



DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, CORPS OF ENGINEERS
333 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94105-2197

SEP 4 2003

Regulatory Branch

SUBJECT: File Number 28135S – Western Stege Marsh Remediation and Restoration

Mr. Mike Hryciw
University of California, Berkeley
Project Manager
Capital Projects
1936 University Avenue, 2nd. Floor
Berkeley, California 94720

Dear Mr.Hryciw:

This letter is in reference to your submittal of June 24, 2003 concerning Department of the Army authorization to excavate and then restore between 3.71 and 5.23 acres of wetlands pursuant to a clean-up order (Number 01-02) from the Regional Water Quality Control Board (RWQCB) for property in and adjacent to Western Stege Marsh in Richmond, Contra Costa County, California. The property is south of South 46th Street and the Richmond Field Station, off Highway 580 in Richmond. The actual number of acres to be disturbed and restored is uncertain because the final acreage will be determined with RWQCB staff during the clean-up operation.

Based on a review of the information you submitted, your project qualifies for authorization under Department of the Army Nationwide Permit 38 (*Cleanup of Hazardous and Toxic Waste*), (67 FR 2020, January 15, 2002), pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403). See Enclosure 1.

The project must be in compliance with the General Conditions cited in Enclosure 2 for this Nationwide Permit authorization to remain valid. **Upon completion of the project and all associated mitigation requirements, you shall sign and return the Certification of Compliance**, Enclosure 3, verifying that you have complied with the terms and conditions of the permit. Non-compliance with any condition could result in the revocation, suspension or modification of the authorization for your project, thereby requiring you to obtain an individual permit from the Corps. This Nationwide Permit authorization does not obviate the need to obtain other State or local approvals required by law.

This authorization will remain valid for two years from the date of this letter unless the Nationwide Permit is modified, suspended or revoked. If you have commenced work or are under contract to commence work prior to the suspension, or revocation of the Nationwide Permit and the project would not comply with the resulting Nationwide Permit authorization, you

have twelve (12) months from that date to complete the project under the present terms and conditions of the Nationwide Permit.

This authorization will not be effective until you have obtained Section 401 water quality certification or a waiver of certification from the San Francisco Bay Regional Water Quality Control Board (RWQCB), and a concurrence from the S.F. Bay Conservation and Development Commission with your certification that your project will comply with California's Coastal Zone Management Act. If the RWQCB fails to act on a valid request for certification within two (2) months after receipt, the Corps will presume a waiver of water quality certification has been obtained. If the Commission fails to act on a valid request for concurrence with your certification within six (6) months after receipt, the Corps will presume a concurrence has been obtained. You shall submit a copy of the certification or waiver and concurrence to the Corps prior to the commencement of work.

To ensure compliance with the Nationwide Permit, the following special conditions shall be implemented:

- 1) The project shall be implemented as shown on Figures 1 and 5-9 attached.
- 2) The project shall be implemented as described in the documents entitled "Nationwide Permit 38 Modification Request (ACOE File No. 26417S) Western Stege Marsh Remediation and Restoration Project at Richmond Field Station," dated June 2003 and prepared by BBL, and the "Richmond Field Station Remediation Project Biological Assessment Report," dated July 2003 and also prepared by BBL.
- 3) This Corps permit does not authorize you to take an endangered species, in particular the California clapper rail (*Rallus longirostrus obsoletus*). In order to legally take a listed species, you must have separate authorization under the Endangered Species Act (ESA). The Biological Opinion (BO) dated September 3, 2003, (copy enclosed), contains mandatory terms and conditions to implement the reasonable and prudent measures that are associated with "incidental take" that is also specified in the BO. Your authorization under this Corps permit is conditional upon your compliance with all of the mandatory terms and conditions associated incidental take of the attached BO, which terms and conditions are incorporated by reference in this permit. Failure to comply with the terms and conditions associated with incidental take of the BO, where a take of the listed species occurs, would constitute an unauthorized take, and it would also constitute non-compliance with your Corps permit. The Fish and Wildlife Service is the appropriate authority to determine compliance with the terms and conditions of its BO and with the ESA.

You may refer all questions to Molly Martindale of our Regulatory Branch at 415-977-8448. All correspondence should reference the file number 28135S.

Sincerely,



Edward A. Wylie
Chief, South Section

Enclosures

Copy furnished (w/ enclosure):

Ms. Diane Mims
Blasland, Bouck and Lee, Inc.
Walnut Creek, CA

Copies furnished (w/o enclosures):

US F&WS, Sacramento, CA Attn: Dan Buford
CA RWQCB, Oakland, CA Attn: Cecil Felix
CA BCDC, San Francisco, CA Attn: Michelle Levinson

2002 Nationwide Permits

(effective 18 March 2002)

38. **Cleanup of Hazardous and Toxic Waste.** Specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority provided the permittee notifies the District Engineer in accordance with the "Notification" General Condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. Court ordered remedial action plans or related settlements are also authorized by this NWP. This NWP does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste. Activities undertaken entirely on a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under Section 404 of the CWA or Section 10 of the Rivers and Harbors Act. (Sections 10 and 404)

Nationwide Permit General Conditions - March 18, 2002

The following General Conditions must be followed in order for any authorization by an NWP to be valid:

1. Navigation. No activity may cause more than a minimal adverse effect on navigation.
2. Proper Maintenance. Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.
3. Soil Erosion and Sediment Controls. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow.
4. Aquatic Life Movements. No activity may substantially disrupt the necessary life-cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. Culverts placed in streams must be installed to maintain low flow conditions.
5. Equipment. Heavy equipment working in wetlands must be placed on mats, or other measures must be taken to minimize soil disturbance.
6. Regional and Case-By-Case Conditions. The activity must comply with any regional conditions that may have been added by the Division Engineer (See 33 CFR Part 330.4(e).) and with any case specific conditions added by the Corps or by the State or tribe in its Section 401 Water Quality Certification or Coastal Zone Management Act consistency determination.
7. Wild and Scenic Rivers. No activity may occur in a component of the National Wild and Scenic River System; or in a river officially designated by Congress as a "study river" for possible inclusion in the system, while the river is in an official study status; unless the appropriate Federal agency, with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation, or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency in the area (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service).
8. Tribal Rights. No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.
9. Water Quality.
 - (a) In certain states and tribal lands an individual Section 401 Water Quality Certification must be obtained or waived. (See 33 CFR Part 330.4(c).)
 - (b) For NWPs 12, 14, 17, 18, 32, 39, 40, 42, 43, and 44, where the state or tribal Section 401 certification (either generically or individually) does not require or approve water quality management measures, the permittee must provide water quality management measures that will ensure that the authorized work does not result in more than minimal degradation of water quality (or the Corps determines that compliance with state or local standards, where applicable, will ensure no more than minimal adverse effect on water quality). An important component of water quality management includes stormwater management that minimizes degradation of the downstream aquatic system, including water quality. (Refer to General Condition 21 for stormwater management requirements.) Another important component of water quality management is the establishment and maintenance of vegetated buffers next to open waters, including streams. (Refer to General Condition 19 for vegetated buffer requirements for the NWPs.)

