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THE REGULATION OF DREDGING

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THE REGULATION OF DREDGING

Summary of the report, "The Regulation of Dredging," by the San Francisco Bay Conservation and Development Commission staff.

This is a summary of a report prepared by the San Francisco Bay Conservation and Development Commission pursuant to an interagency agreement with the Resources Agency. The authorization and funding for the study is provided for by Senate Bill 2418 (Marks) of the 1973-1974 legislative session.

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INTRODUCTION

In recent years, as interest in environmental issues and resource management has become more prominent, both the Federal and State Governments have increased their participation in the regulation of dredging. Under State Senate Bill 2418, the State Resources Agency was required to establish temporary procedures for an experimental "one-step" coordination system intended to speed the processing of permit applications for specified dredging projects within the jurisdiction of the San Francisco Bay Conservation and Development Commission (BCDC) and also report to the Legislature on the problems in the regulatory process, make recommendations concerning those problems, and advise the Legislature as to their possible statewide application. Figure 1 shows the jurisdictional boundaries of agencies that regulate dredging in the Bay Area.

FINDINGS

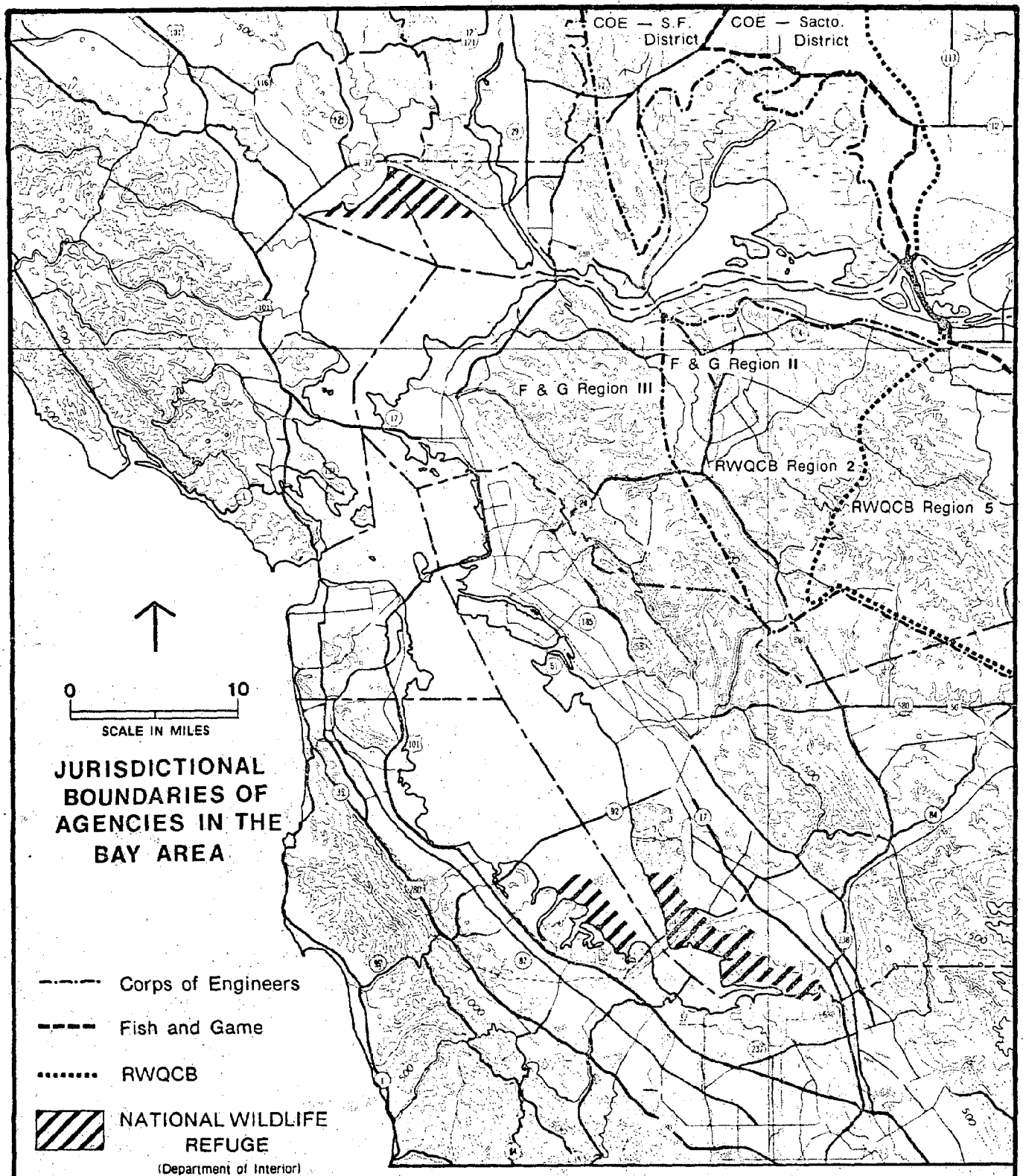
This report supersedes an earlier study, "The Regulation of Dredging, Part I," prepared under the same authorization, that dealt with the legal basis for dredging regulation, the procedures of the various agencies regulating dredging in San Francisco Bay, and the formal and informal relations among these agencies. Based on those analyses, the earlier report also contained fourteen findings about the regulatory process. These findings were adopted by the Commission on August 21, 1975, following a public hearing. Because these findings are the basis for the recommendations made in the present report, it is appropriate to list them here:

