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18 SUPERIOR COURT OF THE STATE OF CALIFORNIA
19 COUNTY OF CONTRA COSTA

20 ACME FILL CORPORATION,)
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22 Petitioner Acme Fill Corporation, petitions the court
23 for a writ of mandamus, and by this verified petition repre-
24 sents as follows:
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INTRODUCTION

1
2 1. This action challenges the San Francisco Bay
3 Conservation and Development Commission's ("BCDC") improper
4 and unlawful effort to stop Acme Fill Corporation from
5 obtaining a federal permit to expand the central Contra
6 Costa County sanitary landfill. Acme owns and operates the
7 sanitary landfill used to dispose of the 1,500 tons of resi-
8 dential, commercial and industrial solid waste that accumu-
9 lates daily in the central county area. Acme's existing
10 landfill site has reached its present working limits.
11 Immediate approval of the federal permit BCDC seeks to
12 block is essential so that Acme can begin operating the
13 expansion site, and meet the pressing need for space to
14 dispose of the community's solid wastes. However, the BCDC
15 has issued a decision finding that Acme's expansion plan
16 conflicts with the recommendations in the San Francisco Bay
17 Plan that the area be used for water-related industries such
18 as oil refineries and chemical processing plants.

19 The BCDC's decision objects to issuance of a Corps of
20 Engineers permit for the landfill expansion, and asserts
21 that the Corps of Engineers cannot issue the permit over the
22 BCDC's objection. BCDC purports to base this action on the
23 provisions of the McAteer-Petris Act, the San Francisco Bay
24 Plan, and the Federal Coastal Zone Management Act. However,
25 the BCDC has no authority to demand that Acme's landfill
26

1 expansion plans conform to the land use recommendations con-
2 tained in the San Francisco Bay Plan; there is no legal
3 basis for the BCDC's decision objecting to expansion of the
4 sanitary landfill; and its attempt to interfere with Acme's
5 federal permit application is plainly in excess of its
6 jurisdiction.

7 PARTIES

8 2. Petitioner Acme Fill Inc. ("Acme") is a California
9 corporation with its principal place of business in the
10 County of Contra Costa, State of California. Acme is the
11 owner and operator of a 125-acre solid waste disposal
12 sanitary landfill located in central Contra Costa County.
13 This sanitary landfill is the primary solid waste disposal
14 facility located in central Contra Costa County.

15 3. Respondent San Francisco Bay Conservation and
16 Development Commission is a commission of the State of
17 California organized and existing pursuant to the provisions
18 of the McAteer-Petris Act, Government Code §§ 66600 et seq.
19 Pursuant to the provisions of the McAteer-Petris Act, BCDC
20 is given authority to administer the San Francisco Bay Plan
21 and to issue or deny permits for land development projects
22 within the geographic area of BCDC's jurisdiction. Pursuant
23 to Public Resources Code § 30330 BCDC is also the state
24 designated agency responsible for reviewing applications for
25 federal permits for compliance with the Federally Approved
26

1 Management Program for San Francisco Bay, pursuant to the
2 provisions of the Coastal Zone Management Act, 16 U.S.C.
3 § 1456(c)(3)(A) and applicable federal regulations. At all
4 times herein mentioned, Respondent Alan Pendleton
5 ("Executive Director") was and is the official designated
6 and acting Executive Director of BCDC.

7 4. The true names or capacities, whether individual,
8 corporate, associate or otherwise, of respondents Does 1 to
9 50 are unknown to petitioner, who therefore sues such
10 respondents by such fictitious names, and will amend this
11 petition to show their true names and capacities when ascer-
12 tained. Petitioner is informed and believes and thereon
13 alleges that each of the respondents designated as a Doe is
14 an agent, servant, employee or member of each of the other
15 respondents and is responsible in some manner for the events
16 referred to in this petition.

17 STATEMENT OF FACTS

18 5. On or about March 11, 1981, Acme filed an applica-
19 tion with the United States Army Corps of Engineers for a
20 permit to expand its solid waste disposal site to a parcel
21 adjacent to the existing disposal site. This permit appli-
22 cation was amended December 9, 1983. (Public Notice
23 No. 13881E59.) As amended, the permit application seeks a
24 Corps of Engineers permit under Section 10 of the Rivers and
25 Harbors Act of 1899 (33 U.S.C. § 403), to fill the 97-acre
26

1 8. BCDC has no jurisdiction under state law over
2 Acme's proposed solid waste sanitary landfill expansion
3 because the site is located well outside the geographic area
4 of BCDC's jurisdiction under Government Code Section 66610,
5 in that it is more than one mile from the shoreline of San
6 Francisco Bay. Accordingly, BCDC has no authority under
7 state law to grant or deny a permit for the project, and any
8 provisions of the San Francisco Bay Plan which may refer to
9 the area of the Acme expansion site are advisory recommen-
10 dations to local land use agencies.

11 9. On August 13, 1982, the United States Army Corps of
12 Engineers, San Francisco District, published and mailed its
13 public notice of Acme's application for a Corps of Engineers
14 permit for the solid waste sanitary landfill expansion.
15 This notice states that the project is outside the jurisdic-
16 tion of the BCDC.

17 10. The provisions of the Federally Approved Management
18 Program adopted and administered by BCDC under the provi-
19 sions of the Coastal Zone Management Act, and applicable to
20 the Acme expansion site, consist of the San Francisco Bay
21 Plan, developed by BCDC pursuant to the McAteer-Petris Act,
22 and the McAteer-Petris Act itself. The Bay Area Coastal
23 Zone for purposes of the Coastal Zone Management Act is
24 defined in the Federally Approved Management Program for San
25 Francisco Bay as an area coextensive with BCDC's permit
26 jurisdiction under the provisions of the McAteer-Petris Act.

1 11. BCDC asserts that while the solid waste sanitary
2 landfill expansion site is outside of its jurisdiction, it
3 is within an area designated water-related industry in the
4 advisory portion of the San Francisco Bay Plan. BCDC
5 further contends that the project "may affect land and water
6 uses within the Commission's jurisdiction" and that it
7 therefore has authority to review the project for compliance
8 with the Federally Approved Management Program for San
9 Francisco Bay under the provisions of the Coastal Zone
10 Management Act.

11 12. On or about July 14, 1983, the Executive Director
12 of BCDC notified the District Engineer, United States Army
13 Corps of Engineers that the staff of BCDC believed that Acme
14 was required to provide a compliance certification to be
15 reviewed by BCDC under the Coastal Zone Management Act, 16
16 U.S.C. § 1456(c)(3)(A). On or about August 4, 1983, the
17 District Engineer notified the Executive Director of BCDC
18 that compliance certification and review by BCDC was not
19 required, and that BCDC was without jurisdiction to demand
20 such certification and review. A true copy of this notice
21 is attached to this petition as Exhibit A and incorporated
22 by reference. On or about September 1, 1983, Acme notified
23 the BCDC that compliance certification and review by BCDC
24 was not required, and that BCDC was without jurisdiction to
25 demand compliance certification and review. In or about
26