This condition is only applicable to projects that have the potential to affect water quality. While appropriate measures must be taken, in most cases it is not necessary to conduct detailed studies to identify such measures or to require monitoring.
10. Coastal Zone Management. In certain states, an individual state coastal zone management consistency concurrence must be obtained or waived. (See 33 CFR Part 330.4(d).)
11. Endangered Species.
 - (a) No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the District Engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or is located in the designated critical habitat and shall not begin work on the activity until notified by the District Engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that may affect Federally-listed endangered or threatened species or designated critical habitat, the notification must include the name(s) of the endangered or

threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. As a result of formal or informal consultation with the FWS or NMFS, the District Engineer may add species-specific regional endangered species conditions to the NWP.

(b) Authorization of an activity by a NWP does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the FWS or the NMFS, both lethal and non-lethal "takes" of protected species are in violation of the ESA. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the FWS and NMFS or their world wide web pages at <http://www.fws.gov/r9endspp/endspp.html> and http://www.nfms.gov/prot_res/overview/es.html respectively.

12. Historic Properties. No activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the District Engineer has complied with the provisions of 33 CFR Part 325, Appendix C. The prospective permittee must notify the District Engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin the activity until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places. (See 33 CFR Part 330.4(g).) For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the notification must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

13. Notification.

(a) Timing: Where required by the terms of the NWP, the prospective permittee must notify the District Engineer with a preconstruction notification (PCN) as early as possible. The District Engineer must determine if the notification is complete within 30 days of the date of receipt and can request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the District Engineer will notify the prospective permittee that the notification is still incomplete and the PCN review process will not commence until all of the requested information has been received by the District Engineer. The prospective permittee shall not begin the activity:

(1) Until notified in writing by the District Engineer that the activity may proceed under the NWP with any special conditions imposed by the District or Division Engineer; or

(2) If notified in writing by the District or Division Engineer that an Individual Permit is required; or

(3) Unless 45 days have passed from the District Engineer's receipt of the complete notification and the prospective permittee has not received written notice from the District or Division Engineer. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR Part 330.5(d) (2).

(b) Contents of Notification: The notification must be in writing and include the following information:

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed project;

(3) Brief description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), Regional General Permit(s), or Individual Permit(s) used or intended to be used to authorize any part of the proposed project or any related activity. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the project and when provided result in a quicker decision.);

(4) For NWPs 7, 12, 14, 18, 21, 29, 31, 34, 38, 39, 40, 41, 42, and 43, the PCN must include a delineation of affected special aquatic sites, including wetlands, vegetated shallows (e.g., submerged aquatic vegetation, seagrass beds), and riffle and pool complexes (See Paragraph 13(f) below.);

(5) For NWP 7 (Outfall Structures and Maintenance), the PCN must include information regarding the original design capacities and configurations of those areas of the facility where maintenance dredging or excavation is proposed;

(6) For NWP 14 (Linear Transportation Projects), the PCN must include a compensatory mitigation proposal to offset permanent losses of waters of the U.S. and a statement describing how temporary losses of waters of the U.S. will be minimized to the maximum extent practicable;

(7) For NWP 21 (Surface Coal Mining Activities), the PCN must include an Office of Surface Mining (OSM) or state-approved mitigation plan, if applicable. To be authorized by this NWP, the District Engineer must determine that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are minimal both individually and cumulatively and must notify the project sponsor of this determination in writing;

(8) For NWP 27 (Stream and Wetland Restoration Activities), the PCN must include documentation of the prior condition of the site that will be reverted by the permittee;

(9) For NWP 29 (Single-family Housing), the PCN must include:

(i) Any past use of this NWP by the prospective permittee and/or the permittee's spouse;

(ii) A statement that the single-family housing activity is for a personal residence of the permittee;

(iii) A description of the entire parcel, including its size, and a delineation of wetlands. For the purpose of this NWP, parcels of land measuring 1/4 acre or less will not require a formal on-site delineation. However, the applicant shall provide an indication of where the wetlands

are and the amount of wetlands that exists on the property. For parcels greater than 1/4 acre in size, formal wetland delineation must be prepared in accordance with the current method required by the Corps. (See Paragraph 13(f) below.);

(iv) A written description of all land (including, if available, legal descriptions) owned by the prospective permittee and/or the prospective permittee's spouse, within a one mile radius of the parcel, in any form of ownership (including any land owned as a partner, corporation, joint tenant, co-tenant, or as a tenant-by-the-entirety) and any land on which a purchase and sale agreement or other contract for sale or purchase has been executed;

(10) For NWP 31 (Maintenance of Existing Flood Control Facilities), the prospective permittee must either notify the District Engineer with a PCN prior to each maintenance activity or submit a five year (or less) maintenance plan. In addition, the PCN must include all of the following:

(i) Sufficient baseline information identifying the approved channel depths and configurations and existing facilities. Minor deviations are authorized, provided the approved flood control protection or drainage is not increased;

(ii) A delineation of any affected special aquatic sites, including wetlands; and

(iii) Location of the dredged material disposal site;

(11) For NWP 33 (Temporary Construction, Access, and Dewatering), the PCN must include a restoration plan of reasonable measures to avoid and minimize adverse effects to aquatic resources;

(12) For NWPs 39, 43, and 44, the PCN must also include a written statement to the District Engineer explaining how avoidance and minimization for losses of waters of the US were achieved on the project site;

(13) For NWP 39 and NWP 42, the PCN must include a compensatory mitigation proposal to offset losses of waters of the US or justification explaining why compensatory mitigation should not be required. For discharges that cause the loss of greater than 300 linear feet of an intermittent stream bed, to be authorized, the District Engineer must determine that the activity complies with the other terms and conditions of the NWP, determine adverse environmental effects are minimal both individually and cumulatively, and waive the limitation on stream impacts in writing before the permittee may proceed;

(14) For NWP 40 (Agricultural Activities), the PCN must include a compensatory mitigation proposal to offset losses of waters of the U.S. This NWP does not authorize the relocation of greater than 300 linear feet of existing serviceable drainage ditches constructed in non-tidal streams unless, for drainage ditches constructed in intermittent non-tidal streams, the District Engineer waives this criterion in writing, and the District Engineer has determined that the project complies with all terms and conditions of this NWP, and that any adverse impacts of the project on the aquatic environment are minimal, both individually and cumulatively;

(15) For NWP 43 (Stormwater Management Facilities), the PCN must include, for the construction of new stormwater management facilities, a maintenance plan (in accordance with state and local requirements, if applicable) and a compensatory mitigation proposal to offset losses of waters of the U.S. For discharges that cause the loss of greater than 300 linear feet of an intermittent stream bed, to be authorized, the District Engineer must determine that the activity complies with the other terms and conditions of the NWP, determine adverse environmental effects are minimal both individually and cumulatively, and waive the limitation on stream impacts in writing before the permittee may proceed;

(16) For NWP 44 (Mining Activities), the PCN must include a description of all waters of the U.S. adversely affected by the project, a description of measures taken to minimize adverse effects to waters of the U.S., a description of measures taken to comply with the criteria of the NWP, and a reclamation plan (for all aggregate mining activities in isolated waters and non-tidal wetlands adjacent to headwaters and any hard rock/mineral mining activities);

(17) For activities that may adversely affect Federally-listed endangered or threatened species, the PCN must include the name(s) of those endangered or threatened species that may be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work; and

(18) For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the PCN must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

(c) Form of Notification: The standard Individual Permit application form (ENG FORM 4345) may be used as the notification but must clearly indicate that it is a PCN and must include all of the information required in Paragraphs (b) (1)-(18) of General Condition 13. A letter containing the requisite information may also be used.

