while restoration efforts over the entire site could accommodate up to 33 million cubic yards of dredged material.

The California Coastal Conservancy and The San Francisco Bay Conservation and Development Commission have established a Hamilton Restoration Group (HRG) composed of representatives of federal, state, and local governments, environmental groups, business groups, and concerned citizens. The HRG has identified four different preliminary project alternatives to provide the basis for further analysis to develop an environmentally preferred project plan that would probably include a mixture of one or more of the four alternatives. The four alternatives are: (1) the recreation of historic wetlands conditions, including large isolated tidal ponds and fresh, brackish, and tidal wetlands, (2) a natural gradient of wetlands elevations across the site to provide uplands and freshwater non-tidal wetlands at higher elevations transitioning to tidal wetlands near the Bay, (3) the division of the site by a levee into distinct areas of seasonal and tidal wetlands, and (4) restoration entirely by natural sedimentation to establish tidal wetlands.

164. The proposed Montezuma Wetlands Restoration Project involves a much larger capacity for the beneficial reuse of dredged material and a much more complex and ambitious restoration project. The proposed project site lies immediately west of Collinsville in the Suisun Marsh, Solano County near the historic location of the entrapment zone. Historically, the site was part of the Suisun Marsh but was diked off from tidal action in the late 1800's and has been used for agriculture and cattle grazing since then.

The site is currently highly disturbed. Subsidence has caused the site to sink to a present elevation of -8 feet NGVD. Thus, simply breaching the levees and allowing tidal waters to flood the site would result in a large tidal lake for many years until sufficient siltation occurs so that marsh vegetation could develop. The introduction of dredged material as a substitute for natural sedimentation could greatly accelerate the marsh restoration process.

The goal of the project is to use 20 million cubic yards of dredged material to create approximately 1,800 acres of tidal and seasonal wetlands. Present plans call for the creation of approximately 800 acres of high marsh and seasonal wetlands and 1,000 acres of low marsh. The project would be entirely privately funded and sponsored. Several studies, including extensive physical, chemical, and biological surveys of the site and some preliminary design work, have been completed. The project sponsors have also commenced the preparation of a joint environmental impact statement/environmental impact report. Current studies have raised several issues, including concerns over the possible release of contaminants from the dredged material into the environment, what constitutes an acceptable range of alternatives for evaluation through the CEQA process, marsh design, salinity impacts, and cost.

The Commission's jurisdiction over the project is both direct for that portion of the project located within the primary management area of the Marsh and indirect for that portion of the project located within the secondary management area of the Marsh.

LTMS has achieved many accomplishments, including changes to the McAteer-Petris Act,¹⁶⁶ improved BCDC dredging policies,¹⁶⁷ the designation of a deep ocean disposal site, improving in-Bay sediment testing guidelines, improving in-Bay disposal site management, fostering the Sonoma Baylands wetland restoration project, and the creation of a pilot Dredged Material Management Office. The LTMS process has taken substantially longer than initially forecast, and the implementation of any final statement of goals will continue to occupy the participating agencies into the foreseeable future. BCDC participation was initially financed through a user fee of ten cents per cubic yard of material authorized for dredging or disposal through a BCDC permit, with a cap of \$650,000.¹⁶⁸ When this authority expired, BCDC sought and received additional authority to impose a user fee of seven cents per cubic yard of material authorized for in-Bay disposal only up to a maximum of \$210,000 with this authority expiring on January 1, 1999.¹⁶⁹ Funding from this source has proven to be less than antici-

When the project planning first commenced, the *San Francisco Bay Plan* designated a portion of the restoration site as a water-related priority use area and would have therefore prevented the use of the site for marsh restoration. However, the Commission has since removed that designation as it applies to any land located below the 10-foot contour line and provided that any marsh restoration work must be carried out in a manner that will not preclude the use of the deep water shoreline and area above the 10-foot contour for water-related industry and port use.

165. The Port of Oakland's efforts to dredge first to -38 feet MLLW and then to -42 feet MLLW have been successful. The Port is now actively planning the next phase of dredging, from -42 feet to -50 feet MLLW. The Port anticipates dredging approximately 12-14.5 million cubic yards of material with this project. It is studying a range of disposal sites as part of this project, one of which involves placing approximately seven million cubic yards of material at the Port Middle Harbor to create an array of intertidal and submerged land habitats. Planning is still at an earlier stage for this project. The current design concept features a mixture of habitat types, including a large deep hole, many acres of shallow sand channels, shallow flats with and without eel grass, beaches, and several acres of rock revetments. The project is also not without potential opposition and skeptical participation by environmental interests. The ultimate success or failure to this proposed beneficial use for habitat restoration must await the numerous studies, evaluations, and public hearings before being approved and then must also await completion and long-term monitoring before its success or failure can be determined.

166. See CAL. GOV'T CODE §§ 66663 - 66667 (West 1997).

167. See Bay Plan Amendment No. 3-91, adopted on May 21, 1992 and Commission Regulation Section 10602, 14 CAL. CODE REGS. § 10602, effective on March 4, 1993.

168. See CAL. GOV'T CODE § 66667(a) (West 1996).

169. See CAL. GOV'T CODE §§ 66667(b) (West 1996); Commission Regulation § 10522, 14 CAL. CODE REGS. § 10522.

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pated. Thus, BCDC also sought and received a direct state general fund appropriation of \$100,000 to supplement the user fees received and to allow BCDC to continue its LTMS participation.

After the completion of the EIS/EIR process, the LTMS agencies will jointly develop a draft management plan to implement the preferred strategy. The agencies also anticipate developing a regional implementation manual for sampling and testing guidance. Finally, the agencies anticipate formalizing the DMMO as a permanent entity to coordinate and streamline the processing of dredging permit applications. Individual agencies will take additional actions including the establishment of a permanent allowable disposal volume for the deep ocean disposal site, revisions to the *Bay Plan* and the Regional Board's San Francisco Bay Basin Plan, and changes to other applicable statewide policies. In addition, BCDC has entered into a partnership with the California Coastal Conservancy to help achieve LTMS goals by working with other agencies and interested parties to develop projects that involve the beneficial reuse of dredged materials. Current entities also involved in this effort include the Port of Oakland, the City of Novato, and the California Environmental Trust.