1 September, 1983, the Executive Director of BCDC notified the
2 District Engineer that BCDC believed the proposed issuance
3 of a Corps of Engineers permit for the Acme landfill expan-
4 sion requires compliance certification, and BCDC review and
5 concurrence. In response to this position, and at the
6 request of the District Engineer, on or about November 4,
7 1983, Acme filed a compliance certification application with
8 BCDC, number CN 9-83, requesting BCDC to issue a decision of
9 concurrence on the ground the proposed landfill expansion
10 would be an appropriate interim use under the San Francisco
11 Bay Plan provisions of the Federally Approved Management
12 Program for San Francisco Bay. At all times herein men-
13 tioned, Acme and the Corps of Engineers continued to assert
14 their objections to BCDC's contention that a Coastal Zone
15 Management Act compliance certification and review and con-
16 currence by BCDC was appropriate or required. On January 19
17 and February 2, 1984, BCDC held public hearings on Acme's
18 application for a Corps of Engineers permit for the solid
19 waste sanitary landfill expansion. On February 2, 1984, the
20 BCDC passed a resolution declaring that it had jurisdiction
21 to conduct a Coastal Zone Management Act review of Acme's
22 federal permit application for compliance with the San
23 Francisco Bay Plan provisions of the Federally Approved
24 Management Program for San Francisco Bay. The BCDC also
25 passed a resolution declaring that the proposed activity is

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1 inconsistent with the San Francisco Bay Plan provisions of
2 the Federally Approved Management Program for San Francisco
3 Bay, and objecting to certification of the project as in
4 compliance with the Federally Approved Management Program
5 for San Francisco Bay.

6 13. By decision dated February 9, 1984, BCDC notified
7 Acme of BCDC's findings and conclusions. (Decision in
8 matter CN 9-83, exhibit B, attached to this petition.) BCDC
9 found that the proposed sanitary landfill is outside the
10 BCDC's permit jurisdiction under the McAteer-Petris Act. It
11 further concluded that even though it had no authority under
12 the McAteer-Petris Act to review the project for compliance
13 with the San Francisco Bay Plan, and to grant or deny a per-
14 mit on that basis, it had authority under the Federal
15 Coastal Zone Management Act to review the project and object
16 to issuance of a permit by the Corps of Engineers if it
17 found the solid waste sanitary landfill project not in
18 compliance with the San Francisco Bay Plan.

19 14. The project site is designated in one of the
20 San Francisco Bay Plan Maps as a water-related industrial
21 use area. Although such designation is merely an advisory
22 land use recommendation, rather than a mandatory land use
23 classification, under the provisions of the McAteer-Petris
24 Act and the San Francisco Bay Plan, BCDC determined the site
25 could not be used for purposes other than water-related
26 industrial use.

1 15. BCDC based this determination on its erroneous
2 conclusion that because the advisory portion of the San
3 Francisco Bay Plan recommends that the site be used for
4 water-related industry, the proposed use for a nonwater-
5 related industry would have a "direct effect in land or
6 water uses in the coastal zone." This conclusion was in
7 turn based on a finding that use of the site for purposes
8 other than water-related industry will directly affect the
9 waters of the Coastal Zone by increasing the need for Bay
10 fill sites at some unspecified time during the next 20
11 years.

12 16. Based on the foregoing the BCDC issued its decision
13 that the sanitary landfill expansion does not comply with
14 the San Francisco Bay Plan, and therefore, with the
15 Federally Approved Management Program for San Francisco Bay.
16 Based on this decision, BCDC asserts that the Corps of
17 Engineers is barred from issuing a permit for the sanitary
18 landfill expansion by the provisions of the Coastal Zone
19 Management Act.

20 17. BCDC also decided that the proposed sanitary land
21 fill expansion is not an appropriate interim use of the pro-
22 perty permitted by the San Francisco Bay Plan. BCDC's
23 findings in support of this decision were:

24 (a) that a sanitary landfill is not a water-
25 related industry as that term is defined in the San
26 Francisco Bay Plan;

1 (b) that while the site will only be used as a
2 sanitary landfill for five years, the site will be una-
3 vailable for water-related industrial use for 25 to 35
4 years, when sufficient settlement of the landfill could
5 occur to permit water-related industrial development, and
6 that therefore, use of the site for a sanitary landfill can-
7 not be considered an "interim use" as the term is used in
8 the water-related industrial policies of the San Francisco
9 Bay Plan; and

10 (c) that the sanitary landfill cannot be con-
11 sidered an interim use because the condition of the site
12 after closure will make the site unlikely to be developed
13 for water-related industry.

14 18. Acme has exhausted all administrative remedies it
15 is required by law to pursue.

16 19. Acme does not have a plain, speedy and adequate
17 remedy in the ordinary course of law. If the relief sought
18 in this action is not granted, Acme, and the people of
19 Contra Costa County, will be irreparably injured: if BCDC's
20 decision is not set aside, the United States Army Corps of
21 Engineers may deny Acme's application for a permit for the
22 sanitary landfill expansion.

23 20. Acme's existing sanitary landfill is filled to pre-
24 sent working capacity. If the expansion permit is not
25 granted, central Contra Costa County will be left without a
26

1 sanitary landfill to dispose of the 1,500 tons of garbage,
2 trash and other wastes generated by the 425,000 residents of
3 the central county area.

4 FIRST CAUSE OF ACTION

5 21. Petitioner realleges and incorporates by reference
6 paragraphs 1 - 20 of this petition.

7 22. BCDC proceeded without or in excess of jurisdiction
8 and failed to proceed in the manner required by law in that
9 BCDC did not inform the Corps of Engineers and Acme within
10 30 days from notice of Acme's permit application that it
11 desired to review the application for compliance with the
12 Federally Approved Management Program for San Francisco Bay,
13 in violation of 15 C.F.R. § 930.54(a) and the Federally
14 Approved Management Program for San Francisco Bay.

15 23. By reason of the foregoing, BCDC waived its right
16 to review the permit application, if any it had, and is
17 without jurisdiction or authority to require a Coastal Zone
18 Management Act compliance certification from Acme, or to
19 otherwise review Acme's federal permit application pursuant
20 to the provisions of the Coastal Zone Management Act.

21 WHEREFORE, petitioner prays relief as set forth below.

22
23 SECOND CAUSE OF ACTION

24 24. Petitioner realleges and incorporates by reference
25 paragraphs 1 - 20 of this petition.

26

1 25. BCDC proceeded without or in excess of jurisdiction
2 and failed to proceed in the manner required by law in that:

3 (a) BCDC failed to notify the Assistant
4 Administrator for Coastal Zone Management within 30 days of
5 notice of Acme's permit application that it believed that
6 Acme's permit application should be subject to state agency
7 review, as required by 15 C.F.R. § 930.54(b); and

8 (b) The Assistant Administrator for Coastal Zone
9 Management has not determined that the activity Acme
10 proposes can be reasonably expected to affect the Coastal
11 Zone of the State, as required by 15 C.F.R. § 930.54(c).

12 26. By reason of the foregoing, BCDC is without juris-
13 diction or authority to require a Coastal Zone Management
14 Act compliance certification from Acme, or to otherwise
15 review Acme's federal permit application pursuant to the
16 provisions of the Coastal Zone Management Act.

17 WHEREFORE, petitioner prays relief as set forth below.

18 THIRD CAUSE OF ACTION

19 27. Petitioner realleges and incorporates by reference
20 paragraphs 1 - 20 of this petition.

21 28. BCDC proceeded without or in excess of jurisdiction
22 and failed to proceed in the manner required by law in that:

23 (a) the solid waste sanitary landfill site for
24 which Acme seeks a federal permit is not located within the
25 Coastal Zone defined by the Federally Approved Management
26 Program for San Francisco Bay; and

1 (b) the solid waste sanitary landfill activity for
2 which a federal permit is sought is not likely to directly
3 affect the BCDC segment of the Coastal Zone.