(d) District Engineer's Decision: In reviewing the PCN for the proposed activity, the District Engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. The prospective permittee may submit a proposed mitigation plan with the PCN to expedite the process. The District Engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed work are minimal. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, after considering mitigation, the District Engineer will notify the permittee and include any conditions the District Engineer deems necessary. The District Engineer must approve any compensatory mitigation proposal before the permittee commences work. If the prospective permittee is required to submit a compensatory mitigation proposal with the PCN, the proposal may be either conceptual or detailed. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the District Engineer will expeditiously review the proposed compensatory mitigation plan. The District Engineer must review the plan within 45 days of receiving a complete PCN and determine whether the conceptual or specific proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the

District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant. The response will state that the project can proceed under the terms and conditions of the NWP.

If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then the District Engineer will notify the applicant either:

- (1) that the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an Individual Permit;
- (2) that the project is authorized under the NWP subject to the applicant's submission of a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level; or

(3) that the project is authorized under the NWP with specific modifications or conditions. Where the District Engineer determines that mitigation is required to ensure no more than minimal adverse effects occur to the aquatic environment, the activity will be authorized within the 45-day PCN period. The authorization will include the necessary conceptual or specific mitigation or a requirement that the applicant submit a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level. When conceptual mitigation is included, or a mitigation plan is required under item (2) above, no work in waters of the U.S. will occur until the District Engineer has approved a specific mitigation plan.

(e) Agency Coordination: The District Engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

For activities requiring notification to the District Engineer that result in the loss of greater than 1/2 acre of waters of the U.S., the District Engineer will provide immediately (e.g., via facsimile transmission, overnight mail, or other expeditious manner) a copy to the appropriate Federal or state offices (FWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO), and, if appropriate, NMFS). With the exception of NWP 37, these agencies will then have 10 calendar days from the date the material is transmitted to telephone or fax the District Engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 15 calendar days before making a decision on the notification. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency, except as provided below. The District Engineer will indicate in the administrative record associated with each notification that the resource agencies' concerns were considered. As required by Section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act, the District Engineer will provide a response to NMFS within 30 days of receipt of any Essential Fish Habitat conservation recommendations. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification.

(f) Wetland Delineations: Wetland delineations must be prepared in accordance with the current method required by the Corps. (For NWP 29 see Paragraph (b)(9)(iii) for parcels less than 1/4 acre in size.) The permittee may ask the Corps to delineate the special aquatic site. There may be some delay if the Corps does the delineation. Furthermore, the 45-day period will not start until the wetland delineation has been completed and submitted to the Corps, where appropriate.

14. Compliance Certification. Every permittee who has received NWP verification from the Corps will submit a signed certification regarding the completed work and any required mitigation. The certification will be forwarded by the Corps with the authorization letter and will include:

- (a) A statement that the authorized work was done in accordance with the Corps authorization, including any general or specific conditions;
- (b) A statement that any required mitigation was completed in accordance with the permit conditions; and
- (c) The signature of the permittee certifying the completion of the work and mitigation.

15. Use of Multiple Nationwide Permits. The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the U.S. authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit (e.g. if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the U.S. for the total project cannot exceed 1/3 acre).

16. Water Supply Intakes. No activity, including structures and work in navigable waters of the U.S. or discharges of dredged or fill material, may occur in the proximity of a public water supply intake except where the activity is for repair of the public water supply intake structures or adjacent bank stabilization.

17. Shellfish Beds. No activity, including structures and work in navigable waters of the U.S. or discharges of dredged or fill material, may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWP 4.

18. Suitable Material. No activity, including structures and work in navigable waters of the U.S. or discharges of dredged or fill material, may consist of unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.) and material used for construction or discharged must be free from toxic pollutants in toxic amounts. (See Section 307 of the CWA.)

19. Mitigation. The District Engineer will consider the factors discussed below when determining the acceptability of appropriate and practicable mitigation necessary to offset adverse effects on the aquatic environment that are more than minimal.

(a) The project must be designed and constructed to avoid and minimize adverse effects to waters of the U.S. to the maximum extent practicable at the project site (i.e., on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing or compensating) will be required to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland impacts requiring a PCN, unless the District Engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-specific waiver of this requirement. Consistent with National policy, the District Engineer will establish a preference for restoration of wetlands as compensatory mitigation, with preservation used only in exceptional circumstances.

(d) Compensatory mitigation (i.e., replacement or substitution of aquatic resources for those impacted) will not be used to increase the acreage losses allowed by the acreage limits of some of the NWPs. For example, 1/4 acre of wetlands cannot be created to change a 3/4 acre loss of wetlands to a 1/2 acre loss associated with NWP 39 verification. However, 1/2 acre of created wetlands can be used to reduce the impacts of a 1/2 acre loss of wetlands to the minimum impact level in order to meet the minimal impact requirement associated with NWPs.

(e) To be practicable, the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of the overall project purposes. Examples of mitigation that may be appropriate and practicable include, but are not limited to: reducing the size of the project; establishing and maintaining wetland or upland vegetated buffers to protect open waters such as streams; and replacing losses of aquatic resource functions and values by creating, restoring, enhancing, or preserving similar functions and values, preferably in the same watershed.

(f) Compensatory mitigation plans for projects in or near streams or other open waters will normally include a requirement for the establishment, maintenance, and legal protection (e.g., easements, deed restrictions) of vegetated buffers to open waters. In many cases, vegetated buffers will be the only compensatory mitigation required. Vegetated buffers should consist of native species. The width of the vegetated buffers required will address documented water quality or aquatic habitat loss concerns. Normally, the vegetated buffer will be 25 to 50 feet wide on each side of the stream, but the District Engineer may require slightly wider vegetated buffers to address documented water quality or habitat loss concerns. Where both wetlands and open waters exist on the project site, the Corps will determine the appropriate compensatory mitigation (e.g., stream buffers or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where vegetated buffers are determined to be the most appropriate form of compensatory mitigation, the District Engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland impacts.

(g) Compensatory mitigation proposals submitted with the "notification" may be either conceptual or detailed. If conceptual plans are approved under the verification, then the Corps will condition the verification to require detailed plans be submitted and approved by the Corps prior to construction of the authorized activity in waters of the U.S.

(h) Permittees may propose the use of mitigation banks, in-lieu fee arrangements or separate activity-specific compensatory mitigation. In all cases that require compensatory mitigation, the mitigation provisions will specify the party responsible for accomplishing and/or complying with the mitigation plan.

20. Spawning Areas. Activities, including structures and work in navigable waters of the U.S. or discharges of dredged or fill material, in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., excavate, fill, or smother downstream by substantial turbidity) of an important spawning area are not authorized.

