APPENDIX C

DMMO AGENCIES

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This appendix further summarizes the authorities and permitting processes for the Dredged Material Management Office (DMMO) agencies with regards to authorization for San Francisco Bay Area dredging and dredged material disposal projects.

U.S. ARMY CORPS OF ENGINEERS, SAN FRANCISCO DISTRICT (USACE)

Under Section 10 of the Rivers and Harbors Act of 1899, the USACE regulates work in navigable waters, including dredging and disposal of dredged material, because such work may affect navigability. Navigable waters are those subject to the ebb and flow of the tide, and include ocean waters to the extent of the territorial sea (approximately three nautical miles from the coastline). Areas such as tidal wetlands are considered navigable by law, regardless of one's actual ability to navigate such waters. In addition, areas that were navigable historically, such as diked baylands, are subject to regulation under Section 10.

Under Section 404 of the Clean Water Act (CWA), the USACE shares responsibility for the regulation of discharges of dredged or fill material into waters of the U.S. with U.S. Environmental Protection Agency (USEPA). The CWA defines waters of the U.S. very broadly, to include all navigable waters as well as those that are or could be used for interstate commerce, by migratory birds, for tourism, for irrigation, or for fish or shellfish production. In practice, most all waters and wetlands are considered waters of the U.S. and therefore, are regulated under Section 404.

In addition, under the Marine Protection Research and Sanctuaries Act (MPRSA), the USACE issues permits for the transport of dredged material for the purpose of ocean disposal. The USACE, with USEPA oversight, is also responsible for determining whether proposed dredged material meets the criteria for ocean disposal outlined in Section 103 of the MPRSA.

Finally, the USACE, in its Civil Works mission, undertakes operations and maintenance dredging of federal channels and basins and performs new work projects, such as harbor deepening, that are authorized by Congress. Although the USACE does not issue itself permits, the agency is required to comply with all pertinent laws and regulations in its activities. These civil works projects are reviewed by the DMMO in the same manner as are other dredging and dredged material disposal projects, although the types of approvals required from other agencies may be different from those for non-federal projects.

Potential project proponents request a Department of the Army permit for dredging and dredged material disposal from the USACE through the DMMO. The USACE is responsible for considering the full public interest for both the protection and utilization of water resources.[1] This

1 33 CFR 320.4

process is called the *public interest review*. The majority of dredging projects in San Francisco Bay (the Bay) are subject to public review through the issuance of a USACE Public Notice.[2] The Public Notice is the primary method of providing public agencies and other interested parties with information on the project and its potential impacts, and of soliciting comments and gathering information necessary to evaluate the probable impact of a proposed project on the public interest. During the Public Notice comment period, interested parties may request that a public hearing on the permit application be held. A public hearing will be held if it is determined that an issue substantial to the proposed project has not been fully addressed in the Public Notice. The public hearing serves as a forum for gathering further information on a proposed project for use by the USACE in evaluating the permit application. The USACE accepts public comment on the project, based on the Public Notice, and provides the applicant with an opportunity to respond. The application is reviewed, balancing the need and expected benefits against the probable impacts of the work, taking into consideration all comments received and other relevant factors.

If the application involves discharge of dredged or fill material into "waters of the United States" the USACE will review the application in accordance with the guidelines promulgated by the Administrator of USEPA under authority of Section 404(b)(1) of the CWA. Before issuing a permit, the USACE must also review the project pursuant to National Environmental Policy Act (NEPA). As part of compliance with the Section 404(b)(1) guidelines and NEPA, the applicant must provide an alternatives analysis to demonstrate there are no practicable alternatives to the discharge that would cause less environmental damage.

If the application involves discharge of dredged material into ocean waters, the USACE will review the application in accordance with the guidelines promulgated by the administrator of the USEPA under the authority of Section 103 of the MPRSA.[3] Before issuing a permit, the USACE must also review the project pursuant to NEPA.

After review of the project has been completed, the USACE will determine, in accordance with the record and applicable regulations, whether the permit should be issued, issued with conditions, or denied. A Statement of Finding is prepared, documenting and justifying the decision.

The USACE is also responsible for monitoring permit compliance, including the permittee's adherence to all permit terms and conditions of Department of the Army Permits.

U.S. ENVIRONMENTAL PROTECTION AGENCY (USEPA)

The CWA and MPRSA provide for USEPA oversight of Department of the Army permits issued by the USACE for disposal of dredged material.