C. REVIEW OF CALTRANS PROJECTS

BCDC has an important and distinctive relationship with the California Department of Transportation ("Caltrans").¹⁷⁰ Caltrans has responsibility for planning and supervising the construction of all of the major freeways and bridges that extend over and around San Francisco Bay. This relationship is reflected in both statutory provisions¹⁷¹ and in the *San Fran-*

170. See CAL. GOV'T CODE §§ 14000-14456 (West 1997) (Caltrans's basic statutory authority). A representative of the State Department of Business, Housing, and Transportation sits on the San Francisco Bay Conservation and Development Commission; this representative is often a Caltrans management official.

171. See McAteer-Petris Act § 66605(a), codified at CAL. GOV'T CODE § 66605(a), which recognizes a bridge as a "water-oriented" use; McAteer-Petris Act § 66620(c), codified at CAL. GOV'T CODE § 66620(c), which provides that the Secretary for Business, Transportation, and Housing shall appoint one of the 27 members who make up the Commission.

cisco Bay Plan.¹⁷² Beginning in the late 1980's and extending into the 1990's, Caltrans sought various BCDC permits to expand the capacity of the bridges that cross San Francisco Bay at various locations,¹⁷³ to make them safe from damage by earthquake, to expand the capacity of Interstate Highways 80 (I-80) and 580 (I-580) by constructing high occupancy vehicle (HOV) lanes, and to replace the Cypress Structure.¹⁷⁴ The bridge expansion and I-80 applications each involved a substantial project¹⁷⁵ that raised significant policy issues for

172. See BCDC, SAN FRANCISCO BAY PLAN, *supra* note 8, at 25 (Findings and Policies on Transportation).

173. Nine bridges cross San Francisco Bay at various locations. Caltrans is responsible for the maintenance of eight of them, including the San Francisco Bay Bridge, which connects San Francisco and Oakland, the San Mateo Bridge, which connects San Mateo and Hayward, the Dumbarton Bridge, which connects Palo Alto to Fremont and Newark, the Richmond San Rafael Bridge, which connects San Rafael and Richmond, the Carquinez Bridge, which connects Crockett and Vallejo, and the Martinez-Benicia Bridge, which connects Martinez and Benicia. The Golden Gate Bridge, which connects San Francisco to Marin County, is maintained and operated by a separate entity, the Golden Gate Bridge, Transportation, and Ferry District.

174. I-80 crosses San Francisco Bay on the San Francisco Bay Bridge and then runs generally north along the eastern shoreline of San Francisco Bay through Emeryville, Berkeley, and Albany until it moves inland through Richmond and further northeast to and across the Carquinez Strait. Part of I-580 connects the Richmond San Rafael Bridge to I-80 in Albany. The "maze" refers to an overlapping group of freeway ramps and bridges that connect I-80 southward to Interstate 880 (I-880) and with the San Francisco-Oakland Bay Bridge on the west.

175. San Francisco Bay Conservation and Development Commission Permit No. 9-87 ("the 'Central Avenue Interchange project'") (June 15, 1988) as amended through Amendment No. Four dated December 15, 1993, involves the widening of Interstate Highway I-580 from four to six lanes and the improvement of the Central Avenue interchange in Albany.

BCDC Permit No. 11-83 ("the Benicia-Martinez Bridge permit"), issued on October 26, 1983 as amended through Amendment No. Two dated March 29, 1994 involves the widening of the Benicia-Martinez Bridge over which Interstate Highway I-680 runs.

San Francisco Bay Conservation and Development Commission Permit No. 4-92 ("the Powell Street Interchange permit") dated June 18, 1992, as amended through Corrected Amendment No. One dated October 22, 1992, projects involves improvements to the shoreline and frontage road contiguous to the Powell Street Interchange in Emeryville as part of improvements to I-80 from the Bay Bridge Distribution Structure north to Ashby Avenue in Berkeley.

San Francisco Bay Conservation and Development Commission Corrected Permit No. 8-92 ("I-80/I-580 Interchange permit") (Dec. 12, 1995) involves the redesign and reconstruction of portions of I-80 and I-580 and their connecting interchange.

Application No. 11-92 and later Permit No. 11-93 ("the Cypress/Bay Bridge Distribution/Flyover Project"), dated June 8, 1994, as amended through Amendment No. Two dated April 14, 1995, involves the reconstruction of the Cypress Freeway, the modification of the Bay Bridge Distribution Structure, and the construction of the "flyover," an elevated structure designed to connect the southbound inside HOV lane on I-80 to the

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BCDC.¹⁷⁶ In reviewing each of these applications, BCDC resolved these policy issues by balancing the Caltrans goals and requirements with BCDC policies and obligations.¹⁷⁷ These

toll-free car pool lanes located at the toll booth structure. Initially, Caltrans had submitted a separate application for the flyover, but the Commission voted to deny that application to force Caltrans to combine that project with the Cypress Reconstruction Project.

175. The Central Avenue Interchange project involved the placement of 8,380 square feet of solid and 2,180 square feet of pile-supported fill. The pile-supported fill consisted of widening a bridge over Cerrito Creek where it empties into a mudflat near the Hoffman Marsh.

The Benicia-Martinez Bridge project involved the placement of 52,500 square feet of cantilevered fill to allow the construction and use of one new northbound lane and one new southbound lane over the bridge.

The I-80/I-580 Interchange permit involved the removal and replacement of shoreline protection and debris removal over more than 1 million square feet of the Albany mudflats within the Commission's Bay jurisdiction and the construction, use, and maintenance of portions of the redesigned interchange within the Commission's shoreline band jurisdiction. The permit also required significant public access along approximately 9,860 feet of shoreline over 2.7 acres.

176. The Central Avenue Interchange project raised two issues: mitigation and public access. The Benicia-Martinez Bridge project raised the single issue of public access. The I-80/I-580 Interchange permit raised issues of public access in close proximity to very important bird habitat area. The permit involved the relationship of measures designed to mitigate possible adverse impacts of public access on use of the bird habitat area with the rights of handicapped people who want to use the public access area and their rights under the Americans With Disabilities Act and analogous state laws. The permit also raised issues of visual access, mitigation and wildlife habitat improvement, and consistency of the application with the designation of part of the project site as a park-priority land use area.

The Cypress/Bay Bridge Distribution/Flyover Project raised numerous significant, difficult, and extraordinarily complex issues concerning transportation planning, wildlife designations at the Emeryville Crescent, visual access, and possible incompatibilities between public access and the use of the Emeryville Crescent by numerous waterfowl, including rare and endangered species. Without summarizing all of the Commission's involvement with this application, San Francisco Bay Conservation and Development Commission, the DRB, and the ECRB held numerous public hearings on the project and the San Francisco Bay Conservation and Development Commission permit that authorizes the project is 55 pages long.