21. Management of Water Flows. To the maximum extent practicable, the activity must be designed to maintain preconstruction downstream flow conditions (e.g., location, capacity, and flow rates). Furthermore, the activity must not permanently restrict or impede the passage of normal or expected high flows (unless the primary purpose of the fill is to impound waters) and the structure or discharge of dredged or fill material must withstand expected high flows. The activity must, to the maximum extent practicable, provide for retaining excess flows from the site, provide for maintaining surface flow rates from the site similar to preconstruction conditions, and provide for not increasing water flows from the project site, relocating water, or redirecting water flow beyond preconstruction conditions. Stream channelizing will be reduced to the minimal amount necessary, and the activity must, to the maximum extent practicable, reduce adverse effects such as flooding or erosion downstream and upstream of the project site, unless the activity is part of a larger system designed to manage water flows. In most cases, it will not be a requirement to conduct detailed studies and monitoring of water flow.

This condition is only applicable to projects that have the potential to affect waterflows. While appropriate measures must be taken, it is not necessary to conduct detailed studies to identify such measures or require monitoring to ensure their effectiveness. Normally, the Corps will defer to state and local authorities regarding management of water flow.

22. Adverse Effects From Impoundments. If the activity creates an impoundment of water, adverse effects to the aquatic system due to the acceleration of the passage of water, and/or the restricting of its flow shall be minimized to the maximum extent practicable. This includes structures and work in navigable waters of the U.S., or discharges of dredged or fill material.

23. Waterfowl Breeding Areas. Activities, including structures and work in navigable waters of the U.S. or discharges of dredged or fill material, into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

24. Removal of Temporary Fills. Any temporary fills must be removed in their entirety and the affected areas returned to their preexisting elevation.

25. Designated Critical Resource Waters. Critical resource waters include, NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally listed threatened and endangered species, coral reefs, state natural heritage sites, and outstanding national resource waters or other waters officially designated by a state as having particular environmental or ecological significance and identified by the District Engineer after notice and opportunity for public comment. The District Engineer may also designate additional critical resource waters after notice and opportunity for comment.

(a) Except as noted below, discharges of dredged or fill material into waters of the U.S. are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters. Discharges of dredged or fill materials into waters of the U.S. may be authorized by the above NWPs in National Wild and Scenic Rivers if the activity complies with General Condition 7. Further, such discharges may be authorized in designated critical habitat for Federally listed threatened or endangered species if the activity complies with General Condition 11 and the FWS or the NMFS has concurred in a determination of compliance with this condition.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with General Condition 13, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The District Engineer may authorize activities under these NWPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

26. Fills Within 100-Year Floodplains. For purposes of this General Condition, 100-year floodplains will be identified through the existing Federal Emergency Management Agency's (FEMA) Flood Insurance Rate Maps or FEMA-approved local floodplain maps.

(a) Discharges in Floodplain; Below Headwaters. Discharges of dredged or fill material into waters of the U.S. within the mapped 100-year floodplain, below headwaters (i.e. five cfs), resulting in permanent above-grade fills, are not authorized by NWPs 39, 40, 42, 43, and 44.

(b) Discharges in Floodway; Above Headwaters. Discharges of dredged or fill material into waters of the U.S. within the FEMA or locally mapped floodway, resulting in permanent above-grade fills, are not authorized by NWPs 39, 40, 42, and 44.

(c) The permittee must comply with any applicable FEMA-approved state or local floodplain management requirements.

27. Construction Period. For activities that have not been verified by the Corps and the project was commenced or under contract to commence by the expiration date of the NWP (or modification or revocation date), the work must be completed within 12 months after such date (including any modification that affects the project).

For activities that have been verified and the project was commenced or under contract to commence within the verification period, the work must be completed by the date determined by the Corps.

For projects that have been verified by the Corps, an extension of a Corps approved completion date maybe requested. This request must be submitted at least one month before the previously approved completion date.

END

Enclosure 3

Permittee: **University of California, Berkeley**

File No.: **28135S - Western Stege Marsh Remediation Project**

**Certification of Compliance
for
Nationwide Permit**

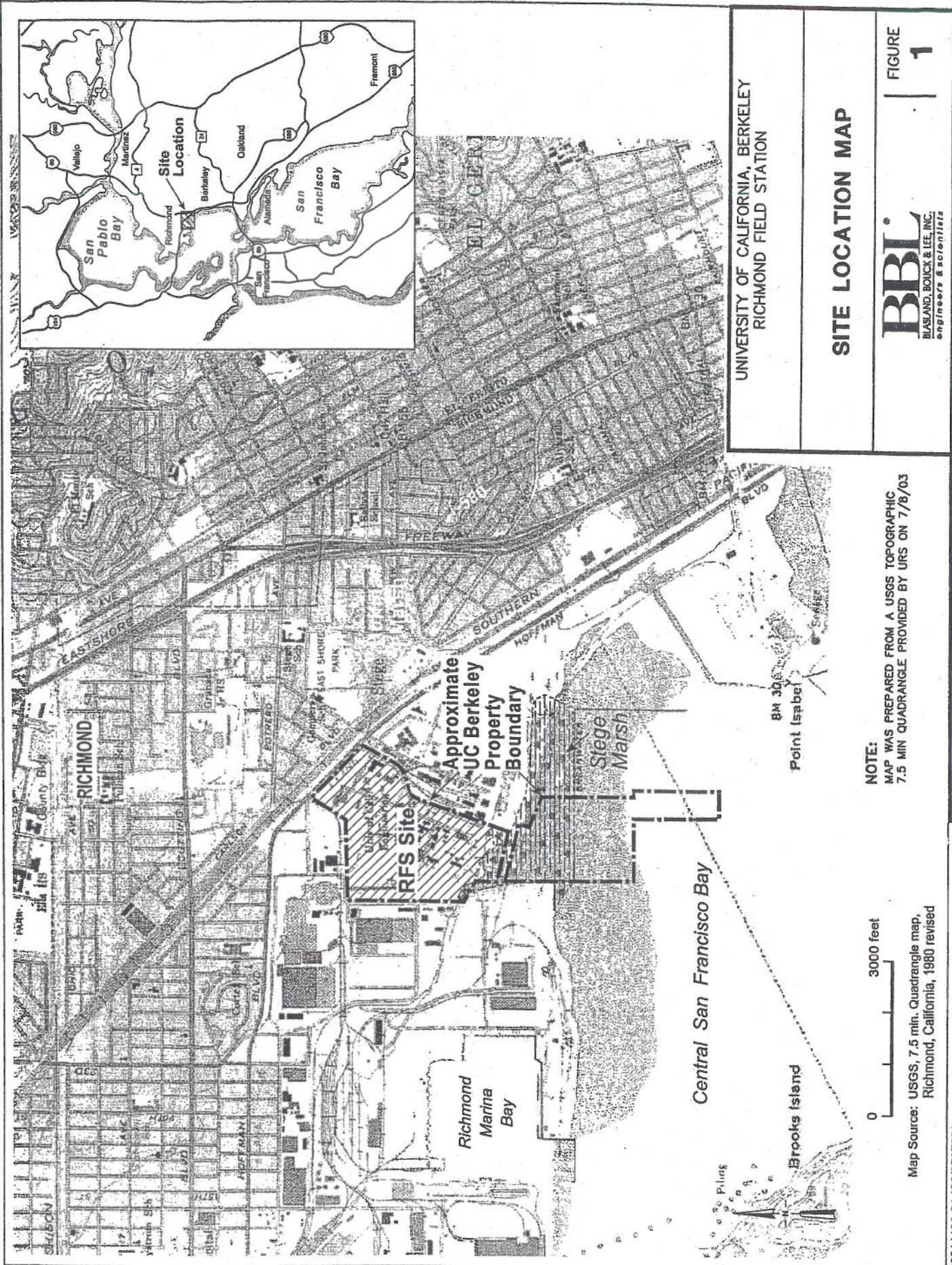
"I hereby certify that the work authorized by the above referenced file number and all required mitigation have been completed in accordance with the terms and conditions of the nationwide permit."

