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San Francisco Bay Conservation and Development Comm'n v. U.S. Army Corps of Engineers—Ninth Circuit rejects CZMA and CWA challenges to Corps' dredging course of action in San Francisco Bay

The Army Corps of Engineers carries out dredging activities in the San Francisco Bay. Those activities are subject to, inter alia, the Coastal Zone Management Act, 16 U.S.C. §§ 1451 to 1467, and the Clean Water Act, 33 U.S.C. §§ 1311 to 1377a. State entities—the San Francisco Bay Conservation and Development Commission (CZMA) and the San Francisco Regional Water Control Board (CWA)—have general regulatory responsibility under these statutes. The Commission has received approval from the National Ocean and Atmospheric Administration for its Bay Plan, while the Corps must obtain a water quality certification from the Board to discharge dredge material into the Bay. The CZMA limits the Commission's authority somewhat insofar as it "allows states to amend their coastal zone management programs, but ... it mandates that any amendment must be approved by NOAA in order to render it legally enforceable against the federal government." So, for example, the Commission has adopted a Long-Term Management Strategy "to guide the agencies' decisions about placement of dredged material in the Bay Area over the next 50 years" but has never received NOAA approval for the Plan—a prerequisite to its enforceability against federal agencies. The LTMS "did inform several NOAA-approved amendments to the Bay Plan in 2001" which, in turn, included "policies [that] envision[ed] reducing the disposal of dredged material back into the Bay and increasing reuse of such material for environmentally friendly purposes."

The Corps submitted a dredging proposal to the Commission in 2015. The latter conditionally concurred in the proposal through a "Letter of Agreement" with two special conditions—one relating to in-Bay disposal of the resulting waste material and the other limiting the use of hydraulic hopper dredging in the Bay's Richmond and Pinole channels. At the same time, the Corps sought a WQC from the Board that then issued a certification with a condition (Provision 10) which, like the Commission's second special condition, "called for hydraulic dredging to be used in, at most, one of the Richmond and Pinole channels in any given year." The Board added Provision 10 with knowledge, also like the Commission, of the Corps' historical practice of typically dredging both channels annually. The Corps rejected these conditional authorizations and, after considering four possible "courses of action," adopted the second (COA #2) to "dredge in accordance with the WQC, but not the LOA (reducing hydraulic dredging by dredging only one of the Richmond and Pinole channels each year in alternating fashion, and making no commitments with respect to in-Bay disposal or beneficial reuse)[.]"

The Commission, later joined by an environmental group, sued alleging CZMA, CWA and Administrative Procedure Act violations because, in part, "the LOA's conditions were enforceable because they were necessary to ensure the Corps' operations' consistency with enforceable

policies of the Bay Area management plan—primarily Bay Plan Dredging Policies 1 and 5." The district court granted summary judgment to the Corps, concluding that the Bay dredging policies were nonbinding "generalized policy statements" and that the Corps' selected dredging alternative complied with the literal terms of Provision 10. *San Francisco Bay Conservation and Dev. Comm'n v. U.S. Army Corps of Engr's*, No. 16-cv-05420-RS, 2019 WL 5699076 (N.D. Cal. Nov. 4, 2019).

The Ninth Circuit affirmed. *San Francisco Bay Conservation and Dev. Comm'n v. U.S. Army Corps of Engr's*, No. 20-15576, 2021 WL 3439655 (9th Cir. Aug. 6, 2021). As for the CZMA claim premised on the Corps' rejection of the LOA dredging condition,

> [t]he problem for Plaintiffs is that the statute and implementing regulations require compliance only with the "enforceable policies" of approved management programs. ... Governing regulations specify that this federal approval must come from NOAA. ... The specific numerical targets in the 20/40 Disposal Condition—no more than 20% of the Corps' dredged material disposed of in the Bay, and no less than 40% of it committed to beneficial reuse—are not drawn from any provision of a NOAA-approved program. Nor does any provision resembling or contemplating the terms of the 20/40 Disposal Condition appear in any NOAA-approved program. The Corps was therefore not required to comply with the condition.

Nor did the plaintiffs gain purchase from the Bay dredging policies since they "do provide general policy guidance for dredgers to deposit dredged material outside of the Bay and maximize reuse where possible" but did "not appear to contemplate requiring any specific ratios or allocations among different sites for the disposal of dredged materials, much less imposing such requirements on an individual basis."

The CWA failed for essentially the opposite reason. The panel accepted the Corps' position "that the course of action it eventually adopted, COA #2, complied with the plain language of Provision 10 and therefore with the CWA." Provision 10, it held, "only directs the Corps to limit its use of hydraulic dredging. COA #2 does exactly that. In the district court's words, 'COA #2 meets the letter of that requirement, because the Corps is in fact using a hydraulic dredge in only one channel each year.'" The Corps' historical practice made no difference in this regard since "the issue before this court is whether the Corps' plan complied with the condition that the Water Board imposed: Provision 10. The requirements set forth in a WQC are what is legally enforceable under the CWA." Given the Corps' compliance with the CWA and CZMA, "[i]t is hard to see how the adoption of COA #2 could be arbitrary and capricious" and thus irrational under the APA. The panel concluded by stating that it "understand[s] Plaintiffs' concerns that the Corps' chosen course of action represents a departure from understandings the parties had in the past and may lead to problems in the future" but that "we must agree with the district court that the adoption of COA #2 did not violate any applicable law."

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/08/06/20-15576.pdf