177. With the Central Avenue Interchange application, Caltrans asked San Francisco Bay Conservation and Development Commission to consider as full mitigation for the project marsh restoration work that Caltrans had performed as part of an earlier project that San Francisco Bay Conservation and Development Commission authorized. San Francisco Bay Conservation and Development Commission refused to do so because the earlier restoration work was needed to offset the detriments of the earlier project. BCDC and Caltrans eventually agreed to the creation of 10,000 square feet of new tidal marsh by Caltrans as appropriate mitigation. This project also involved the creation of 51,000 square feet of public access along 3,000 feet of Bay shoreline by creating a 13 to 15-foot-wide public access corridor. BCDC and Caltrans had substantial difficulty resolving issues concerning the location and design of the access. The limited width of the shoreline in the project vicinity and the need to protect sensitive wildlife habitat of the Albany mudflats imposed significant limitations on public access. Cal-

balancing exercises were always lengthy, difficult, frustrating, and, to some degree, unsatisfactory, but they also did serve to protect important Bay-related goals and objectives.

trans and the Commission negotiated the length, height, and nature of a barrier to separate the highway and the public access corridor to balance safety, access, and esthetic concerns.

With the Benicia-Martinez Bridge project, the Commission required Caltrans to provide one of the following: (1) a five-foot-wide walkway across the bridge, (2) a ferry service between Benicia and Martinez, or (3) a regularly-scheduled shuttle service for transporting pedestrians and bicyclists across the bridge.

In the Powell Street Interchange permit, the Commission denied part of the application involving the proposed placement of 3,240 cubic yards of material that would cover in part 4,800 square feet of mudflat because the record did not show that the fill was necessary for shoreline protection but seemed to indicate that it was needed simply to increase the size of the road. The Commission also approved the application in part and subsequently approved the placement of the material previously denied when Caltrans also reduced the amount of riprap involved and included the removal 4,600 square feet of existing but unsuitable concrete and asphalt riprap as part of the project.

In the I-80/I-580 Interchange project BCDC imposed conditions that deal with the height of the fence that would separate the public access pathway corridor from the adjacent bird habitat and the material used to construct the fence. BCDC also concluded that the slight incursion into a park-priority land use area was not inconsistent with the designation and that the required mitigation will protect environmentally-sensitive marshes and mudflats, and not adversely affect Bay water quality.

In August 1996, the Office of the State Architect asked San Francisco Bay Conservation and Development Commission staff concerning a public complaint that public access conditions violate Title 24 because its interference with views from the public access pathway to the mudflats and Bay affected persons confined to a wheelchair much more substantially than a person not so confined. The State Architect's Office initially stated that it tentatively agreed that the project does not comply with Title 24. Subsequently, representatives of the State Architect's Office of Regulation Services, San Francisco Bay Conservation and Development Commission, Caltrans, and the City of Albany met to discuss this problem. Interestingly, San Francisco Bay Conservation and Development Commission has not received a final response from the State Architect's Office on this matter.

Permit 11-93, which authorizes the Cypress, Bay Bridge Distribution/flyover project, contains numerous special conditions including a requirement that the final design of the freeway and overpass structures be reviewed by the Design Review Board, a requirement that preliminary engineering plans and engineering criteria be reviewed by the Engineering Criteria Review Board, a requirement that Caltrans shall prepare and certify an environmental document concerning any possible adverse environmental impacts of the required public access, numerous requirements relative to public access, including specified improvements and a contingency plan for the creation of an interest bearing account of \$2,445,000 if environmental concerns prevent the construction of the improvements, a requirement that Caltrans establish an interest-bearing account with \$400,000 for use by the East Bay Regional Park District for improving a public view area along the south side of Powell Street and for habitat enhancement in the northern portion of the Emeryville Crescent, limitations on the size and location of safety barriers to protect views, a requirement for an open space dedication on Caltrans property located in the Emeryville Crescent wildlife priority use area, and mitigation requirements to offset possible adverse impacts of the project on wildlife that uses the Emeryville Crescent.

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Similarly, the various Caltrans seismic retrofit projects that came before BCDC¹⁷⁸ were complex, raised significant policy issues for BCDC,¹⁷⁹ and involved even more pressure on BCDC to act very quickly. Also similarly, the resolution of these issues and the issuance of the BCDC permits for these Caltrans projects were difficult, sometimes frustrating, and unsatisfactory to some degree for all involved.¹⁸⁰

178. Permit No. 7-94 involved proposed seismic safety improvements to the Richardson Bay Bridge ("the Richardson Bay Bridge project"). The application was reviewed by both the Design Review Board and the Engineering Criteria Review Board, and the Commission held two public hearings on the application.

Permit No. 1-97 involved the seismic retrofitting of the Richmond-San Rafael Bridge ("the Richmond-San Rafael Bridge seismic retrofit project"). The proposed project would result in approximately 40,000 square feet of new solid and pile-supported fill and approximately 159,000 square feet of temporary solid and pile-supported fill for coffer dams, work platforms, and construction access trestles. The project would also involve the dredging of approximately 219,000 cubic yards of material with most being disposed of at the Alcatraz disposal site.

179. Caltrans and San Francisco Bay Conservation and Development Commission considered five alternative retrofit strategies for the Richardson Bay Bridge project. These include the Caltrans proposal to construct pier walls at the bottom of the supporting columns at a cost of \$5.2 million, the DRB-preferred alternative of moving the pier walls up to the tops of the columns with an estimated cost of \$6-\$8 million, the use of steel and concrete infill cross-bracing with an estimated cost of \$10-\$20, replacing the entire substructure of the bridge with an estimated cost of \$30-\$40 million, and building a full replacement bridge with an estimated cost of \$80 million.

The Richmond-San Rafael Bridge seismic retrofit project raised issues concerning whether the amount of fill proposed was the minimum necessary, whether mitigation for the fill would be adequate, whether the application would provide maximum feasible public access consistent with the project, whether the project is consistent with Bay Plan policies protecting fish and wildlife, and whether the project is consistent with Bay Plan policies on dredging and water quality. Soon, however, another issue that proved to be the most controversial aspect of this application developed from testimony from bicycle advocates seeking permanent bicycle access across the bridge.