(permittee)

(date)

Return to:

Molly Martindale
Department of the Army
U.S. Army Engineer District, San Francisco
333 Market Street, CESP-N-OR-R
San Francisco, CA 94105-2197



UNIVERSITY OF CALIFORNIA, BERKELEY
 RICHMOND FIELD STATION

SITE LOCATION MAP

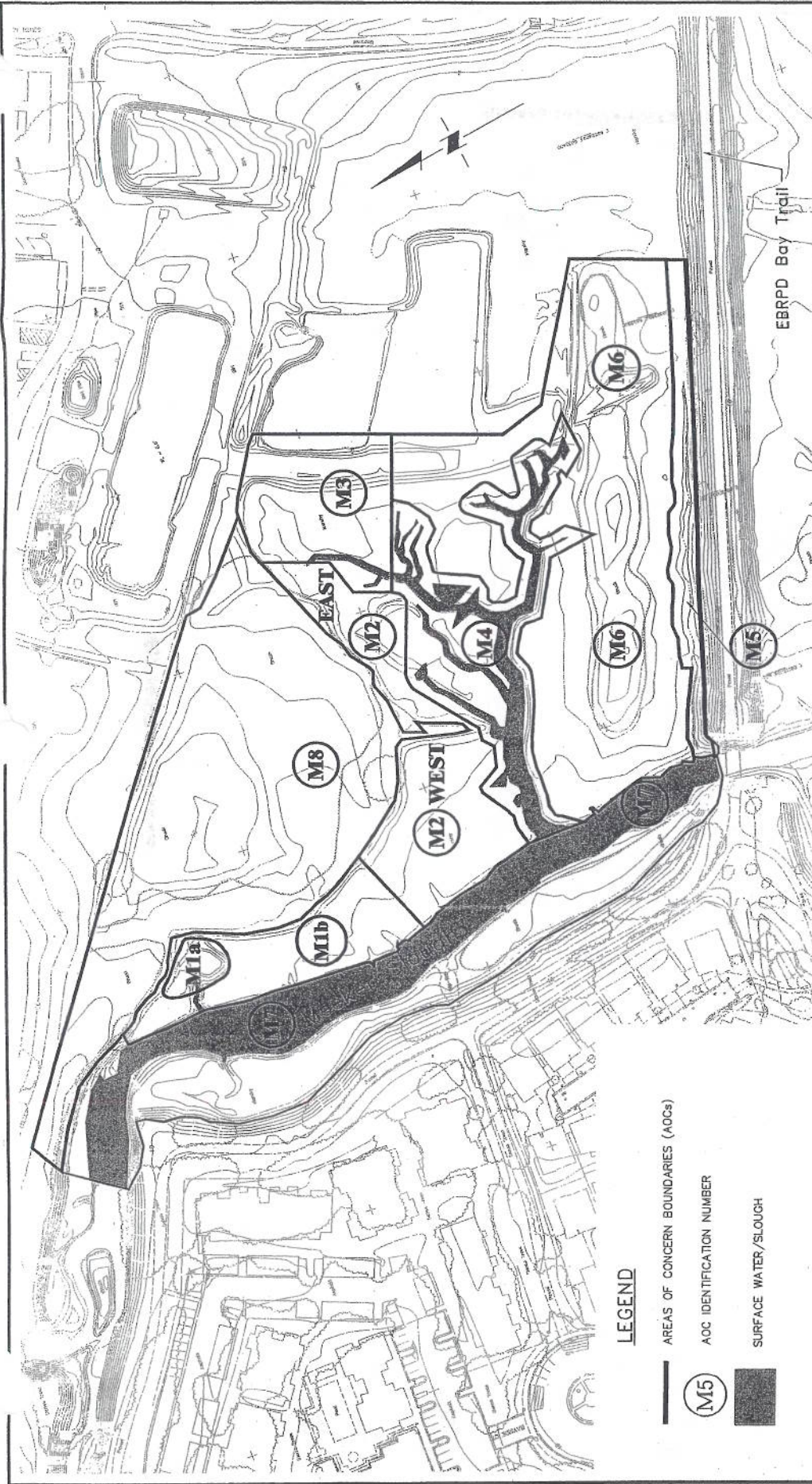
FIGURE
 1

BBL
 BLASLAND, BOUCK & LEE, INC.
 engineers & scientists

NOTE:
 MAP WAS PREPARED FROM A USGS TOPOGRAPHIC
 7.5 MIN QUADRANGLE PROVIDED BY URS ON 7/8/03

0 3000 feet

Map Source: USGS, 7.5 min. Quadrangle map,
 Richmond, California, 1980 revised



LEGEND

AREAS OF CONCERN BOUNDARIES (AOCs)

AOC IDENTIFICATION NUMBER

SURFACE WATER/SLOUGH



NOTE:
1) BASE MAP SUPPLIED BY URS ON 7/9/03 AT A SCALE OF 1"=100'.



UNIVERSITY OF CALIFORNIA, BERKELEY
RICHMOND FIELD STATION















LOCATIONS OF AOCs
MARSH PORTION OF SUBUNIT 2B

BBL
BUSLAND, BOGGS & BLES, INC.
engineers & scientists

FIGURE
5

U:\BASE\URS
L:\URS\URS
7/11/03 11:41 AM
F:\BBL\COB\2003\PROJ\24519\24510005.DWG

LEGEND

	PAMPAS GRASS 0.2 ACRES
	WALKING PATH 0.25 ACRES
	SURFACE WATER (ORANGE POND) 0.1 ACRES
	DISTRESSED/DEAD HIGH SALT MARSH (SALT GRASS) 0.2 ACRES
	COYOTE BRUSH/CONCRETE RUBBLE 0.3 ACRES
	MIXED RUDEERAL SCRUB 2.5 ACRES
	LOW SALT MARSH (PACIFIC CORDGRASS) 3 ACRES
	MIDDLE SALT MARSH (PICKLEWEED) 1.4 ACRES
	HIGH SALT MARSH (SALT GRASS) 3.7 ACRES
	SURFACE WATER/SLOUGH 1.1 ACRES
	ALKALI BULRUSH 0.1 ACRES
	FENCE LINE
	BOUNDARY OF DISTURBED AREA
	DISTURBED HABITAT LOW QUALITY HABITAT = 2.31 ACRES MEDIUM QUALITY HABITAT = 2.92 ACRES



NOTES:

- 1) SOME PORTIONS OF THE HIGH SALT MARSH (SALT GRASS) AREAS ALONG THE EBRPD BAY TRAIL ALSO CONTAIN INTERMITTENT PATCHES OF PICKLEWEED.
- 2) BASE MAP SUPPLIED BY URS ON 7/9/03 AT A SCALE OF 1"=100'.