1. There is no comprehensive coordination of the permit application process.

2. Without coordination, agencies are required to comment several times on project applications.

3. The complexity of the existing regulatory framework necessitates a high level of applicant expertise to expedite permit processing.

4. Dredging is generally considered as an isolated activity in the regulatory process rather than as an integral part of a larger development.



BCDC jurisdiction and area of dredging permit coordination generally lie within a line 100 ft. inland of Bay shoreline and including those areas shaded grey.

AGENCIES WITH STATEWIDE JURISDICTION

STATE

The Resources Agency

State Lands Commission

State Water Resources Control Board

FEDERAL

U.S. Fish and Wildlife Service
(Dept. of Interior)

National Marine Fisheries Service
(Dept. of Commerce)

Environmental Protection Agency

Figure 1

5. Although all agencies claim to protect the "public interest," it is unclear what is meant by this term and whether or not it is, in fact, being protected.

6. Most agencies formal policies are so general as to necessitate case-by-case decision-making even on non-controversial projects.

7. An objection to a given project by a single-purpose agency can act as a veto over the application.

8. Although all regulatory agencies have procedures for soliciting comments on projects, these procedures are not coordinated among the agencies and are only rarely used.

9. State agencies derive a great deal of their authority from Federal agency procedures.

10. There is a considerable amount of substantive jurisdictional overlap among agencies at all levels of government.

11. Agencies regulate many activities besides dredging.

12. Agencies that regulate dredging may lack appropriate geographical jurisdiction.

13. Although most agencies have some limited alternatives in their processing procedures, as a general rule projects of all sizes and applicants of all types must seek their approvals in basically the same manner.

14. The laws and regulations which surround the dredging process are currently in a very dynamic state.

NEW FINDINGS

In addition, the following additional findings were identified while preparing the final report:

15. Dredging is regulated in all areas of the State under basically the same laws, although the agencies involved, the standards applied, and the procedures used vary according to regional factors. Primary examples of statewide agencies are the nine Regional Water Quality Control Boards and the three U. S. Army Corps of Engineers Districts.

16. The Department of Fish and Game and the California Coastal Zone Conservation Commission conduct major permit programs which regulate dredging outside of the Bay Area.

17. The State Board of Reclamation conducts a permit program regulating dredging within the flood plain of the San Joaquin and Sacramento river systems.

18. The California Tahoe Regional Planning Agency and the Tahoe Regional Planning Agency both regulate dredging in Lake Tahoe.