180. On November 17, 1994, San Francisco Bay Conservation and Development Commission denied the Richardson Bay Bridge application. BCDC based its denial on five reasons: raised pier walls could preserve Bay views near the bridge, could provide better light, would prevent possible safety, surveillance, and graffiti problems, would minimize fill, and would maintain water circulation. Caltrans appealed the denial to the State Earthquake Emergency and Seismic Retrofit Permit Review Panel. The Review Panel ordered BCDC to issue the permit so that it would take effect within 30 days and that the permit not include any condition requiring review by the Design Review Board or by the Engineering Criteria Review Board. The order also asked San Francisco Bay Conservation and Development Commission, Marin County, and Caltrans to submit to the Secretary of Business, Transportation, and Housing (BTH Secretary) all conditions on which they agree concerning public access, security, lighting, and fencing. If unable to agree, the BTH Secretary shall resolve the disagreement. The permit shall be limited to conditions on which all parties agree or that the BTH Secre-

These BCDC interactions with Caltrans convinced both agencies that better coordination and communication are essential if they are to meet their various statutory obligations quickly and efficiently and without the mutual mistrust and frustration that characterized their earlier experiences. As an example of this different approach, both agencies have become deeply involved in the planning for the replacement of the east span of the San Francisco-Oakland Bay Bridge.¹⁸¹

BCDC and Caltrans have utilized other ways to improve their relationship. First, Caltrans has agreed to fund the hiring of a staff engineer by BCDC, and BCDC has agreed to hire the engineer from Caltrans to improve BCDC staff's understanding

tary has approved. Revised Permit No. 7-94, as issued on May 18, 1995, contains conditions relative to public access, security lighting and fencing, and marsh protection.

With regard to the Richmond-San Rafael Bridge project, Caltrans opposed the requests for bicycle access on the bridge because it believed that providing such access would not be safe unless Caltrans redesigned the project in such a way that would significantly increase the cost of and time to complete the project and thus be inconsistent with direction given to Caltrans to complete the retrofit projects as soon as possible. Caltrans also argued that the imposition of any permit conditions relative to this subject would be illegal.

181. The east span of the Bay Bridge is a double-deck truss structure that is approximately sixty years old and carries approximately 280,000 vehicles per day. The east span is more vulnerable to an earthquake than the west span. Caltrans initially considered a retrofit rather than a replacement project, but an independent team of experienced professionals investigated these alternatives and concluded that full replacement is the most prudent final seismic retrofit strategy. To reach a consensus on the design of the new span, Governor Wilson and the State Legislature asked the Metropolitan Transportation Commission (MTC) for recommendations. MTC established a Bay Bridge Design Task Force, a seven-member task force consisting of representatives from Alameda, Contra Costa, and San Francisco Counties and from San Francisco Bay Conservation and Development Commission. In April 1997, the Task Force formed the Engineering and Design Advisory Panel (EDAP), a thirty-six-member group that included representatives from the Commission's Design Review Board and Engineering Criteria Review Board. EDAP adopted design and engineering criteria in April, reviewed various design proposals and eventually settled on three alternative design proposals for further study: (1) a viaduct between Yerba Buena Island and the toll plaza, (2) a single-tower cable stayed bridge, and (3) a single-tower suspension bridge. Interest in this project is very high, and the Commission has received comments from organizations including the East Bay Regional Park District and the Bike the Bridge Coalition. In response to the continuing concerns of bicyclists and previous experience with BCDC review of the retrofitting of Richmond-San Rafael Bridge, State Senator Quentin Kopp inserted at the last moment a provision into Senate Bill 60, the funding bill for this project, a provision that bars BCDC from imposing any condition concerning bicycle or pedestrian access or mass transit facilities on the replacement structure.

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of Caltrans procedures.¹⁸² Second, BCDC and Caltrans have discussed the possibility of working together to develop a shoreline transportation plan.¹⁸³ BCDC and Caltrans also considered the appointment of a Caltrans engineer to the Commission's Engineering Criteria Review Board.¹⁸⁴

182. Prior to the early 1990's, asked San Francisco Bay Conservation and Development Commission had a staff engineer to coordinate the activities of the Engineering Criteria Review Board and to review final engineering plans submitted pursuant to the Commission's standard plan review condition. However, increasing budgetary constraints in the early 1990's forced the Commission to eliminate its staff engineer. The number of permit applications with their increasingly complex engineering issues forced San Francisco Bay Conservation and Development Commission to find some means of funding the rehiring of a staff engineer. In addition, the Commission believed that it could benefit greatly from having a staff member with special knowledge and experience with Caltrans projects. The result of these interests and continuing dialogue with Caltrans was a plan for Caltrans to provide funding to the Commission necessary to fund the hiring of a staff engineer for one year and hopefully to extend that hiring if both sides were satisfied with the arrangement. San Francisco Bay Conservation and Development Commission has hired a staff engineer who is compensated with funds provided to San Francisco Bay Conservation and Development Commission by Caltrans, and the experience has been very positive. Caltrans is currently considering whether or not to extend this arrangement for another year.

183. San Francisco Bay Conservation and Development Commission staff has considered the need for a shoreline transportation plan as a means of avoiding or minimizing future conflicts with Caltrans and other parties interested in transportation issues and projects that could affect San Francisco Bay. Perhaps even more importantly, such a plan could help eliminate, minimize, and postpone Bay fill that otherwise might be unavoidable to relieve additional Bay traffic congestion. Preliminary discussions with Caltrans staff have occurred but no such plan has been developed. However, the goal is important to San Francisco Bay Conservation and Development Commission, which has directed the Executive Director to present a proposed agreement with MTC and Caltrans to the Commission by June 30, 1998.

184. San Francisco Bay Conservation and Development Commission and Caltrans believed that this arrangement would help the ECRB and the Commission understand Caltrans planning processes and projects better. However, before San Francisco Bay Conservation and Development Commission and Caltrans could enter into such an arrangement, the Commission needed assurance that such an arrangement would not violate state conflict of interest laws. As result, San Francisco Bay Conservation and Development Commission sought advice from the State Fair Political Practices Commission (FPPC) concerning this proposal. On April 8, 1996, FPPC provided written advice to San Francisco Bay Conservation and Development Commission that a Caltrans engineer who sat as a member of the ECRB could not help present Caltrans projects either to the ECRB or to the Commission. Based on this advice, Caltrans determined that it would not be sufficiently beneficial to have a Caltrans engineer become a member of the ECRB.