EBRPD Bay Trail

LOW QUALITY HABITAT

MEDIUM QUALITY HABITAT

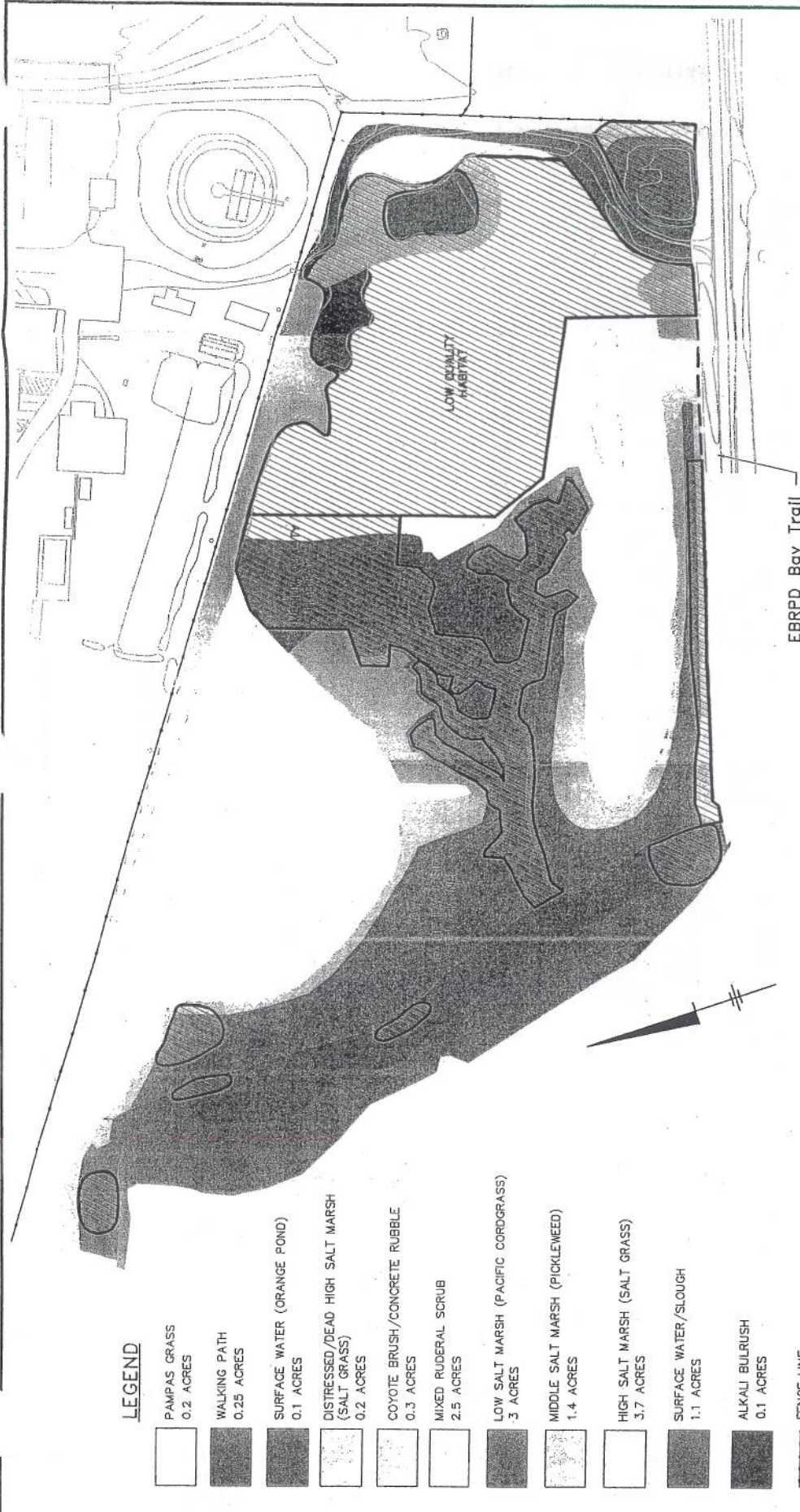
UNIVERSITY OF CALIFORNIA, BERKELEY
RICHMOND FIELD STATION

**ALTERNATIVE 1
DISTURBED AREAS**















BBL
BLAIR AND BOCKELER, INC.
PLANNING AND DESIGN

FIGURE
6

DATE: 7/11/03
BY: P. BOCKELER
PROJECT: EBRPD
FILE: 7/11/03 10-10-03
P:\887\040\2000\0101\24210\24210002.dwg



LEGEND

-  PAMPAS GRASS
0.2 ACRES
-  WALKING PATH
0.25 ACRES
-  SURFACE WATER (ORANGE POND)
0.1 ACRES
-  DISTRESSED/DEAD HIGH SALT MARSH (SALT GRASS)
0.2 ACRES
-  COYOTE BRUSH/CONCRETE RUBBLE
0.3 ACRES
-  MIXED RUDERAL SCRUB
2.5 ACRES
-  LOW SALT MARSH (PACIFIC CORDGRASS)
3 ACRES
-  MIDDLE SALT MARSH (PICKLEWEED)
1.4 ACRES
-  HIGH SALT MARSH (SALT GRASS)
3.7 ACRES
-  SURFACE WATER/SLOUGH
1.1 ACRES
-  ALKALI BULRUSH
0.1 ACRES
-  FENCE LINE
-  BOUNDARY OF DISTURBED AREA
-  DISTRESSED HABITAT
LOW QUALITY HABITAT = 2.31 ACRES
MEDIUM QUALITY HABITAT = 1.4 ACRES

NOTES:

- 1) SOME PORTIONS OF THE HIGH SALT MARSH (SALT GRASS) AREAS ALONG THE EBRPD BAY TRAIL ALSO CONTAIN INTERMITTENT PATCHES OF PICKLEWEED.
- 2) BASE MAP SUPPLIED BY URS ON 7/9/03 AT A SCALE OF 1"=100'.