19. Regulations recently published by the U. S. Army Corps of Engineers enlarge the Corps' geographical jurisdiction and provide for administrative practices which can expedite the processing of applications. Because the number of applications may increase, the workload of agencies that comment on Public Notices or issue certifications of conformance may also increase.

20. A formal coordination system for dredging permit applications is not likely to produce benefits to justify its continuance beyond the expiration of this study's funding period.

PROBLEMS AND ANALYSIS

In general, the regulatory goals of the agencies involved in dredging are being met, although certain problems exist with the regulatory mechanisms. The study divides these problems into three groups: (1) duplicated activities; (2) ambiguous requirements; and (3) what appears to be unnecessarily repetitive or detailed regulation.

"Duplicated activities" encompass all reviews or procedures that are repeated at least once during the processing of the same application. This duplication is the result of the number of regulatory agencies involved either directly or indirectly in either a permitting or commenting capacity. A summary of agencies involved in regulating dredging is given in Table I. Dredging is regulated by parallel review structures involving State agencies on one level and Federal agencies on another. A request to dredge in San Francisco Bay usually requires dealing with between seven and nine agencies. No recommendation is made to change the existing number or substantive jurisdiction of any of them, but certain procedural consolidations, discussed below, can be undertaken.

For every review undertaken by a State agency, there is often a comparable review of the same subject by a Federal agency, and vice versa. Some duplication of review may exist even within the same governmental level. Land use reviews are done by the State Lands Commission, the U. S. Army Corps of Engineers, and by either BCDC or the California Coastal Zone Conservation Commission. Fish and wildlife reviews are undertaken by three agencies--the United States Fish and Wildlife Service, the National Marine Fisheries Service, and the Department of Fish and Game. (Only among the agencies responsible for water quality is there little duplication of review.) Overall duplication of review could be reduced if Federal and State agencies were to develop mutually acceptable regulatory policies and cooperative processing agreements.

The procedural steps in the permitting process itself are also a source of duplicated activity. Often more than one agency undertakes the same procedural step, resulting in unnecessary and prolonged work for both agencies and applicants.

TABLE I

SUMMARY--AGENCIES REGULATING DREDGING

Agency	Principal Area of Concern	Permitting or Commenting Authority	Geographic Jurisdiction	Legislative Authorization
Local				
City, County, Special District	Land Use	Permit/Comment	Local	Charter or Legislative Grant of Authority.
State				
San Francisco Bay Conservation & Development Commission	Land Use	Permit	Regional	McAteer-Petris Act, Cal. Gov. C. Sec. 66600, et seq.
California Coastal Zone Conservation Commission	Land Use	Permit	Coastal Zone	California Coastal Zone Conservation Act, Cal. Pub. Res. C. Secs. 27000-27302.
Regional Water Quality Control Board	Water Quality	Permit	Regional	Porter-Cologne Act, Cal. Wat. C. Sec. 13000, et seq. FWPCA Secs. 401, 404, 33 U.S.C. 1251.
State Water Resources Control Board	Water Quality	Permit	Statewide	Porter-Cologne Act, Cal. Wat. C. Sec. 13000, et seq. FWPCA Secs. 401 404, 33 U.S.C. 1251.
State Lands Commission	Land Use/Royalties	Permit	Statewide	Cal. Pub. Res. C. Sec. 6301.
Department of Fish and Game	Fish and Wildlife Resources	Permit/Comment	Statewide	Cal. Fish and Game C. Secs. 1600 through 1603, 5650(f), 5653. Fish and Wildlife Coord. Act, 16 U.S.C. 661.
Reclamation Board	Flood Control/Land Use	Permit	Regional	Cal. Wat. C. Sec. 8710.
California Tahoe Regional Planning Agency	Land Use	Permit	Regional	Cal. Gov. C. Sec. 67000, et seq.
Tahoe Regional Planning Agency	Land Use	Permit	Regional	P.L. 91-147, 83 Stats. 306 (1969) Cal. Gov. C. Sec. 66800, et seq., Nev. Rev. Stats. Secs. 227.190, et seq.
Resources Agency	Resource Management	Comment	Statewide	CEQA, Cal. Pub. Res. C. Secs. 21000, et seq. Senate Bill 2418 (1974), Cal. Har. Nav. C. Secs. 160 through 170.
Federal				
U. S. Army Corps of Engineers	Navigation, Water Quality, Land Use, Fish and Wildlife	Permit	Regional	Rivers and Har. Act. Sec. 10, 33 U.S.C. 403. Fish and Wildlife Coord. Act, 16 U.S.C. 661. FWPCA Sec. 404, 33 U.S.C. 1251, et seq.
United States Fish and Wildlife Service	Fish and Wildlife	Comment	Statewide	Fish and Wildlife Coord. Act, 16 U.S.C. 661.
National Marine Fisheries Service	Marine, Estuarine and Anadromous Fish	Comment	Statewide	None.
Environmental Protection Agency	Water Quality	Comment	Statewide	NEPA, 42 U.S.C. 4231, et seq. FWPCA Secs. 401, 404, 33 U.S.C. 1251, et seq.