4 29. By reason of the foregoing, BCDC is without juris-
5 diction or authority to require a Coastal Zone Management
6 Act compliance certification from Acme, or to otherwise
7 review Acme's federal permit application pursuant to the
8 provisions of the Coastal Zone Management Act.

9 WHEREFORE petitioner prays relief as set forth below.

10 FOURTH CAUSE OF ACTION

11 30. Petitioner realleges and incorporates by reference
12 paragraphs 1 - 20 of this petition.

13 31. BCDC proceeded without or in excess of jurisdic-
14 tion, and failed to proceed in the manner required by law,
15 in that BCDC's finding that the solid waste sanitary land-
16 fill activity for which Acme seeks a federal permit is
17 likely to directly affect the BCDC segment of the Coastal
18 Zone is not supported by the weight of the evidence. The
19 weight of the evidence supports a finding that the proposed
20 solid waste sanitary landfill is not likely to directly
21 affect the BCDC segment of the Coastal Zone.

22 32. By reason of the foregoing, BCDC is without juris-
23 diction or authority to require a Coastal Zone Management
24 Act compliance certification from Acme, or to otherwise
25 review Acme's federal permit application pursuant to the
26 provisions of the Coastal Zone Management Act.

1 WHEREFORE, petitioner prays relief as set forth below.

2 FIFTH CAUSE OF ACTION

3 33. Petitioner realleges and incorporates by reference
4 paragraphs 1 - 20 of this petition.

5 34. BCDC committed a prejudicial abuse of discretion
6 and failed to proceed in the manner required by law in that
7 BCDC determined that the Acme solid waste sanitary landfill
8 expansion is not in compliance with the provisions of the
9 McAteer-Petris Act and the San Francisco Bay Plan.

10 35. The McAteer-Petris Act limits BCDC's permit and
11 other mandatory land use jurisdiction to a shoreline band
12 100 feet landward from San Francisco Bay. Government Code
13 § 66610. The McAteer-Petris Act further provides that land
14 use designations in the San Francisco Bay Plan applicable to
15 areas outside BCDC's permit and other mandatory jurisdiction
16 are advisory only. Government Code § 66653; 14 Cal. Admin.
17 Code § 10180(b)(5).

18 36. The Acme solid waste landfill expansion site is
19 located outside BCDC's permit and other mandatory land use
20 jurisdiction. The reference to the site and the surrounding
21 area in the San Francisco Bay Plan maps as designated for
22 water-related industrial use is an advisory recommendation
23 only, and has no mandatory legal effect.

24 37. The McAteer-Petris Act prohibits BCDC from denying
25 a permit for an activity on the ground it conflicts with an
26 advisory land use designation in the San Francisco Bay Plan.

1 WHEREFORE, petitioner prays relief as set forth below.

2 SIXTH CAUSE OF ACTION

3 38. Petitioner realleges and incorporates by reference
4 paragraphs 1 - 20 of this petition.

5 39. BCDC committed a prejudicial abuse of discretion
6 and failed to proceed in the manner required by law in that:

7 (a) Prior to and at all times since formulation of
8 the San Francisco Bay Plan, Acme has owned and operated a
9 sanitary landfill located in Central Contra Costa County, as
10 described in paragraph 2 of this petition. At all times
11 during this period, the sanitary landfill expansion site
12 adjacent to this existing sanitary landfill site has been
13 designated and identified in the Contra Costa County Solid
14 Waste Management Plan, the San Francisco Bay Plan, and in
15 solid waste management planning studies, reports and other
16 documents made and/or adopted by BCDC for use as a solid
17 waste disposal site. Based on the foregoing, at all times
18 during this period Acme and the public agencies of the
19 County of Contra Costa concerned with solid waste management
20 have planned to use the site for a sanitary landfill, and
21 have complied with all necessary procedures to allow Acme to
22 operate a sanitary landfill on the site; and

23 (b) BCDC's decision of February 9, 1984, is
24 contrary to its prior determinations and provisions of the
25 San Francisco Bay Plan which provide that the site is to be
26

1 used for a sanitary landfill, and that such use is con-
2 sistent with the San Francisco Bay Plan. BCDC abused its
3 discretion and failed to proceed as required by law in
4 deciding that the expansion proposal is not in compliance
5 with the San Francisco Bay Plan.

6 WHEREFORE, petitioner prays relief as set forth below.

7
8 SEVENTH CAUSE OF ACTION

9 40. Petitioner realleges and incorporates by reference
10 paragraphs 1 - 20 and paragraphs 35 - 39 of this petition.

11 41. BCDC failed to proceed in the manner required by
12 law in that BCDC determined that the Acme solid waste sani-
13 tary landfill expansion is inconsistent with the Federally
14 Approved Management Program for San Francisco Bay.

15 42. The Federally Approved Management Program for San
16 Francisco Bay consists of the McAteer-Petris Act and the San
17 Francisco Bay Plan.

18 43. The McAteer-Petris Act prohibits BCDC from denying
19 a permit for an activity on the ground it conflicts with an
20 advisory land use designation in the San Francisco Bay Plan.
21 Such designations constitute advisory recommendations only,
22 and have no mandatory effect. Further, the San Francisco
23 Bay Plan identifies and designates the site for use as a
24 sanitary landfill.

25 44. By reason of the foregoing, BCDC is barred from
26 objecting under 16 U.S.C. § 1456(c)(3)(A) to Acme's permit

1 application as not being in compliance with the Federally
2 Approved Management Program for San Francisco Bay, and
3 thereby blocking issuance of the federal permit.

4 WHEREFORE petitioner prays relief as set forth below.

5 EIGHTH CAUSE OF ACTION

6 45. Petitioner realleges and incorporates by reference
7 paragraphs 1 - 20 and 34 - 37 of this petition.

8 46. BCDC failed to proceed in the manner required by
9 law in that BCDC's determination that the Acme solid waste
10 sanitary landfill expansion is not in compliance with the
11 Federally Approved Management Program for San Francisco Bay
12 violates 15 C.F.R. § 930.58(a)(4). This regulation provides
13 that applications for federal permits subject to compliance
14 review under the Coastal Zone Management Act need only be
15 consistent with enforceable, mandatory policies of the
16 Federally Approved Management Program.

17 47. The water-related industrial use designation appli-
18 cable to the Acme sanitary landfill expansion site contained
19 in the San Francisco Bay Plan, and thus in the Federally
20 Approved Management Program, is not an enforceable, man-
21 datory policy.

22 48. By reason of the foregoing, BCDC is barred from
23 objecting under 16 U.S.C. § 1456(c)(3)(A) to Acme's applica-
24 tion for a permit from the United States Army Corps of
25 Engineers on grounds of non-compliance with the Federally
26 Approved Management Program for San Francisco Bay.

1 WHEREFORE, petitioner prays relief as set forth below.

2 NINTH CAUSE OF ACTION

3 49. Petitioner realleges and incorporates by reference
4 paragraphs 1 - 20 of this petition.