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2 Only those projects proposing upland disposal may be permitted under the USACE's Nationwide general permit authority, which, because impacts have been determined to be less than significant, do not generally require a public notice. Depending on the scope of the project, even some of these (e.g., sand mining) require full public review.

3 40 CFR 227-228

The 404(b)(1) Guidelines, promulgated by the USEPA Administrator, form the cornerstone of USEPA's oversight of the USACE's CWA program. The USEPA also has "veto" authority under Section 404(c)[4] of the Clean Water Act. Regulations implementing Section 404(c) state that USEPA is authorized to prohibit or otherwise restrict use of a disposal site when it determines that disposal of dredged or fill material will have an unacceptable adverse effect on municipal water supplies, shellfish beds, fisheries areas (including spawning and breeding areas), wildlife, or recreational uses. In such cases, the USEPA Region recommends to the USEPA Administrator to restrict or prohibit disposal at the proposed site. The USEPA Administrator makes a final determination to affirm, modify, or rescind the region's recommendation, after consultation with the Chief of Engineers of the USACE. Section 404(q) allows for elevation of policy issues and individual permit decisions to the agencies' headquarters. USEPA can only elevate specific individual permit cases that involve an aquatic resource of national importance.

The USEPA is responsible for designating ocean disposal sites under MPRSA. In the San Francisco Bay Area, the only multi-user ocean disposal site is the San Francisco Deep Ocean Disposal Site (SF-DODS), which USEPA designated in 1994 through the SF-DODS Rule, was published after public review and comment. The SF-DODS Rule includes a tiered site management and monitoring program that provides specific requirements for site monitoring. This program requires more extensive monitoring only when results obtained during lower tier(s) monitoring indicate potentially adverse impacts. The site management and monitoring program also includes permit conditions that are applicable to every project using SF-DODS as the designated disposal site. These permit conditions are intended to minimize adverse impacts to marine and other resources. USEPA recently finalized the annual disposal limit at SF-DODS with an amendment to the Rule, published in July 1999. It provides for an annual limit of 4.8 million cubic yards per year, and modifies certain permit conditions for improved clarity.

A national Memorandum of Agreement (MOA) between USEPA and USACE, under the authority of Section 404(q) of the Clean Water Act, was completed in 1992. The MOA applies to regulatory authorities under Section 404, Section 10 of the Rivers and Harbors Act, and Section 103 of MPRSA. The purpose of the MOA is to establish policies and procedures to minimize duplication, needless paperwork, and delays in the issuance of permits. Local coordination procedures between USEPA Region IX and the USACE South Pacific Division were established in 1994. The coordination procedures were intended to ensure more effective interagency coordination, full discussion of issues, and cooperative working relationships. Although the local coordination procedures and Part II of the MOA focus on improving communications and cooperation among the two agencies, Section 404(q) allows for elevation of policy issues and individual permit decisions to the agencies' headquarters. USEPA can only elevate specific individual permit cases that involve an aquatic resource of national importance.

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4 40 CFR 231

SAN FRANCISCO BAY REGIONAL WATER QUALITY CONTROL BOARD (SFBRWQCB) AND THE STATE WATER RESOURCES CONTROL BOARD (SWRCB)

Section 401 of the Clean Water Act requires applicants for Section 404 permits from USACE to first obtain certification from the state that proposed projects will not violate water quality objectives. The SWRCB is the State of California's certifying agency. Proposed projects are reviewed by the SFBRWQCB, which makes recommendations to the State Board on the approval or denial of Water Quality Certifications.

SFBRWQCB has separate regulatory authority by the issuance of Waste Discharge Requirements under the State of California's Porter-Cologne Water Quality Control Act. The issuance of Waste Discharge Requirements (WDRs) fulfills the requirement for state certification of a project and allows the USACE to proceed with issuance of a Section 404 permit. WDRs are typically only issued for large, complex dredging and disposal projects, or for those with potential to impact particularly sensitive areas. For example, the USACE maintenance dredging program for the entire San Francisco Bay is usually authorized by WDRs, as are port or navigation channel deepening projects, upland rehandling facilities, and beneficial reuse projects. The Regional Board makes decisions on the issuance or denial of WDRs at its monthly public meetings.