D. SAN FRANCISCO AND OAKLAND WATERFRONT PLANNING EFFORTS

As part of BCDC's recent efforts to create partnerships with other public entities, BCDC has worked with the Ports of San Francisco and Oakland to develop detailed plans for the public and private use of the two waterfronts. BCDC's direct involvement in San Francisco waterfront planning commenced in 1975 when BCDC adopted the San Francisco Waterfront Special Area Plan ("BCDC SF Waterfront Plan").¹⁸⁵ As recommended by the BCDC SF Waterfront Plan, BCDC also adopted a total design plan for the San Francisco waterfront from Pier 24 under the Bay Bridge north to Pier 7 north of the Ferry Building.¹⁸⁶ In 1974 and 1975, BCDC also adopted a policy for

185. The *San Francisco Bay Conservation and Development Commission SF Waterfront Plan* recognizes the San Francisco waterfront as a vitally important regional resource that can support port and related maritime facilities, public access, open space, recreational sites, and water-oriented commercial recreation without undue conflict if guided by overall planning responsive to public desires that balances economic, environmental, and social goals. The Plan also acknowledges (1) that economic studies indicate that the use of replacement fill of office and residential use within current city height limitations is not likely to generate rent to the Port, (2) that waterfront land is valuable and scarce and should not be used for automobile access and parking unless absolutely necessary, no upland location is feasible, and it is the minimum necessary, (3) that elevated freeways near the shoreline impair visual access to the Bay and are perceived as a barrier between the City and its waterfront, (4) that maritime activities are intrinsically interesting and that public access, view sites, and recreational areas are desirable if they do not interfere with maritime functions, (5) that greater amounts of public access, view sites, and public recreation sites are particularly desirable in the Ferry Building area but that public funding may be needed to achieve the desirable amount of public access in addition to public access obtained through the permit process, (6) that the replacement and reuse of obsolete maritime finger piers north of the Bay Bridge should be guided by a "Total Design Plan" with detailed design specifications developed by a public agency, (7) that the character of the Fisherman's Wharf area depends on the maintenance and expansion of the fishing fleet and related maritime activities, and (8) that the waterfront and adjacent inland areas between the Bay Bridge and China Basin hold potential for development as unique residential area in conjunction with commercial, existing industrial, and open space uses. The Plan then consists of a series of permitted uses on new or replacement fill, policies, recommendations, and maps for the various areas of the waterfront.

186. The *Total Design Plan* includes the approximate configuration of piers and other fill, the approximate location, amount, height, and bulk of proposed uses, the location and design of parks, open space, public access areas, and view corridors, the amount of permitted parking, and the means by which public recreation, open space, and public access are to be provided and maintained.

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providing "credit" for the removal of deteriorated piers, i.e., a so-called "replacement fill policy."¹⁸⁷

Development of the San Francisco waterfront has not proceeded as anticipated when BCDC adopted the BCDC SF Waterfront Plan and the Total Design Plan. The Port's existing facilities could not accommodate the new container technology that quickly transformed the operation of ports worldwide without very substantial investment in new facilities, and the Port failed to make such investment before the Port of Oakland did and thereby the Port of Oakland attracted most container shipping away from San Francisco. In addition, the replacement fill policy did not provide a sufficient financial incentive to new waterfront development. The Port believes that the development constraints contained in the BCDC SF Waterfront Plan and the Total Design Plan prevent the financial investment needed to allow new development. Whatever the reasons, many of the piers have continued to deteriorate¹⁸⁸ and remain largely unused or underused.

Three further factors have substantially affected the planning and development of the San Francisco waterfront. First, in October, 1986, the Attorney General's Office provided informal written advice to BCDC concerning limitations imposed by the McAteer-Petris Act, the *San Francisco Bay Plan*, the BCDC Waterfront Plan, and the Total Design Plan on development of the finger piers, especially as those limitations affect the Port's ability to upgrade the piers to meet current seismic standards and building codes.¹⁸⁹ Second, in November, 1990, the voters of

187. The San Francisco waterfront contains many deteriorated piers. The issue the San Francisco Bay Conservation and Development Commission considered was whether the Port should be allowed some credit for removing those piers as an incentive toward accelerating their removal when the Port seeks to place replacement fill. The report concluded that credit for the removal of deteriorated piers should be allowed for those locations covered by a special area plan that specifies permitted uses for the replacement fill, a permit application must be filed within ten years of obtaining the credit, and the use of the replacement fill must be consistent with the adopted special area plan.

188. SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION, STATUS OF CERTAIN PIERS ALONG THE SAN FRANCISCO WATERFRONT (Feb. 1991).

189. Prior to receipt of this advice letter, BCDC had always treated the tops of piers that extend over the Bay and existed prior to BCDC's coming into existence as part of

San Francisco approved Proposition H, which required the City to establish a waterfront land use process and to adopt a waterfront land use plan and also banned hotels along the San Francisco waterfront. This set in motion an extensive local land use planning process for the San Francisco waterfront. Third, in 1991, BCDC completed its review of the physical status of San Francisco waterfront piers and confirmed that the condition of many of the piers was very poor and that they would require extensive repairs prior to any development.¹⁹⁰ These factors led to a deadlock concerning future development along the San Francisco waterfront.

In January, 1995, the Port approved a draft waterfront plan for environmental review. BCDC staff review identified several areas of the draft plan that were inconsistent with the McAteer-Petris Act and the *San Francisco Bay Plan*, the BCDC San Francisco Waterfront Plan, and the Total Design Plan. In March, 1996, the Port and BCDC signed a memorandum of understanding to jointly review the plan in the context of BCDC's laws and policies and to resolve these issues and identify possible amendments to the Commission's plans.¹⁹¹ At the invitation of the Port and BCDC, the Save San Francisco Association joined the negotiations.

the shoreline band. So long as BCDC treated the tops of the pier structures as part of the shoreline band, its authority over development would be much more limited, generally to issues of public access and consistency with the port-priority use designation. However, if BCDC had Bay jurisdiction over development of the tops of the piers, the Commission's authority would be much greater and include issues of whether the proposed development was water-oriented, whether an alternative upland location existed for the project, whether the amount of Bay fill was the minimum amount needed, and mitigation for the fill, in addition to the issues of public access and consistency with the port priority use designation. The AG advice letter concluded that where proposed development of the piers involves work on the pier itself or substructure, the scope of the Commission's permit review varies with the physical extent, nature, and purpose of the work. The advice letter then stated that the difference between an administrative or minor permit from a major permit might be an appropriate basis for distinguishing between those activities that trigger the application of Bay fill-related policies. See Letter From Dennis Eagan, Deputy Attorney General to Alan R. Pendleton, San Francisco Bay Conservation and Development Commission Executive Director (October 8, 1986).

190. SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION, STATUS OF CERTAIN PIERS ALONG THE SAN FRANCISCO WATERFRONT, February 1991

191. Specific areas of discussion that the MOU identified included public access requirements and Bay Plan policies on fill for commercial recreation.

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These negotiations led to the adoption of a Concept Agreement between the Port, BCDC, and the Save San Francisco Bay Association.¹⁹² However, the Concept Agreement is quite general and leaves many issues and details unresolved.¹⁹³ Negotiations have continued, but reaching even a consensus staff resolution of these issues applicable to the entire waterfront has proved elusive. Therefore, BCDC and Port staffs have abandoned this approach for the time being and instead are attempting to develop specific recommendations for different areas of the waterfront, one at a time. Currently, BCDC and Port staffs continue intensive negotiations over this shoreline planning initiative.

192. The major provisions of the conceptual agreement are as follows: (1) Piers 24, 33, 34, 36, and such other piers as will be determined later will be removed to create open water, (2) three new public plazas will be created at Fisherman's Wharf, near Piers 19 through 27 (Wharf 25 project), and near Piers 34 and 36 (Brannan Street Wharf project), (3) the Port will set aside 25% of gross cash receipts from new development on all piers and seawall lots to finance the Wharf 25 and the Brannan Street Wharf projects (the Fisherman's Wharf project is expected to be self-funded from revenues associated with new development and a new parking garage in the area), (4) the parties will adopt specific public access requirements on piers, (5) San Francisco Bay Conservation and Development Commission will adopt new policies for replacement fill to guide the size and shape of replacement piers in specific locations, (6) BCDC will adopt new policies governing repairs and allowable uses on new or replacement piers, depending on physical condition and remaining useful life of the pier, (7) historic resources will be preserved as determined through a special study, and (8) a joint design review committee will be created to develop early consensus on the design of new port projects. The conceptual agreement also provides that piers will be assigned to one of two categories: category I piers will be treated as falling within the San Francisco Bay Conservation and Development Commission's shoreline band jurisdiction, and category II piers will be treated as falling within the San Francisco Bay Conservation and Development Commission's San Francisco Bay jurisdiction and thus only water-oriented uses will be allowed. See Draft Concept Agreement Among the Port of San Francisco, the Save San Francisco Bay Association, and the San Francisco Bay conservation and Development Commission dated December 12, 1996; memorandum from Will Travis and Jennifer Ruffolo to San Francisco Bay Conservation and Development Commission Commissioners and Alternates Re: Staff Report and Recommendation on Draft Conceptual Agreement Between the Staffs of the Commission, the Port of San Francisco, and the Save San Francisco Bay Association (February 28, 1997).

193. Among those unresolved issues are: (1) definitions of key terms, (2) priorities for pier removal and fund use, (3) the concept of total pier area, amount of pier removed, remaining, or offset, (4) the special study area process for piers 15-29, (5) details of the financing provisions, and (6) the adequacy of public access on piers. In addition, the issue also remains of how to make the Concept Agreement as revised through further negotiations consistent with the Port's Waterfront Land Use Plan and its Design and Access Element as well as amendments to the Commission's Bay Plan, San Francisco Waterfront Special Area Plan, and the Total Design Plan.

Similar to the Port of San Francisco process, BCDC has entered into a shoreline planning process for the Port of Oakland shoreline. In April, 1996, BCDC authorized its Executive Director to enter into an agreement with the Port of Oakland and the City of Oakland to jointly develop a public access plan and an implementation strategy for the Oakland waterfront and provide \$20,000 from the Port to finance BCDC staff participation in the process. After considerable negotiation, BCDC, the Port, and the City entered into such an agreement in February, 1997.¹⁹⁴ Currently, the BCDC, Port, and City staffs have made substantial progress in this planning initiative, but substantial additional work remains before any final agreement can be submitted to the three agencies.

E. OTHER BCDC RESPONSES

BCDC has also responded in other ways to the attempts to eliminate it. Those additional attempts include promoting the concepts of a mitigation bank¹⁹⁵ and of a Bay trust,¹⁹⁶ engaging

194. The agreement describes the following tasks the San Francisco Bay Conservation and Development Commission, the Port, and the City will complete by June 30, 1997: (1) the refinement of the concepts of "maximum feasible public access" in the context of areas of the Port and City that lie within issue the San Francisco Bay Conservation and Development Commission's jurisdiction, especially in connection with future Port and City development, (2) the preparation of a land use and ownership inventory map of the Oakland shoreline, (3) the preparation of a public access opportunities map, (4) the preparation of a public access constraints map, (5) the creation of a mechanism to operate a public access bank, (6) the development of a public access implementation plan, (7) the streamlining of the application review process through coordination and, to the maximum extent feasible, consolidation of Port, City, and the San Francisco Bay Conservation and Development Commission permit processes, and (8) the adoption of necessary amendments to the *San Francisco Bay Plan*. The agreement also contained a public participation and outreach element and a work program and schedule. Funding of BCDC staff participation in this project is through a similar arrangement as that used in the Port of San Francisco waterfront planning process.

195. In 1996, the San Francisco Bay Conservation and Development Commission Executive Director began developing the idea of a virtual mitigation bank. The idea was refined through several drafts and was circulated informally for comment selected persons with an interest or demonstrated expertise. In his proposed 1997-98 budget, Governor Wilson included "the Governor's Coastal Initiative," a combination of proposed plans and expenditures to "fulfill the vision of California voters who passed Proposition 20 in 1972 and of the California Coastal Act of 1976." The initiative proposed spending a total of \$12.9 million to improve public access, make local decision-making on coastal matters for accountable, enhance coastal wetlands, improve coastal water quality, and expand the utilization of information technology in coastal planning, management, and permitting. One element of the proposed initiative involved the

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expenditure of \$6.25 million for coastal wetlands restoration and protection. One part of this element proposed providing \$500,000 to the California Coastal Conservancy and \$109,000 to the San Francisco Bay Conservation and Development Commission to establish a San Francisco Bay Regional Wetlands Mitigation Bank.

The idea of developing a tidal wetlands mitigation bank raised a number of concerns with the environmental community. These concerns included (1) creating an institution that could provide an easy way to allow projects that would otherwise not be permitted, (2) not limiting the use of the bank to small fill projects, for which there is substantial evidence that they are not already being mitigated, when such evidence does not exist for larger projects, (3) any project eligible for bank credits should be water-dependent, (4) the use of banks financed with public funds should be limited to public agency projects, and (5) the project should impact less than one acre of wetlands, (6) the use of mitigation credit certificates, (6) the allegedly poor track record of existing mitigation projects, and (7) concerns about mitigation ratios.