5 50. BCDC's decision that the proposed solid waste sani-
6 tary landfill is not in compliance with the Federally
7 Approved Management Program for San Francisco Bay violates
8 applicable law, the decision is unsupported by the findings,
9 and the findings are not supported by substantial evidence
10 in the record, in that:

11 (a) Under the provisions of the Coastal Zone
12 Management Act and the Federally Approved Management Program
13 for San Francisco Bay, BCDC may only object to issuance of a
14 federal permit on the ground a proposed activity in the
15 Coastal Zone will have a direct adverse effect on land or
16 water uses within the Coastal Zone. The Acme solid waste
17 sanitary landfill expansion site is not located in the
18 Coastal Zone and will not have a direct adverse effect on
19 land or water uses within the Coastal Zone;

20 (b) BCDC's decision objecting to issuance of a
21 Corps of Engineers federal permit for Acme's solid waste
22 sanitary landfill expansion is unsupported by the findings.
23 BCDC's findings of adverse effect on land and water uses
24 within the Coastal Zone postulate remote, speculative, and
25 indirect effects on land or water uses within the Coastal
26

1 Zone that may result from the activity. BCDC wholly failed
2 to find any direct adverse effects on land or water uses
3 within the Coastal Zone resulting from the proposed
4 activity; and

5 (c) BCDC's findings that the Acme solid waste
6 sanitary landfill expansion will have a direct adverse
7 affect on land and water uses within the Coastal Zone are
8 not supported by substantial evidence in the record. There
9 is no substantial evidence in the record that (1) the expan-
10 sion site will be needed for industrial use at any time
11 during the foreseeable future; (2) that the site is suitable
12 for water-related industrial development; (3) that anyone is
13 interested in developing the site for water-related
14 industry; (4) that use of the site for a sanitary landfill
15 will result in a need for additional Bay fill to accommodate
16 water-related industry.

17 WHEREFORE, petitioner prays relief as set forth below.

18 TENTH CAUSE OF ACTION

19 51. Petitioner realleges and incorporates by reference
20 paragraphs 1 - 20 and 50 of this petition.

21 52. BCDC's determination that the Acme solid waste
22 sanitary landfill expansion is not an appropriate interim
23 use under the San Francisco Bay Plan is unsupported by the
24 findings, and the findings are not supported by substantial
25 evidence in the record, in that BCDC's findings relating
26

1 to: (1) cost of development of water-related industrial uses
2 at the conclusion of the interim use period; (2) a need for
3 development of the site at the conclusion of the interim use
4 period; and (3) and the condition of the site at the conclu-
5 sion of the interim use period are all unsupported by
6 substantial evidence in the record.

7 WHEREFORE, petitioner prays relief as set forth below.

8 ELEVENTH CAUSE OF ACTION

9 53. Petitioner realleges and incorporates by reference
10 paragraphs 1 through 20 and 42 of this petition.

11 54. BCDC failed to proceed in the manner required by
12 law by issuing a decision objecting to issuance of a Corps
13 of Engineers permit for the Acme solid waste sanitary land-
14 fill expansion, and the findings do not support the deci-
15 sion, in that:

16 (a) The Acme solid waste sanitary landfill expan-
17 sion is necessary to the health, safety and welfare of the
18 public in the Bay Area, and BCDC was accordingly required to
19 concur with Acme's federal permit application by Government
20 Code § 66632(f)(1); and

21 (b) BCDC failed to make findings in support of its
22 determination the Acme landfill expansion is not necessary
23 to the health, safety or welfare of the public in the Bay
24 Area.

25 WHEREFORE, petitioner prays relief as set forth below.
26

TWELFTH CAUSE OF ACTION

1 55. Petitioner realleges and incorporates by reference
2 paragraphs 1 - 20 and 33 - 44 of this petition.

3 56. BCDC failed to proceed in the manner required by
4 law in that:

5 (a) BCDC asserts authority, under the provisions
6 of the Coastal Zone Management Act, to review activities
7 outside its permit jurisdiction for which a federal permit
8 is required, and to exercise a veto over any such activity
9 it believes is not in compliance with an advisory land use
10 designation contained in the San Francisco Bay Plan;

11 (b) However, BCDC does not assert authority and
12 has no authority under state law, to review activities out-
13 side its permit jurisdiction for which a federal permit is
14 not required, or to exercise a veto over any such activity
15 even though it may believe the activity is not in compliance
16 with an advisory land use designation contained in the
17 San Francisco Bay Plan;

18 (c) Activities outside BCDC's permit jurisdiction
19 which do require a federal permit and activities outside
20 BCDC's permit jurisdiction which do not require a federal
21 permit are identically situated with respect to the legiti-
22 mate and permissible purposes of the San Francisco Bay
23 Plan, and the Federally Approved Management Program for
24 San Francisco Bay; and
25

26

1 (d) To permit BCDC to veto activities requiring a
2 federal permit on grounds of non-compliance with an advisory
3 land use designation of the San Francisco Bay Plan, while
4 activities not requiring a federal permit which are also
5 purportedly not in compliance with an advisory land use
6 designation of the San Francisco Bay may be developed unham-
7 pered by such restrictions, creates an arbitrary and irra-
8 tional discrimination and distinction in violation of the
9 equal protection and due process provisions of the constitu-
10 tions of the United States and the State of California.

11 WHEREFORE, petitioner prays relief as follows:

12 1. That an alternative writ of mandamus and an order
13 to show cause be issued ordering respondents to set aside
14 the decision in matter No. CN 9-83 which states (a) that
15 BCDC, has jurisdiction and authority to conduct review under
16 U.S.C. § 1456(c)(3)(A) of Acme's application for a permit
17 from the United States Army Corps of Engineers and (b)
18 objecting to certification that the project is in compliance
19 with the Federally Approved Management Program for
20 San Francisco Bay, or in the alternative to show cause
21 before this court why it has not done so;

22 2. That this court find, adjudge, and declare that
23 respondent BCDC has no jurisdiction or authority to require
24 a compliance certification from Acme or to conduct a review
25 under 16 U.S.C. § 1456(c)(3)(A) of Acme's application for a
26 permit from the United States Army Corps of Engineers;

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3. That this court find, adjudge and declare that respondents' decision objecting to certification of the Acme solid waste sanitary landfill expansion as in compliance with the Federally Approved Management Program for San Francisco Bay is invalid, void and of no force or effect;

4. That a peremptory writ of mandamus be issued vacating respondents' decision in matter No. CN 9-83 and ordering respondents to set aside the decision;

5. That petitioner receive an award of reasonable attorneys' fees pursuant to Code of Civil Procedure Section 1021.5;

6. That petitioner be awarded its costs of suit; and

7. That the court order such other and further relief as may be just and proper.

Dated: April 10, 1984

VAN VOORHIS & SKAGGS

By: 
Stephen L. Kostka
Attorneys for Petitioner
Acme Fill Inc.

SLK:dv-P
ACME1/8



DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, CORPS OF ENGINEERS
211 MAIN STREET
SAN FRANCISCO, CALIFORNIA 94108

Office of Counsel
No. 13881888

4 AUG 1988

RECEIVED

Mr. Michael B. Wilman, Executive Director
San Francisco Bay Conservation and
Development Commission
37 Van Ness Avenue
San Francisco, California 94102

Dear Mr. Wilman:

This is in response to your letter of July 14, 1988 concerning coastal zone consistency certification for the Acme Landfill permit application. For both substantive and procedural reasons, we disagree with your position that the Coastal Zone Management Act, 16 U.S.C. 1456(c)(3)(A), requires a certification for that application.

The BCDC Management Program, as approved by the Commerce Department on March 10, 1980, at page 10, defines the BCDC segment of the coastal zone as "the Commission's permit jurisdiction under Section 66610 of the McArthur-Petris Act." Since BCDC has not required a permit for the proposed Acme Landfill expansion, the proposal is apparently outside the Commission's permit jurisdiction and thus outside the coastal zone. Your letter does not indicate where the Commission's jurisdiction is. However, it appears from BCDC's Bay Plan that the Commission's jurisdiction does not extend into Pacheco Creek (shown as white on Plan No. 17) but is limited to approximately its mouth. The Acme Landfill is about one mile from the mouth of Pacheco Creek.