EBRPD Bay Trail

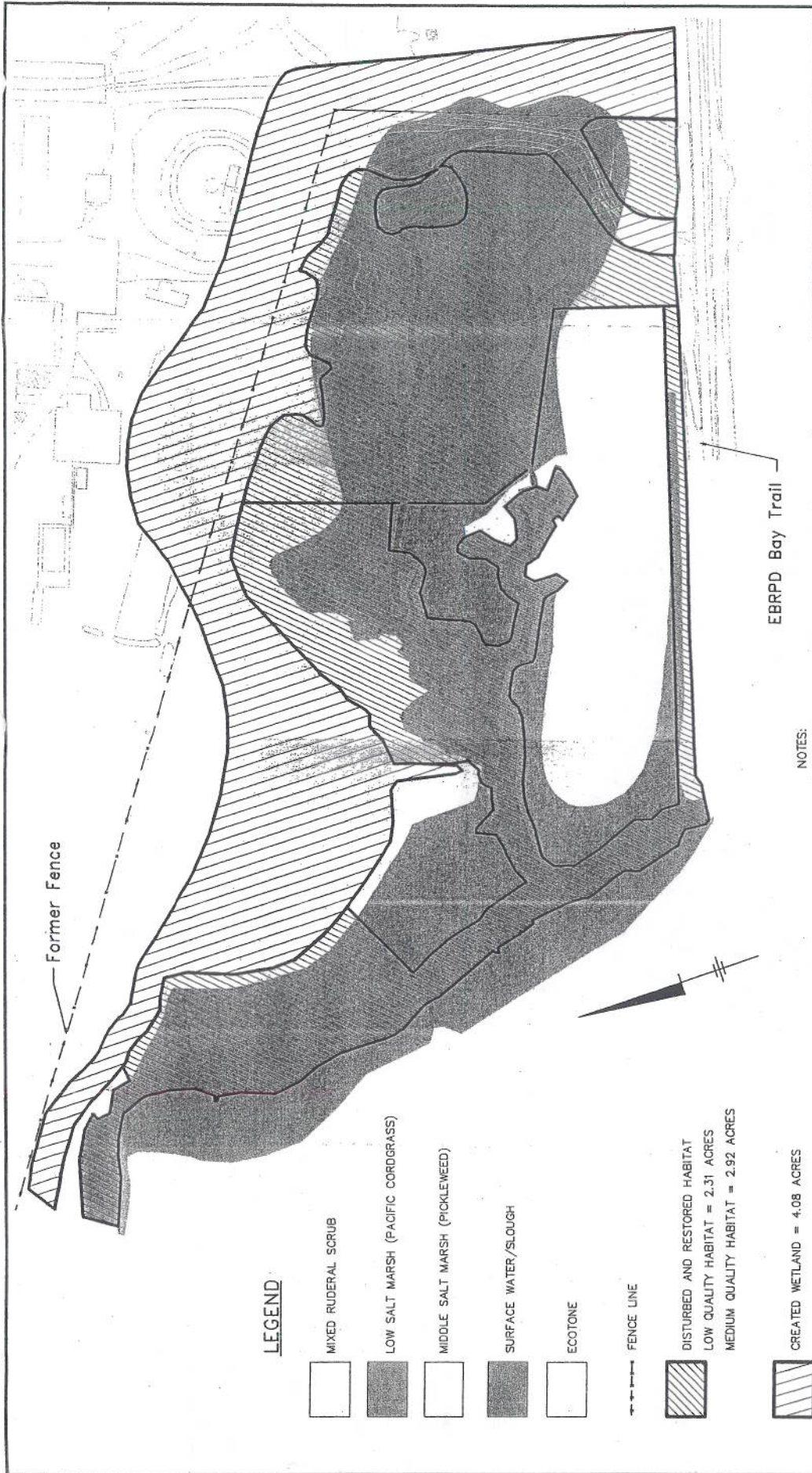
UNIVERSITY OF CALIFORNIA, BERKELEY
RICHMOND FIELD STATION

**ALTERNATIVE 2
DISTURBED AREAS**









BBI
BIOLOGICAL & BIOMIMETIC
INTEGRATION

FIGURE
7

DATE: 7/11/03
BY: P. WASSER/PLT-RL
PROJECT: 24160001.DWG



LEGEND

-  MIXED RUDERAL SCRUB
-  LOW SALT MARSH (PACIFIC CORDGRASS)
-  MIDDLE SALT MARSH (PICKLEWEED)
-  SURFACE WATER/SLOUGH
-  ECOTONE
-  FENCE LINE
-  DISTURBED AND RESTORED HABITAT
LOW QUALITY HABITAT = 2.31 ACRES
MEDIUM QUALITY HABITAT = 2.92 ACRES
-  CREATED WETLAND = 4.08 ACRES

TOTAL ACRES RESTORED AND CREATED = 9.31

NOTES:

- 1) SOME PORTIONS OF THE HIGH SALT MARSH (SALT GRASS) AREAS ALONG THE EBRPD BAY TRAIL ALSO CONTAIN INTERMITTENT PATCHES OF PICKLEWEED.
- 2) BASE MAP SUPPLIED BY URS ON 7/9/03 AT A SCALE OF 1"=100'.



EBRPD Bay Trail

Former Fence

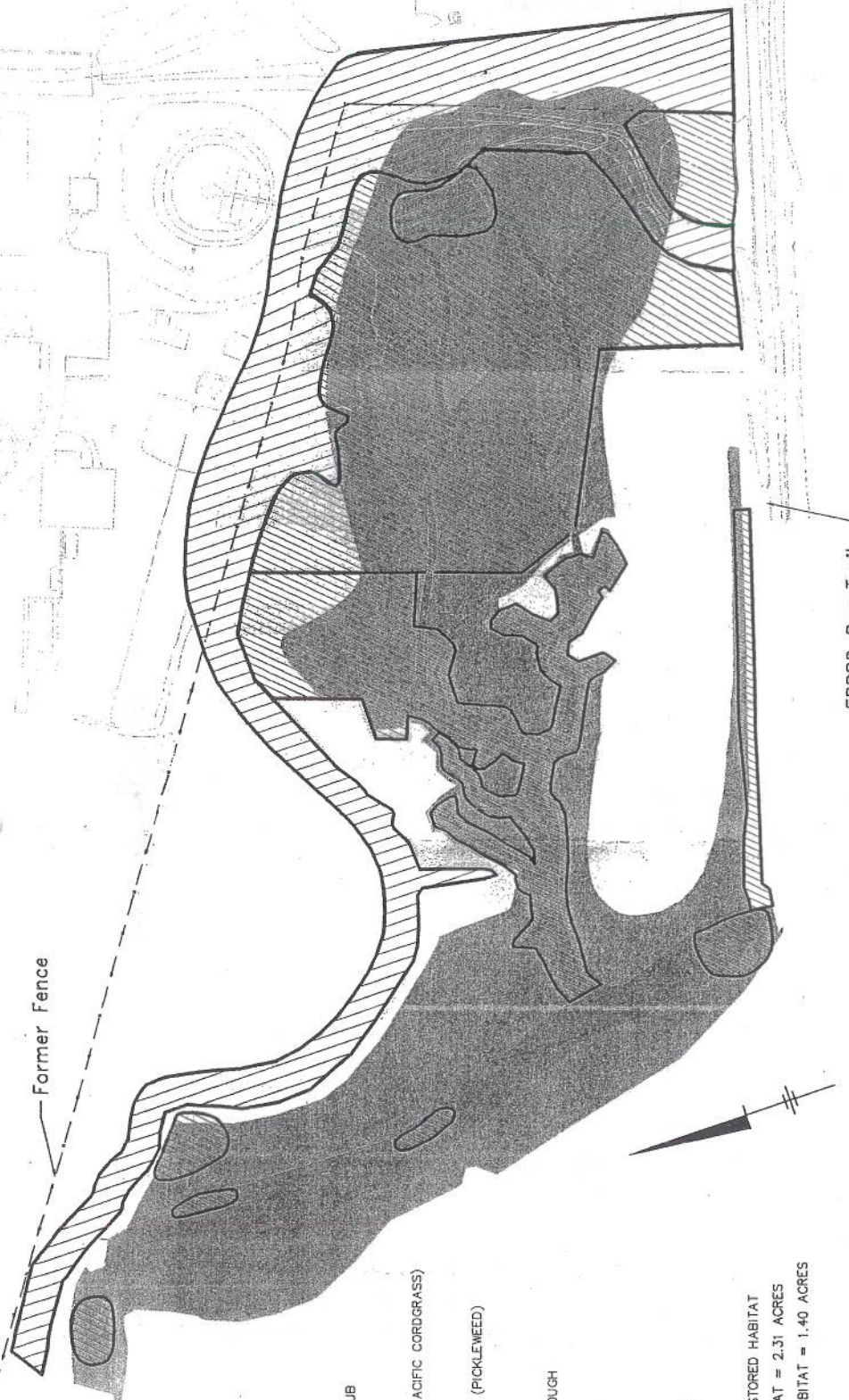
UNIVERSITY OF CALIFORNIA, BERKELEY
RICHMOND FIELD STATION

**ALTERNATIVE 1
CONCEPTUAL RESTORATION PLAN**









BBI
BAYLANDS BIOLOGICAL INC.
1000 UNIVERSITY AVENUE, SUITE 200
BERKELEY, CA 94702-1800
TEL: 415.863.8100 FAX: 415.863.8101