For example, while a dredging application is being processed there may be as many as four independent solicitations for comments on it, coming from the U. S. Army Corps of Engineers via their Public Notice, the BCDC or the California Coastal Zone Conservation Commission, the State Lands Commission, and the Regional Boards.

Ambiguous requirements constitute the second broad group of problems in the regulatory process. Applicants often have difficulty in anticipating the requirements that will be imposed on their dredging projects. Although each agency's general concerns and requirements are clear, applicants may be unable to easily determine whether or not sediment samples will be required, whether a State Lands permit (which frequently takes a considerable amount of time to obtain) will be necessary, whether an application will be processed administratively (substantially reducing the time requirements for notice and hearing), or whether any environmental documents must be prepared. These uncertainties cause delay and additional workloads.

The principal complaint of dredging applicants is the length of time it takes to obtain the necessary approvals. As the regulatory process now stands, an applicant cannot estimate, within an accuracy of two or three months, how long the processing of an application will take. This hinders applicants from soliciting contract bids or scheduling construction. Although most of the permit-granting agencies involved in the regulation of dredging have statutory limits on the time they can take to consider an application, most of the time limits are illusory because no sanctions are imposed to compel agency performance. Commenting agencies have virtually no time limits. For example, State agencies that want to comment on dredging projects may delay their comment submission until the close of the Corps' Public Notice period. Some of the agencies have indicated that substantial workloads coupled with understaffing have made them unable to comply with response-time requests.

State and Federal agencies need up-to-date guidelines for the substantive reviews they are obligated by law to undertake. In many cases, the sole agency guidance is found in the organic law that established the agency. The absence of formal policy guidance has two effects. First, applicants have difficulty determining what is expected of them in terms of project requirements. Applicants who have been through the process more than once may have some general notions of what is or is not acceptable. But certain agencies have indicated that a change in personnel may result in a change in informal policies--often the only policies that the agencies have--so the experienced applicant has no necessary advantage. This void in clear policy guidance creates a situation that is difficult for the applicant and time-consuming for agencies. Second, the lack of guidance on policies makes agency review difficult. Decisions are based on a case-by-case review, without any direction that ensures a consistent approach.

The third group of problems concerns unnecessarily repetitive or detailed regulation. Approximately half of the applications considered by the BCDC since 1970 have been for the dredging of less than 10,000 cubic yards, considered a small project in the Bay Area. These projects may have relatively little significant environmental or land use impact, yet require full review. One application submitted to BCDC during the dredging coordination experiment involved the dredging of less than 200 cubic yards of material which would be loaded onto trucks and taken away for dry land disposal. The applicant had to be told that even if all agencies used every procedural shortcut at their disposal, the regulatory process would still require review by at least nine agencies, take at least one month, and cost at least a few hundred dollars in application fees.