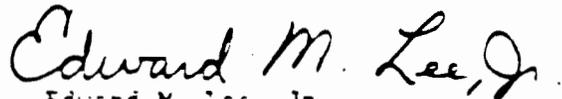
From our point of view, your letter does not make the necessary distinction between effects on priority use areas under the BCDC Bay Plan and direct effects on land or water uses in the coastal zone under the Management Program. While the Acme Landfill project "may" affect certain designated priority use areas, we consider that the matters you raised in your letter will have only remote and highly speculative effects on land or water uses in the coastal zone. We have reached this conclusion because both BCDC and the Corps have permit jurisdiction over the bay and its shoreline and as a result, loss of the Acme Landfill site to a non-water oriented-use will not necessarily lead to additional fill in the Bay to provide for water-related industry. Also, it appears that the Acme site would have limited water-related industrial potential because the adjacent Pacheco Creek is essentially a flood control channel and its navigable usage is constrained by the low level Southern Pacific railroad bridge and Waterfront Road.

EXHIBIT A

Office of Counsel
No. 13881E50

The Management Program also provides, at page 44, that activities outside the coastal zone do not normally require certification unless, among other reasons, the Commission determines that the activity "is likely to directly affect the BCD segment of the coastal zone" and the Commission notifies the Federal agency and the applicant within the time period specified in 15 C.F.R. 930.54, i.e., within thirty days of its receipt of notice of the activity. We do not consider that the position or unilateral actions of the Commission's staff constitute the Commission's "determination" and notification within the meaning of these provisions of the Management Program. Additionally the time period specified in the Management Program for Commission determination and notification has long since lapsed.

Sincerely,



Edward M. Lee, Jr.
Lieutenant Colonel, Corps of Engineers
District Engineer

Copy furnished:
Mr. Frank T. Eberhart, Newport, CA
Office of Coastal Zone Management, Washington, DC

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

30 VAN NESS AVENUE
SAN FRANCISCO, CALIFORNIA 94102-6080
PHONE (415) 557-3686



February 9, 1984

Mr. Frank Boerger
Harding-Lawson Associates
P. O. Box 578
Novato, California 94947

SUBJECT: BCLC Consistency Certification No. CN 9-83

Dear Mr. Boerger:

On February 2, 1984, the San Francisco Bay Conservation and Development Commission objected to the consistency certification by Acme Fill Corporation that the proposed 97-acre expansion of the existing 125-acre sanitary landfill was consistent with the Commission's federally-approved Management Program for San Francisco Bay. The vote was as follows: 5 Commissioners concurred that the project was consistent with the Commission's Management Program, 11 objected, and 5 abstained. In objecting to the consistency certification, the Commission adopted the following resolution:

I. Non-Concurrence

The Commission OBJECTS to the certification by the Acme Fill Corporation that the project is consistent with the federally-approved Management Program for San Francisco Bay.

II. Findings and Declarations

The Commission finds and declares as follows:

A. Water-Related Industrial Use. The Bay Plan defines water-related industry as those industries that use water for transportation, thereby gaining significant economic benefits by fronting on navigable water. It is clear that a sanitary landfill is not a water-related industry and the applicant has never made that contention. The Commission finds that a sanitary landfill is not a water-related industry as that term is defined in the San Francisco Bay Plan.

B. Interim Use. The Bay Plan recognizes that water-related industrial sites will be developed over a period of years and, therefore, states that designated sites can be developed with interim uses. Neither the Bay Plan nor the Commission's regulations define "interim use." However, in past

Exhibit B

Mr. Frank Boerger
February 9, 1983
Page 2

decisions, the Commission has used two general criteria for determining whether a proposed use is interim: (1) the relative ease of displacing the interim use, usually measured by the value of the capital improvements placed on the site for the interim use; and (2) the length of time that the use is expected to occupy the site and render it unavailable for the preferred use. In this case, the Commission finds the appropriate standard to be whether the landfill makes the site significantly more difficult or costly to develop for water-related industry as well as the number of years the site will be unavailable for such use.

The Commission finds that the length of time that the landfill operation will exist, plus the time it will take the site to settle, will render it impractical to develop the site within a time period that can be considered interim. The site will be unavailable for use for the next six years while the landfill operation continues and is then closed. In addition, the site will be realistically rendered unavailable for a water-related industrial use for another 20 to 30 years while the landfill and underlying muds settle. For example, with 70 feet of landfill, the amount of settlement after 30 years will be between 6-1/2 and 10-1/2 feet with another 45 percent to take place thereafter. These figures do not take into account the additional settlement that will take place within the debris that makes up the landfill itself. Using settlement rates provided by the applicant, the landfill itself will settle an additional 7 to 10-1/2 feet in 30 years. Thus, the amount of settlement with the landfill could be as much as 21 feet in 30 years.

The Commission finds it is not realistic to expect anyone to develop the site for water-related industry before a substantial amount of the settlement has taken place. When settlement rates reach the amounts expected here and it is likely that differential settlement will also occur, the maintenance costs are simply too great and uncertain. Given that situation, the Commission finds it is unlikely that any water-related industrial development would take place within 25 to 35 years and that period cannot be considered "interim," as that term is used in the water-related industrial policies of the Bay Plan.

C. Condition of the Site After Closure. The Commission further finds that a sanitary landfill of the size proposed cannot be considered an interim use because the condition of the site after closure will make the site unlikely to be developed for water-related industry.

The applicant contends to the contrary that landfill will make the site more desirable and that placing landfill on the site should reduce development costs by eliminating the need to place fill. There is no question that the site in its present condition would be difficult and expensive to

develop for water-related industry because it has a low elevation that creates drainage and flooding problems. The applicant estimates that it will cost approximately \$24 million to fill the existing site to a usable elevation and compact the underlying bay mud. Because the proposed landfill eliminates the need for some of that fill, the applicant estimates it would only cost about \$14 million to accomplish the same goals if the landfill is placed because it will reduce the need to import additional fill to the site.

However, it is likely that the cost of placing 12 feet of clean granular fill on the site will be largely offset by the additional engineering costs to develop on the landfill, the additional costs associated with maintenance, the cost of imported fill needed to create enough flat surfaces for development, and the lower return that can be expected because fewer number of acres of the site will be usable than if the entire 200 acres were level. Adding 70 feet of landfill on top of 80 feet of bay mud creates a number of problems that require costly engineering solutions. The increased costs and the additional constraints that the landfill poses to an industrial developer makes it significantly more unlikely that water-related industry would locate on the site than if landfill of the height proposed were not placed. The constraints and associated costs imposed by the landfill include:

1. Given the bay muds under the site, most heavy industrial structures would have to be supported by pilings. The additional 70 feet of landfill would introduce a significant additional cost to construct and drive those pilings. The subsiding landfill will also cause a downdrag on the pilings requiring an increase in the pilings' bearing capacity which would increase cost an additional 25 percent.
2. If heavy structures were placed on pilings, the structures would remain at a fixed elevation but all ancillary facilities, such as utilities, parking areas, roadways, etc., would settle continually for a long period, necessitating additional costs to design, construct, and maintain these facilities. These design restrictions would further limit the site's availability and attractiveness to many water-related industrial uses which need stable sites that can withstand heavy loading without differential settlement.
3. Due to the organic content of the landfill, methane gas will be manufactured as long as there is decomposition in the fill, adding additional cost to trap, contain, and/or dispose of the methane gas.