With the concurrence of Resources Secretary Douglas Wheeler, a State Senate Budget and Fiscal Review Subcommittee withheld the requested funding and recommended putting the proposed appropriation into State Assemblyman Ted Lempert's bill, 241 A.B. 241, Cal. Leg., 1997-98 Reg. Sess. (1997). Negotiations led to the use of A.B. 241 for that purpose. The bill was eventually approved by the Assembly and the Senate. However, the Bay Planning Coalition recommended a veto for the bill because it believed that it was not included in the negotiations over the bill. Governor Wilson thereafter vetoed the bill. However, efforts to reinvigorate the concept with the support of all parties, including the Bay Planning Coalition and Governor Wilson, are currently in progress.

196. The San Francisco Bay Conservation and Development Commission first raised the idea of a Bay Trust as part of its first strategic plan. That plan contained several goals, including developing and implementing a comprehensive program for the use and restoration of Bay resources. Objective No. 3 for that goal required the San Francisco Bay Conservation and Development Commission's Bay Trust Task Force to evaluate the feasibility of establishing a new "Bay Trust" and to identify means of making better use of existing programs to acquire, manage, and enhance Bay natural resources. The task force submitted its report to the San Francisco Bay Conservation and Development Commission in December 1996. The Task Force recommended that the San Francisco Bay Conservation and Development Commission endorse the establishment of a Bay Trust in partnership with the California Coastal Conservancy. The San Francisco Bay Conservation and Development Commission endorsed the idea on April 17, 1997.

Simultaneously to the San Francisco Bay Conservation and Development Commission's consideration of this idea, the Bay Area Open Space Council was studying the idea of developing a more effective structure for financing open space projects. Resource-based, regionally-funded programs already exist in other parts of California. The Council concluded that the establishment of a new organization would be a good way to focus attention on the resource and recreational needs of the Bay Area.

State Senator Byron Sher, a former San Francisco Bay Conservation and Development Commission Commissioner, had introduced S.B. 1048 to establish the type of program envisioned by the Council. Numerous Bay Area Assembly members and Senators had joined as co-authors of the bill. S.B. 1048, Cal. Leg., 1997-98 Reg. Sess. (1997). With minor changes, the San Francisco Bay Conservation and Development Commission supported the bill as the vehicle to establish the Bay Trust. Subsequently, however, the bill was placed in suspense in the Senate Appropriations Committee.

in strategic planning,¹⁹⁷ and implementing a public outreach and information program.¹⁹⁸

VI. CONCLUSION

Prior to 1965, San Francisco Bay was generally considered potentially prime real estate, appropriate for immediate development. As a result of physical, economic, and political condi-

197. Since 1993, the San Francisco Bay Conservation and Development Commission staff has been involved in strategic planning as a means to developing a more coherent plan for future BCDC actions. On December 7, the San Francisco Bay Conservation and Development Commission adopted its first strategic plan. Since then the San Francisco Bay Conservation and Development Commission has twice amended its strategic plan. The current plan contains a vision statement that states that "BCDC will be relied upon to lead in achieving a larger, healthier Bay and improving public access to it," a mission statement that states that "BCDC is dedicated to the protection and enhancement of San Francisco Bay and to the encouragement of the Bay's responsible use," identifies four ongoing goals [prevent unnecessary Bay fill, maximize public access where compatible with resource protection, encourage and support appropriate development of the shoreline, and promote the optimum use and management of Bay resources], five three-year goals [develop and implement a comprehensive program for the use and restoration of Bay resources, develop and implement a responsible and effective funding strategy, maintain and improve an effective enforcement program, establish a more effective, collaborative Baywide regulatory program, and increase awareness and visibility the San Francisco Bay Conservation and Development Commission's programs], and a series of nine-month objectives to help implement those goals. The current plan will provide the basis for the San Francisco Bay Conservation and Development Commission's 1997-98 and 1998-99 work programs and its budget requests for these years, as required by Governor Wilson's Executive Order.

198. The San Francisco Bay Conservation and Development Commission's public outreach program has resulted in the preparation of a compliance assistance brochure, over 1,100 of which have been distributed to various local agencies for further distribution to the public. The San Francisco Bay Conservation and Development Commission public outreach task force has met on several occasions to develop a strategy to improve public awareness of BCDC. Subsequently, the San Francisco Bay Conservation and Development Commission accepted a report from the Task Force that contains seven short-term goals and three long-term goals. Subsequently, the San Francisco Bay Conservation and Development Commission adopted an amended strategic plan that includes increasing awareness and visibility of the San Francisco Bay Conservation and Development Commission's programs as one of the Commission's five three-year goals. The goal contains seven ninth-month objectives, all of which are related to public outreach and reflect the San Francisco Bay Conservation and Development Commission's concern with improving public knowledge of and understanding of the San Francisco Bay Conservation and Development Commission's evolving role in Bay-related resource governance. In short, the San Francisco Bay Conservation and Development Commission has adopted and is partially implementing an aggressive public outreach program to try to become a more effective and responsive agency, to try to meet its various statutory obligations more comprehensively and efficiently, and to try to avoid future attempts to abolish it or to significantly cut back on its authority and role.

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tions, developers were filling 2,400 acres of Baylands per year. The entire Bay shoreline provided only approximately four miles of public access. The future of the Bay as a functioning estuary and resource of incalculable wealth and beauty was in serious jeopardy.

Unprecedented public lobbying of the State Legislature and then Governor Ronald Reagan resulted in the creation of BCDC in 1965. The result was the McAteer-Petris Act and later the *San Francisco Bay Plan*. Those two documents and their subsequent implementation very successfully addressed the basic problems of uncoordinated, haphazard filling of the Bay and a lack of public access, while allowing significant development along the Bay shoreline. The process of filling San Francisco Bay was halted and even reversed. Substantial amounts of new and improved public access to and along San Francisco Bay have been created. Significant new development has occurred along the Bay shoreline. Subsequently, a similar story evolved in the mid 1970's concerning the protection of the Suisun Marsh. During the first twenty to twenty-five years of BCDC's existence, BCDC provided a model of successful regional governance¹⁹⁹ while addressing significant problems before recognition of those problems became popular and common nationwide.²⁰⁰

During the 1980's and into the 1990's, however, changing political, social, and economic forces, including increased population growth, increased traffic, concern over seismic safety, economic recession and then rebound and growth, concerns about the size, nature, and legitimacy of government, changing shipping technology, and changing legal constraints on environmental and land use regulation, had an accelerating impact on BCDC. The specific manifestations of these forces in the Bay Area involved BCDC in a series of disputes with seri-

199. See San Francisco Bay Conservation and Development Commission, *The San Francisco Bay Conservation and Development Commission Accomplishments*; SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION 1996 ANNUAL REPORT.