Most agencies submit every project proposed to exactly the same review, which means that applicants face the same steps in each agency regardless of the significance of their project. The majority of dredging reviews are for maintenance projects, on which basic land use, disposal, ownership, and navigational and environmental questions have been addressed. It

seems inappropriate to review a maintenance project to the same degree as a new project.

THE COORDINATION EXPERIMENT EVALUATION

The experiment in centralized processing of permit applications for specified dredging projects within the jurisdiction of BCDC was not an effort to establish a permanent regulatory overhaul, but rather to try out a number of ideas to decide if permanent reform of some type was in order. The experiment was designed to aid both applicants and agencies by providing a central office (BCDC) to which all inquiries, documents, and decisions could be directed and establishing a single application form acceptable to all Federal and State agencies. Projects coordinated were limited to new dredging of 100,000 cubic yards or less within a twelve-month period and any maintenance dredging.

On receipt of an application, the Permit Coordinator first determines if it is complete. Completed applications are sent to the permitting and commenting agencies for review and notice of all decisions, status reports, or comments are returned to the Coordinator. There are time limits on these responses, but adherence to them has been erratic.

Agencies have differed over whether or not the initial screening of applications has speeded up the process. Experienced applicants reacted rather negatively because preliminary agency contacts were still required and all the information previously required was still asked for. However, inexperienced applicants found that a great deal of time and effort was saved because they were able to determine in advance with which agencies preliminary contact is necessary, what types of information are required, and how applications are to be filled out. Agencies have said that the screening of applications for completeness is an effective service.

Nevertheless, the experiment does not bear out the belief that a formal coordination system is the answer to time delays. The major delays in the processing of permits result from both the internal operating procedures of the agencies and the cluttering of the process with projects that should not be

extensively reviewed. Certain aspects of coordination should probably be retained--such as the single application form and the information service for applicants--but continuance of temporary coordination on a permanent basis is not justified. The proper approach for coordinated processing should involve statewide and regional agencies. At the statewide level, the Resources Agency should be designated to oversee the operations of designated regional agencies. An existing regional agency should be designated as the "principal agency" in its area. Where such exist, agencies approved under the Federal Coastal Zone Management Act should be given prime considerations because these agencies can compel Federal compliance with their plan and permit decisions. These two groups would be responsible for implementing this study's recommendations and overseeing the processing of dredging applications. Imposing these functions on existing agencies should require minimal, if any, additional personnel once initial procedural mechanisms are established.

RECOMMENDATION IMPLEMENTATION

The recommendations for improving the regulatory process are based on the belief that the government must continue to regulate dredging in a comprehensive and cautious manner in order to protect vital resources and provide a healthy environment. The government has a related responsibility to respond to dredging applicants in a timely, consistent, and reasonable manner. These recommendations, listed below and summarized in Table II, can be applied statewide (with regional variations for specific criteria) and, for the most part, can be enacted administratively.

I. Each agency regulating dredging should adopt regulations into the California Administrative Code to formalize the procedures used in the processing of applications or comments on applications. These regulations should include all administrative policies capable of being made into general rules other than those specifically designated for discretionary determination.