4. It is possible that a limited number of water-related industries might be able to withstand some of the adverse impacts of high settlement rates by using smaller, more flexible buildings on slab foundations rather than pile-supported structures. These buildings, however, would be limited in size as well as orientation and can be expected to settle differentially as would any other facility located on the landfill. Even smaller buildings will likely require special treatment to counter the effects of differential settlement. More importantly, however, the types of water-related industry that could make use of such structures would be much more limited than if the site was not subject to such high settlement rates.

Although most, if not all, the problems cited above can be relieved or solved with proper engineering, significant and uncertain additional costs will be introduced in doing so. In fact, neither the applicant nor the staff have been able to identify a case where a water-related industrial use has chosen to locate on a former landfill site. The applicant suggests that the office buildings on the former landfill at Sierra Point in Brisbane may be considered comparable. However, the Sierra Point project differs in two important respects from this project: (1) the height of the landfill at Sierra Point was significantly less (12 to 15 feet vs. 70 feet); and (2) the return on investment in the present market for heavy industry is considerably less than the expected return on light industrial parks and offices.

There is one instance where a sanitary landfill was intended for uses in some ways similar to water-related industry. Organic materials were used to fill behind dikes to create Pier 94 in San Francisco. Although the fill was only high enough to create the desired elevation, 12 years elapsed before settlement decreased to a point where buildings and the container crane could be constructed. Since that time, the site has continued to experience differential settlement which interferes with the use of the crane and part of the fill has failed completely. To further develop the site will undoubtedly require dewatering the site, the addition of new compacted fill, and possibly the removal of some of the old fill that was placed. Therefore, the Commission cannot find the Pier 94 experience to be a successful example of developing a landfill for industrial purposes. It must be noted that Pier 94 is not comparable to the project in that the landfill at Pier 94 was not placed in the manner recommended by the design engineers, but it does illustrate some of the problems that can occur. Also, Pier 94 is not strictly comparable in that it involves port rather than water-related industrial uses. However, Pier 94 is the only example of a use with an industrial character on landfill that the staff could identify in the Bay Area.

Sanitary landfill sites around the Bay for the most part have been used for park purposes. Even then, installation of irrigated landscaping and parking lots has been delayed for several years because of anticipated differential settlement. Given the settlement rates estimated by the applicant, and the absence of any successful examples to the contrary, the Commission finds that it is not realistic to expect the site to be developed for water-related industry once the proposed landfill is in place. Although it is possible that small scale industrial uses may be accommodated at the site given enough time, the Commission finds the landfill will place such major limitations on the use of the site that it will significantly detract from its ability to support water-related industry and is therefore inconsistent with the Bay Plan priority use designation.

D. Coastal Zone Management Act. The Federal Coastal Zone Management Act requires an applicant for a federal permit for an activity "affecting land or water uses in the coastal zone" to file a certification with the federal agency issuing the permit that the project is consistent with the state's Management Program. The federal permit cannot be issued until the Commission has concurred that the project is consistent with the state's management program.

In this case, a Corps of Engineers permit is required and the approved Management Program consists of the McAteer-Petris Act and the Bay Plan. Although the proposed landfill is outside of the Commission's permit jurisdiction, the site is designated in the Bay Plan as a water-related industrial priority use area. The priority use areas were included in the Bay Plan because the Commission and the Legislature recognized the need to preserve land suitable for water-related industrial uses that were important to the economy of the entire region with the minimum amount of Bay fill. The site was included in the original Bay Plan as a water-related industrial priority use area and that designation was continued after the Commission's review of those designations in 1978. The Commission's forecasts, made during that 1978 review, also indicated a need for more water-related industrial land by the year 2020 than is now available. In addition, the applicant has not contested the appropriateness of the water-related industrial use designation.

Allowing a non water-related industrial use to preempt a priority use area obviously removes the site from the inventory of land available to the region for the priority use. To the extent the Commission's forecasts are reasonably correct, the elimination of a significant amount of acreage will increase the pressure for more Bay fill to make up for the lost area. As the Legislature has determined in adopting the McAteer-Petris Act, such uses are important to the economy of the entire region and fill can be authorized for them. Consequently, it is clear that the preemption of a significant acreage designated for water-related industrial purposes will affect the waters of the

coastal zone and the consistency provisions of the Federal Coastal Zone Management Act become operative. In this case, the project involves the expansion of the landfill on 97 acres designated for water-related industrial use. The Commission finds that this is a significant area and its use as proposed will affect the land and water uses of the coastal zone by increasing pressures for Bay fill at less suitable sites.

E. Alternatives. Under the regulations implementing the Federal Coastal Zone Management Act, the Commission is obligated to describe those alternatives to the project, if any, which would make the project consistent with the Management Program. Although it is obviously difficult to describe precisely without detailed engineering reports all suitable alternatives, the Commission finds that it is likely that the two modifications to the project listed below would allow the Commission to find the project to be an interim use and therefore consistent with the Management Program:

1. Uniform, Lower Height. Although any use of the site for a sanitary landfill will preempt the use of the site for water-related industrial use for some period, the Commission finds that fill to a relatively uniform height limited to perhaps 20 feet would both allow some temporary landfill capacity and not preclude water-related industrial development for such a period of time that it cannot be considered interim.
2. Restriction on Future Use. Once the landfill is in place, it is highly unlikely that any future Corps or other federal permits will be required for uses on the existing fill. Consequently, to make sure the site remains available for water-related industrial use in the future, it would be necessary for the applicant to subject the site to an enforceable restriction that would limit any future use of the site after the landfill is closed to water-related industrial uses for so long as that designation remains on the site in the Bay Plan. Such a restriction could take the form of a condition in the Corps permit, a deed restriction, or a binding agreement.

F. Notice of Appeal. The Coastal Zone Management Act requires applicants to be notified of their rights to appeal Commission objections to the Secretary of Commerce. Appeals must be filed with the Secretary within 30 days of notification of Commission objections and must include supporting

Mr. Frank Boenger
February 9, 1983
Page

arguments and data. The Secretary can approve a project despite a state objection if the Secretary finds that the project is either consistent with the objectives of the Coastal Zone Management Act or is necessary in the interests of national security.

iii. Conclusion

For all of the foregoing reasons, the Commission finds that the project as certified by the applicant is inconsistent with the San Francisco Bay Plan, the McAteer-Petris Act, and the Commission's Amended Management Program for San Francisco Bay, as approved by the Department of Commerce under the Federal Coastal Zone Management Act of 1972, as amended. The Commission further finds that all of the foregoing reasons are separate and independent grounds for objection to the certification of consistency provided by the applicant.

Executed at San Francisco, California, on behalf of the San Francisco Bay Conservation and Development Commission on the date first above written.



ALAN R. PENDLETON
Executive Director

ARP/RJB/mm

cc: U. S. Army Corps of Engineers, Attn: Regulatory Functions Branch
U. S. Army Corps of Engineers, Attn: Col. Edward M. Lee, Jr.
State Solid Waste Management Board, Attn: David N. Kennedy, Director
Contra Costa County Planning Department,
Attn: Anthony A. Dehaesus, Director
National Oceanic and Atmospheric Administration, Attn: John Byrne
San Francisco Bay Regional Water Quality Control Board,
Attn: Certification Section
Acme Landfill Corporation

85-088-2

ORIGINAL FILED

FEB 1 1985

WILLIAM L. WHITAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10
11 STATE OF CALIFORNIA ex rel. **1085**
SAN FRANCISCO BAY CONSERVATION **1343**
12 AND DEVELOPMENT COMMISSION,

13 Plaintiff,

14 vs.