200. See, e.g., the San Francisco Bay Conservation and Development Commission's early recognition of and involvement in analyzing sea level rise and its possible implications.

ous economic and political overtones and often found BCDC opposed to powerful political forces. These disputes were not easily or always satisfactorily resolved. Opposition to BCDC grew, and immediate BCDC support waned as the range of environmental issues expanded and diluted public support. Nevertheless, BCDC's future did not seem in serious doubt.

However, in 1995, two serious attempts were made to eliminate BCDC in the name of governmental efficiency. First, State Senator Milton Marks and then Governor Pete Wilson proposed doing away with BCDC and incorporating its duties into the California Coastal Commission, the San Francisco Bay Regional Water Quality Control Board, or some combination of the two. However, the strenuous efforts of the environmental community and the business and development community caused both attempts to be abandoned.

BCDC's response to its attempted elimination occurred on several fronts. BCDC adopted numerous changes to its regulations to speed up the permit application review process and to respond to other objections to BCDC procedures. BCDC developed closer relations with Caltrans, the Resources Agency, the Ports of San Francisco and Oakland, and the dredging community, as well as attempted to revitalize its relationship with its progenitor, the Save San Francisco Bay Association, and other environmental and resource protection groups. BCDC continued its work with dredging and dredged-material disposal through the Long Term Management Strategy process and continues to do so. BCDC helped to plan and to implement the Sonoma Baylands tidal marsh restoration project and is currently involved in helping to plan the proposed Hamilton Air Force Base wetlands restoration project. BCDC has hired a staff engineer with the financial support of Caltrans. BCDC improved its working relationship with Caltrans and engaged in early planning to eliminate or to reduce the conflicts that characterized their dealings with each other in the late 1980's and the early 1990's. BCDC entered into detailed negotiations with the Port of San Francisco over the appropriate level of waterfront development and public access. BCDC also worked with the Port of Oakland to develop a waterfront development and public access plan for portions of the Oakland waterfront.

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BCDC has worked with other local, state, and federal agencies on North Bay planning. BCDC has adopted a strategic plan and is currently improving its public outreach program.

Some of these efforts have been successful while the results of others remain uncertain. BCDC's permit streamlining and larger program of regulatory reform is largely complete and has increased efficiency in BCDC's review of permit applications without any significant reductions in BCDC's decision-making. BCDC and the other agencies involved in the LTMS have made great strides in a more efficient permit process that also provides greater resource protection. Much still remains to be done in the LTMS process. Although BCDC's relationship with Caltrans has improved at both the staff and Commission levels, those improvements have not avoided continuing disagreements over legal authority and appropriate policy. However, the process for developing a design for the new East Span of the San Francisco-Oakland Bay Bridge may bode well for this continuing process. San Francisco and Oakland shoreline planning efforts have resulted in some significant interim successes, but much still remains either unresolved or yet to be addressed. BCDC has made substantial efforts to improve its public outreach and to plan for its future. It has also improved relations with many of the interest groups with which it must interact.

If BCDC has achieved generally positive but still somewhat mixed results from its recent efforts, what can these efforts and results say about regional government in general and BCDC's continuing role specifically? BCDC's successes in its first two decades resulted from many factors, some of which have already been discussed.²⁰¹ However, BCDC now faces new prob-

201. The State Legislature gave the San Francisco Bay Conservation and Development Commission a relatively straight-forward and limited set of goals and objectives that enjoyed wide public support. The Legislature also limited the San Francisco Bay Conservation and Development Commission's permit jurisdiction. The San Francisco Bay Conservation and Development Commission has a large membership with significant representation from all levels of government and the public. Its large and diverse membership and especially the requirement of the McAteer-Petris Act that the San Francisco Bay Conservation and Development Commission membership must include 13 members who represent local government and that the San Francisco Bay Conser-

lems and issues about which no clear public consensus has developed. These problems and issues may be more divisive than the issues BCDC faced in its early existence and involve higher economic stakes. In response to these problems, BCDC has recently emphasized cooperation and consensus building more than a strict regulatory approach and has taken more of a problem-solving approach rather than a strictly legalistic approach. It has also tried to retain its objectivity, its independence, its reputation for fairness, and its ability to make reasonable decisions based both on policy and reason as well as on consensus.

Although BCDC's future may seem somewhat uncertain, the need for a regional agency such as BCDC remains as great as ever. Even recently, BCDC has demonstrated the importance of its role both substantively and procedurally. For example, BCDC has forced the dredging community to consider the upland disposal of dredged material for beneficial use much more seriously. BCDC has required Caltrans to provide mitigation and public access that it initially did not want to provide. BCDC has become very active in cooperative planning efforts along the San Francisco and Oakland waterfronts. BCDC provided a regional forum for addressing issues associated with the construction of the new San Francisco Giants stadium that many believed had not been adequately addressed at the local level. BCDC has proven effective in several important enforcement efforts that have helped clean up illegal houseboats in Alviso Slough and in Redwood Creek and, to some extent, in Richardson Bay. BCDC has helped significantly with marsh restoration efforts at Charleston Slough in Mountain View and at Pier 98 along the southern San Francisco waterfront and is now actively involved in planning for a major marsh restoration project at the former Hamilton Air Field in Marin County. BCDC is also now considering the many issues that surround plans for the placement of fill in the Oakland Estuary by the Port of Oakland to create new fish and wildlife habitat.

vation and Development Commission must hold a public hearing on all major permit applications and cannot issue a permit unless at least 13 of the 25 voting members approve a project have fostered a consensus-based approach to problems.

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In short, the need for an agency like BCDC is as great as it has ever been and may well be greater as the Bay Area enters the twenty-first century. BCDC has made substantial efforts to respond to critics of the agency and to the general trend toward smaller, or at least more efficient, government, while continuing to help protect the many important resources that rely on San Francisco Bay for their existence, and to respond to both the new imperatives and new concerns of the region, state, and nation. BCDC must successfully navigate between too little change, which could result in future attempts to limit its authority or eliminate it altogether, and too much change, which could result in BCDC's failure to provide adequate protections for our magnificent Bay and its many irreplaceable resources. Only time will tell if BCDC can attain this difficult but necessary balance.