II. Each of these agencies should also formally adopt substantive policies and standards to

TABLE II

SUMMARY OF
RECOMMENDATIONS

Recommendation	Implementation Body
I. Adopt Administrative Regulations to guide procedures	Agencies
II. Adopt policies to guide decision-making	Agencies
III. Impose time limits to compel timely processing	
A. Permitting Agencies	Resources Agency and Agencies
B. Regional Water Quality Control Boards	Legislature
C. Commenting Agencies	Resources Agency and Agencies
IV. Clarify CEQA Guidelines regarding maintenance and small new dredging	Resources Agency
V. Authorize long-term approvals for maintenance dredging	Agencies
VI. Interagency Relations	
A. Designate "Supervising Agency"	Governor
1. Designate principle agencies	Supervising Agency
2. Provide statewide guidance	Supervising Agency
3. Annual progress report to Governor and Legislature	Supervising Agency
B. "Principle Agency"	
1. Provide information	Principle Agency
2. Prefiling discussions	Principle Agency
3. Receive applications	Principle Agency
4. Issue joint public notice	Principle Agency and Corps
5. Hold joint hearings	Agencies and Corps
6. Prepare standard application forms	Agencies and Corps
7. Define terms	Agencies
8. Coordinate appropriate applications	Principle Agency
9. Enforce time limits	Principle Agency
10. State position on permits	Governor
VII. Declaration of State policy	Governor and Legislature
VIII. Review budget and staff requirements	
A. Staff changes	Resources Agency and Agencies
B. General fund support for Fish and Game	Resources Agency and Legislature
IX. Alter notice requirements for waste discharge requirements	State Water Resources Control Board and Regional Water Quality Control Board
X. Oversight hearings	Legislature
XI. Federal Agency Action	Governor and Legislature

establish the criteria for decision-making. In particular, key phrases such as "significant water quality effects," "significant concentrations," etc., should be defined. Resources policies of statewide importance should be developed in conjunction with the State Resources Agency.

III. Time limits should be imposed that require agencies to process applications and requests for comments within a reasonable period of time. BCDC has a time limit that compels automatic issuance of permits if time limits are not complied with, and the same type of limits are recommended for all permitting and commenting agencies. Extensions of time limits should be available only when agreed to by the applicant.

IV. Although environmental documents are usually not a significant problem in dredging projects because they are not frequently required, clarification of some aspects of the California Environmental Quality Act Guidelines concerning dredging would eliminate some uncertainties. For example, the Resources Agency is currently revising the Guidelines and should specify all new dredging of 10,000 cubic yards or less within a twelve-month period and all maintenance dredging as an example of an existing class of categorical exemption.

V. All aspects of an agency's concerns, including anticipated maintenance dredging, should be considered in the initial evaluation of a project and permits should be granted for extended time periods.

VI. As noted earlier, the coordination experiment suggests that full formal coordination of dredging applications is not advisable, but that some form of cooperative effort is necessary. It is recommended that the responsibilities for ensuring these cooperative efforts be carried out within the framework of existing State agencies.

VII. It is recommended that the Legislature and Governor acknowledge as State policy that all State agencies are to process dredging permit applications and comment requests as expeditiously as possible without jeopardizing natural resources or environmental controls; that all State agencies are to abide by established time limits; that the time limits are to be considered maximum rather than a normal operating goal; and that, whenever possible, State agencies shall consider project applications concurrently. This statement could be in the form of a directive from the Governor or a legislative resolution.

VIII. Adequate funds and personnel must be provided so that time limits can be met and the recommended regulations, policies, and procedural changes called for can be adopted and implemented by December 31, 1976.

IX. State agencies should be given the flexibility to participate in joint public notices with the U. S. Army Corps of Engineers and other State agencies. The Regional Water Quality Control Boards' regulations should be amended to allow this type of notice.

X. Most of the recommendations in this report can be carried out administratively. It is recommended that the Legislature hold oversight hearings in early 1977 to assess their status and effect.

XI. Many of the problems that State agencies face also occur in Federal agencies; it is recommended that the Legislature adopt a resolution endorsing Federal-State cooperation in the regulation of dredging, and urging the Federal Government to take similar steps with respect to Federal agencies as are recommended here for State agencies.

CONCLUSION

These are the recommendations that the BCDC, as the study agency, proposes. Some require State legislative action. Most can be implemented immediately by the regulatory agencies themselves without legislative action. Change is always difficult, but the pressures today are strong for a change in excessive and unnecessary regulations. If the changes are made haphazardly, the results will be unpredictable and possibly harmful to the environment we all want to protect. The approach proposed here will simplify the regulatory maze and speed application processing without undue disruption of the affected agencies' other activities or jeopardizing the critical protection of natural resources.

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