) NO.

15 COLONEL EDWARD M. LEE, JR.;
LIEUTENANT COLONEL ANDREW M.
16 PERKINS, JR., District Engineer,
San Francisco District, U.S. Army
17 Corps of Engineers; BRIGADIER
GENERAL DONALD J. PALLADINO,
18 South Pacific Division, U.S. Army
Corps of Engineers; LIEUTENANT
19 GENERAL JOSEPH K. BRATTON,
Commanding General, U.S. Army
20 Corps of Engineers; JOHN O. MARSH,
JR., Secretary of the Army, and ACME
21 FILL CORPORATION, a California
Corporation,

) COMPLAINT FOR
) DECLARATORY AND
) INJUNCTIVE RELIEF
) AND MANDAMUS
) (Miscellaneous)

22 Defendants.
23

24 Plaintiff, the State of California ex rel. San Francisco
25 Bay Conservation and Development Commission alleges as follows:

26 /

27 /

1.

1 Commanding General of the U.S. Army Corps of Engineers.

2 9. John O. Marsh Jr. is the Secretary of the Army and
3 has authority over the U.S. Army Corps of Engineers. Unless
4 otherwise indicated, defendants Lee, Perkins, Palladino, Bratton
5 and Marsh are referred to herein as "federal defendants."

6 10. Acme Fill Corporation (hereinafter "Acme") is a
7 California corporation which maintains its principal place of
8 business in the County of Contra Costa, California. Acme is the
9 owner and operator of the sanitary landfill site that is involved
10 in this action, and it is the applicant for, and holder of, the
11 Corps permit at issue in this action. Joinder of Acme as a
12 defendant is necessary so that plaintiff may obtain full relief.

13 FACTS

14 BCDC Management Program and State Consistency 15 Review

16 11. In 1977, the United States Department of Commerce
17 reviewed and approved the San Francisco Bay Segment of the
18 California Coastal Management Program (hereinafter "BCDC
19 Management Program"). By virtue of said approval, the federal
20 government has found that the BCDC Management Program meets the
21 requirements of 16 U.S.C. §§ 1455(c), (d), and (e), including the
22 requirements that the BCDC Management Program ensures direct
23 state land and water use planning and regulation, that BCDC has
24 authority to ensure compliance with the Management Program, and
25 that BCDC shall resolve conflicts among competing land and water
26 uses in the implementation of the BCDC Management Program.

1 12. The CZMA provides that after federal approval of a
2 state management program, any applicant for a federal license or
3 permit to conduct an activity affecting land or water uses in the
4 coastal zone shall submit a certification that the proposed
5 activity complies with the state management program. The CZMA
6 also provides that the state coastal management agency shall
7 review the federal permit applicant's consistency certification
8 and may concur or object to the certification. In the event of a
9 state agency objection, the federal permitting agency shall not
10 issue the license or permit unless the Secretary of Commerce
11 determines to override the state agency objection. 16 U.S.C.
12 1456(c)(3)(A). The CZMA regulations promulgated by the National
13 Oceanic and Atmospheric Administration ("NOAA") in the Department
14 of Commerce also provide that following a state agency objection
15 to a consistency certification, the federal permitting agency
16 shall not issue the permit or license unless the Secretary of
17 Commerce overrides the state objection. 15 C.F.R. § 930.65.

18 13. BCDC administers the BCDC Management Program and
19 exercises consistency review authority under 16 U.S.C.
20 § 1456(c)(3)(A) to ensure that federal permit activities in the
21 San Francisco Bay Area will be consistent with the BCDC
22 Management Program.

23 14. The federally-approved BCDC Management Program
24 lists federal permits that will be reviewed by BCDC for
25 consistency with the Management Program. This permit listing
26 specifically includes the type of Corps of Engineers permit that
27

1 is the subject of this action. The CZMA regulations, 15 C.F.R.
2 930.53(e), prohibit federal agencies from issuing federal permits
3 listed in a state management program unless there has been
4 compliance with state agency consistency review.

5 15. The federally-approved BCDC Management Program
6 provides that federal permit activities outside the coastal zone
7 which BCDC finds are likely to affect the coastal zone, are
8 subject to BCDC consistency review. The CZMA regulations, 15
9 C.F.R. § 930.53(b), also authorize state consistency review over
10 federal permit activities outside the coastal zone that are
11 likely to affect the coastal zone.

12 16. The Corps of Engineers permit for Acme's land fill
13 expansion is subject to review by BCDC for consistency with the
14 BCDC Management Program under 16 U.S.C. § 1456(c)(3)(A).

15 17. The BCDC Management Program includes the
16 McAteer-Petris Act, Cal. Gov. Code §§ 66600 et seq., and the San
17 Francisco Bay Plan (hereinafter "Bay Plan").

18 18. The Bay Plan designates areas for certain land uses
19 around San Francisco Bay, including areas that are reserved for
20 water-related industry.

21 19. Water-related industries, for purposes of the Bay
22 Plan and BCDC regulation, are those industries that rely on water
23 transportation and that gain significant economic benefits from
24 proximity to navigable waterways. Water-related industry is a
25 basic industry and economic stimulus with nation-wide impact. In
26 addition to the employment provided directly by water-related

1 BCDC's updating and refining of the element was based on another
2 more current detailed study of water-related industry around San
3 Francisco Bay by the respected economic consulting firm of Gruen
4 & Gruen and Associates. The firm recommended in its report,
5 Waterfront Industry Study, A Report to the San Francisco Bay
6 Conservation and Development Commission (May 28, 1976), that the
7 areas designated for water-related industry use, including the
8 Acme site, retain that designation and that only water-related
9 industries be allowed.

10 21. Acme's land fill expansion for a garbage
11 dump is not a water-related industrial use. Acme's land fill use
12 is inconsistent with the land use designation for the site in the
13 San Francisco Bay Plan and the federally-approved BCDC Management
14 Program. If the site is used as a landfill as Acme proposes and
15 as the Corps permit allows, that will effectively preclude use of
16 the site for water-related industry, increase pressure to fill
17 San Francisco Bay to create other new water-related industrial
18 sites, hamper development of essential water-related industries
19 and thwart comprehensive land and water use planning mandated by
20 the CZMA, thereby directly and significantly affecting land and
21 water uses in the coastal zone.

22 Corps Permit Application and BCDC Consistency
23 Review

24 22. Acme applied for a Corps permit for a land fill
25 expansion in Contra Costa County in 1978. The Corps of Engineers
26 denied the application in 1980.

1 23. Acme reapplied for a 200 acre land fill expansion
2 in 1982. On September 1, 1983, the Corps of Engineers announced
3 its preliminary conclusion to deny the application.

4 24. Thereafter, Acme amended and revised its applicaton
5 and sought a Corps permit under Section 10 of the Rivers and
6 Harbors Act of 1899, 33 U.S.C. § 403, and Section 404 of the
7 Clean Water Act, 33 U.S.C. § 1344, for a 97 acre expansion of the
8 land fill site. On December 19, 1983, the Corps of Engineers
9 issued Public Notice ("PN") 13881 E59 (revised) for the permit
10 application. The application in PN 13881 E59 (revised) is the
11 subject of this action.