For either type of authorization, the applicant must submit a DMMO Consolidated Permit Application form. When the application is determined to be complete, staff writes draft WDRs or Water Quality Certifications that are circulated to the project proponent and interested parties. Within certain limits, the details of the permit can be modified based on comments from the project proponent or interested parties. If all parties agree on the details, the WDRs or Water Quality Certification will be presented to the Board as an uncontested item. The Board adopts the majority of these items without discussion. If the interested parties and staff cannot agree on the details of the permit, it is taken to the Regional Board for a public hearing whereupon the Board decides the final requirements or recommendations for the permit. For WDRs, adoption by SFBRWQCB constitutes issuance of the permit. For Water Quality Certifications, the SFBRWQCB adopts a recommendation to SWRCB on either approval conditions or denial of the permit. The State Board then makes the final certification decision, usually following the Regional Board's recommendation.

STATE LANDS COMMISSION (SLC)

The State of California acquired ownership of all tidelands and submerged lands and beds of navigable waterways upon admission into the United States in 1850. The State holds these lands, including some areas like diked baylands that are not now, but in the past have been navigable, for the benefit of all people of the state. Dredging, disposal, or beneficial reuse proposals involving use of the sovereign lands of the State could be subject to the lease or permitting requirements of the SLC. If necessary, the SLC representative on the DMMO will contact applicants directly regarding specific permitting requirements, schedules, and fees of the SLC.

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION (BCDC)

BCDC is charged with preventing unnecessary filling of the Bay and increasing public access to and along the Bay shoreline. BCDC has the authority to issue or deny permit applications and review federal consistency determinations for projects proposed in San Francisco Bay. BCDC has regulatory authority over projects proposing to: (1) extract material from the Bay (including dredging); (2) place fill in its jurisdiction (including disposal of dredged material); and (3) change the use of any land, water, or structure within its jurisdiction. BCDC has jurisdiction under two state laws, the McAteer-Petris Act and the Suisun Marsh Preservation Act. BCDC's jurisdiction covers all of San Francisco Bay and the adjacent 100-foot shoreline band, salt ponds, managed wetlands (e.g. managed for duck hunting, game refuges, or agriculture), and certain waterways around the Bay.

To obtain BCDC approval for dredging and dredged material disposal projects, applicants must submit a completed DMMO Consolidated Application form to the DMMO. If necessary, the BCDC representative on the DMMO will contact applicants directly regarding specific permitting requirements, schedules, and fees of the BCDC.

As a part of the permit application process, applicants must submit a fee to cover BCDC's permit application process. The fees vary and are based on project type, location, and total project cost. BCDC issues three types of permits:

(1) Regionwide Permit for *routine maintenance* work that qualifies for approval under an existing BCDC regionwide permit. These permits can be authorized in a short period of time by the BCDC's executive director without Commission review or a public hearing.

(2) Administrative Permit for work that qualifies as a *minor repair or improvement*. These permits can be issued in a relatively short period of time and without a public hearing on the application. However, administrative permits must be listed at one of the Commission's bi-monthly meetings where Commissioners may choose to hold a public hearing on the item before issuing a permit.

(3) Major Permit for work that qualifies as more extensive than a minor repair or improvement. A public hearing is always held on an application for a major permit. In addition, the application may be reviewed at hearings held by the engineers and designers who advise the Commission.

Once an application is deemed complete and filed, it is processed in one of three following ways depending on which type of permit is to be issued.

(1) *Regionwide Permit*. After BCDC's staff determines that an application is complete, staff has 14 days to determine whether the work proposed is authorized by an existing Commission regionwide permit. Once this determination is made, the applicant is notified and work can begin if the application is approved. A complete regionwide permit application takes no more than 44 days to process and does not require a public hearing.

(2) *Administrative Permit*. After an application is deemed complete, BCDC's Executive Director summarizes the application on a listing that is sent to the Commission, state agencies, and the general public. On this listing, the Executive Director indicates whether the staff proposes to approve or deny the application. The action is taken shortly after the BCDC meeting unless a majority of the Commission decides it wants to more fully consider the application in a public hearing. If a public hearing is requested, the applicant is notified within five days after the Commission meeting. If no public hearing is requested, administrative permit applications are typically processed in about five to eight weeks, but no longer than 90 days

(3) *Major Permit*. After an application is deemed complete, the staff distributes a summary of the application to the Commission and the public. Within 28 days of a BCDC application being filed, and at least 10 days after the summary has been distributed, the Commission holds a public hearing on the application. Unless the applicant agrees to provide BCDC with more time, BCDC must act on a permit application within 90 days of the filing of the complete application.

A permit is not effective until it has been signed by the applicant and returned to the Commission.