12 25. Since at least 1981, BCDC has notified the Corps of
13 Engineers, in several letters, that BCDC consistency review is
14 required for a Corps permit for Acme's land fill expansion.

15 26. On or about November 4, 1983, Acme submitted a
16 consistency certification to BCDC for its Corps permit
17 application in PN 13881 E59 (revised).

18 27. On February 2, 1984, BCDC objected to Acme's
19 consistency certification and found inter alia;

20 (a) that Acme's land fill expansion was not a
21 water-related industrial use;

22 (b) that Acme's land fill site was designated for
23 water-related industrial use in the Bay Plan and BCDC Managment
24 Program;

25 (c) that Acme's proposed use for a land fill and
26 garbage dump would result in high amounts of land settlement on
27

1 the site and would generate the release of methane gas for twenty
2 to thirty years after the land fill was closed, which would
3 render use of the site for water-related industry prohibitively
4 expensive and preclude water-related industrial use of the site
5 well into the next century;

6 e) that Acme's proposed project and land use were
7 inconsistent with the Bay Plan and the BCDC Management Program,
8 and;

9 f) that Acme's proposed project and land use would
10 increase pressure to fill San Francisco Bay to create new
11 water-related industrial sites and would significantly and
12 directly affect land and water uses in the coastal zone.

13 In its February 2, 1984 consistency decision, BCDC also
14 found that it could concur with Acme's proposed activity if
15 certain conditions were met. Among the conditions was the
16 requirement that the amount of land fill be limited to a height
17 of twenty feet. If the size of the landfill was so limited, the
18 problems of land settlement and methane gas would be reduced; the
19 site would be available and useable for water-related industry in
20 a shorter period of time after the land fill was closed; and the
21 project, as modified, could consequently be approved as an
22 interim use of a water-related industrial site. A true and
23 correct copy of BCDC's consistency objection is attached hereto
24 as Exhibit 1.

25 29. Following BCDC's consistency objection, Acme
26 appealed that objection to the Secretary of Commerce

27 10.

1 ("Secretary') and asked the Secretary to override BCDC's
2 objection. At Acme's request, the Secretary subsequently stayed
3 any decision on Acme's appeal. To date, the Secretary has not
4 overridden BCDC's consistency objection.

5 30. Following Acme's appeal to the Secretary of
6 Commerce, the Secretary published notice of Acme's appeal in the
7 Federal Register, 49 Fed. Reg. 15597. The Secretary's Federal
8 Register notice specifically states that if the Secretary does
9 not override the objection, the federal agency (ie., the Corps of
10 Engineers) shall not approve the proposed activity. A true and
11 correct copy of the Secretary's notice in 49 Fed. Reg. 15597 is
12 attached hereto as Exhibit 2.

13 31. By letter dated June 11, 1984, NOAA also notified
14 defendant Lee that the Corps of Engineers could not approve
15 Acme's application, in light of BCDC's objection, unless the
16 Secretary determined to override BCDC's objection. A true and
17 correct copy of the June 11, 1984 NOAA letter is attached hereto
18 as Exhibit 3.

19 32. On June 11, 1984, defendant Lee on behalf of the
20 Corps of Engineers approved a Corps permit for Acme's project in
21 PN 13881 E59 (revised). The Corps permit was issued
22 notwithstanding the knowledge of defendant Lee and the Corps that
23 BCDC had objected to Acme's consistency certification, and
24 notwithstanding that the Secretary of Commerce had not overridden
25 BCDC's objection. The Corp's approval of Acme's permit did not
26 include the conditions for a consistency concurrence which BCDC

1 had identified in its consistency objection. A true and correct
2 copy of June 11, 1984 Corps decision is attached hereto as
3 Exhibit 4.

4 Administrative Exhaustion

5 33. Following the June 11, 1984 Corps decision to
6 approve Acme's permit application, BCDC requested defendants
7 Palladino and Bratton to review that decision and to withdraw the
8 Corps permit. These requests were denied by both defendants
9 Palladino and Bratton.

10 FIRST COUNT

11 (Declaratory Relief Pursuant to 28 U.S.C. § 2201)

12 34. The allegations of paragraphs 1 through 33 above
13 are realleged and incorporated herein by reference.

14 35. Federal defendants have issued a Corps permit for
15 Acme's land fill expansion despite BCDC's consistency objection.
16 Federal defendants have failed to rescind the Corps permit
17 despite noncompliance with CZMA requirements; have failed to
18 incorporate the conditions for BCDC's consistency concurrence in
19 the Corps permit; and contend that they have the authority to
20 disregard BCDC's consistency objection.

21 36. Federal defendants also purport to have the
22 authority to disregard the site designations and the planning for
23 water-related industries in the federally-approved BCDC Management
24 Program and the Bay Plan, and contend that they may instead
25 substitute their own judgment and appraisal as to the need and

26 /

27 12.

1 planning for water-related industrial sites around San Francisco
2 Bay.

3 37. The actions of federal defendants as alleged above
4 violate the CZMA and the regulations thereunder, are in excess of
5 federal defendants' jurisdiction and authority, constitute
6 a failure to proceed in the manner required by law, and are an
7 abuse of discretion, all in violation of the Administrative
8 Procedure Act and the standards for issuance of Corps permits
9 under the Rivers and Harbors Act of 1899 and the Clean Water Act.

10 38. There is presently an actual and substantial
11 controversy between federal defendants and BCDC with regard to
12 compliance by the Corps of Engineers with the CZMA and the
13 federally-approved BCDC Management Program, and a declaration
14 with respect to that controversy is appropriate pursuant to 28
15 U.S.C. § 2201.

16 SECOND COUNT

17 (Injunctive Relief Pursuant to Fed. Rule of Civil Pro. 65)

18 39. The allegations of paragraphs 1 through 37 above
19 are realleged and incorporated herein by reference.

20 40. BCDC is informed and believes and alleges that Acme
21 is presently placing fill on the landfill site pursuant to the
22 Corps permit, and that Acme intends to fill the site higher than
23 the twenty-foot level identified by BCDC as a condition for
24 consistency concurrence.

25 41. Unless enjoined, Acme's filling will cause
26 substantial and irreparable injury in that BCDC will not be able

1 to carry out its obligations to manage and plan for land and
2 water uses under the CZMA, the federally-approved BCDC Management
3 Program, the Bay Plan and the McAteer-Petris Act; Acme's filling
4 will create pressure for further filling directly in San
5 Francisco Bay to create new sites for water-related industry; and
6 Acme's filling will preclude use of the site for water-related
7 industry in the future, thereby impairing the development of
8 water-related industries in the San Francisco Bay area.

9 42. Unless enjoined, Acme's filling will also
10 irreparably harm the public interest in comprehensive land and
11 water use planning mandated by the CZMA, the McAteer-Petris Act,
12 the BCDC Management Program and the Bay Plan.

13 43. Injunctive relief to compel federal defendants to
14 comply with the CZMA, and to rescind the Corps permit pending
15 compliance with the CZMA is necessary. Injunctive relief to
16 restrain Acme from filing above the twenty-foot height identified
17 by BCDC as a condition for consistency concurrence is also
18 necessary if the land fill site is to be preserved for
19 water-related industrial use.

20 44. BCDC has no speedy and adequate remedy for the
21 violations of law and the injury and harm alleged above, other
22 than injunctive relief.

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