FIGURE **8**

U. OFF-INTER
P. PACIFIC/PL-08
P. 10/10/03/2003/08/24/03/000000000000



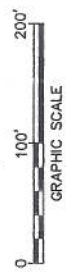
LEGEND

-  MIXED RUDERAL SCRUB
-  LOW SALT MARSH (PACIFIC CORDGRASS)
-  MIDDLE SALT MARSH (PICKLEWEED)
-  SURFACE WATER/SLOUGH
-  ECOTONE
-  FORMER FENCE LINE
-  DISTURBED AND RESTORED HABITAT
LOW QUALITY HABITAT = 2.31 ACRES
MEDIUM QUALITY HABITAT = 1.40 ACRES
-  CREATED WETLAND = 2.55 ACRES

TOTAL ACRES RESTORED AND CREATED = 6.26

NOTES:

- 1) SOME PORTIONS OF THE HIGH SALT MARSH (SALT GRASS) AREAS ALONG THE EBRPD BAY TRAIL ALSO CONTAIN INTERMITTENT PATCHES OF PICKLEWEED.
- 2) BASE MAP SUPPLIED BY URS ON 7/9/03 AT A SCALE OF 1"=100'.



UNIVERSITY OF CALIFORNIA, BERKELEY
RICHMOND FIELD STATION

**ALTERNATIVE 2
CONCEPTUAL RESTORATION PLAN**

BBI
BERKELEY BAY INSTITUTE
ENGINEERING & SCIENTISTS

FIGURE
9



United States Department of the Interior
FISH AND WILDLIFE SERVICE

Sacramento Fish and Wildlife Office
2800 Cottage Way, Room W-2605
Sacramento, California 95825-1846

IN REPLY REFER TO:
1-1-03-F-0228

SEP 3 2003

Mr. Calvin G. Fong
Chief, Regulatory Branch
(Attn: Molly Martindale)
U.S. Army Corps of Engineers
San Francisco District
333 Market Street
San Francisco, California 94105-2197

Subject: Endangered Species Formal Consultation on U.C. Berkeley's Proposed
Western Stege Marsh Remediation Project, Contra Costa County,
California (Corps File No. 28135S)

Dear Mr. Fong:

This document transmits the U.S. Fish and Wildlife Service's (Service) biological opinion based upon our review of the University of California, Berkeley's (UC Berkeley) proposed Western Stege Marsh Remediation Project (Remediation Project) located in Contra Costa County, California, and its effects on the endangered California clapper rail (*Rallus obsoletus longirostris*) (clapper rail) in accordance with section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.) (Act). Your September 1, 2003, request for formal consultation was received in our office on September 3, 2003.

This biological opinion is based on information provided in: (1) your September 1, 2003, letter initiating formal consultation; (2) Blasland, Bouck, and Lee's (BBL) June 2003 *Nationwide Permit 38 Modification Request, Western Stege Marsh Remediation and Restoration Project at Richmond Field Station*; (3) BBL's July 2003 *Richmond Field Station Remediation Project Biological Assessment Report (BA)*; and, (4) additional information contained in Service files. A complete administrative record of this consultation is on file at the Service's Sacramento Fish and Wildlife Office.

Mr. Calvin C. Fong

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CONSULTATION HISTORY

On July 31, 2002, the Corps requested informal consultation on the proposed action.

The applicant surveyed for clapper rails in Stege Marsh from February through May of 2003.

On May 13, 2002, the Service met with URS Corp

On June 26, 2003, the Service participated in a conference call with UC Berkeley, its consultants, and the Corps where the Service identified the need to initiate formal consultation.

BIOLOGICAL OPINION

Description of the Proposed Action

The UC Berkeley will remediate contaminants occurring in western Stege Marsh and Meeker Slough. The UC Berkeley will implement one of two alternatives developed as proposals to meet the requirements of the San Francisco Bay Regional Water Quality Control Board (Regional Board). The alternative to be implemented will be determined between the Regional Board and UC Berkeley based on either the results of treatability studies or at the determination of the Regional Board. Remediation activities include: 1) removal of sediments and overlying vegetation using a combination of land-based excavation using mats or access roadways and/or dredging; 2) treatment and upland disposal to either Subunit 1 or transported to an approved offsite facility; 3) backfilling of treatment areas for restoration with clean bay mud; and, 4) management/monitoring in place of areas designated as low to moderate risk. Areas of work are designated as M1a, M2 east and M2 west, and M3 through M8.

The proposed Remediation Project will result in temporary impacts to occupied clapper rail habitat. Habitats impacted during removal actions will be backfilled with bay muds and restored. Implementation of Alternative 1 is expected to temporarily impact 5.23 acres of tidal marsh suitable for clapper rails. In the event Alternative 2 is implemented, 3.71 acres of occupied clapper rail habitat will be temporarily impacted.

To minimize and mitigate impacts to the clapper rail UC Berkeley will conduct remediation activities outside of the clapper rail's breeding season. All work within 200 feet of suitable clapper rail habitat will be completed between September 1 and January 31 of any given year.

UC Berkeley developed two restoration alternatives, corresponding with the two respective remediation alternatives. If Alternative 1 is implemented, UC Berkeley will restore the 5.23 acres impacted by the remediation and create an additional 4.07 acres of suitable clapper rail habitat. If Alternative 2 is implemented, UC Berkeley will restore the 3.71 acres of habitat that will be remediated, and will create an additional 2.55 acres of suitable clapper rail habitat.

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Action Area

The action area includes Stege Marsh and its tidal sloughs and peripheral upland habitats.

Status of the Species/Environmental Baseline

California clapper rail

The clapper rail was federally listed as endangered in 1970 (35 FR 16047). A detailed account of the taxonomy, ecology, and biology of the clapper rail is presented in the Salt Marsh Harvest Mouse and California Clapper Rail Recovery Plan (Service 1984) and the references cited therein. The clapper rail is a fully protected species under California law (See California Fish and Game Code Section 3511).

The clapper rail is endemic to tidally influenced salt and brackish marshes of California. Historically, the clapper rail occurred in tidal marshes along California's coast from Morro Bay,

San Luis Obispo County, to Humboldt Bay, Humboldt County. Currently, clapper rails are known to occur in tidal marshes in San Francisco, San Pablo, Grizzly, Suisun and Honker Bays.

The clapper rail is distinguishable from other rails by its large body size of 32-47 cm from bill to tail, and weighs approximately 250-350 g. It has a long, slightly decurved orange bill, a rufous breast, black and white barred flanks, and white undertail coverts (Ripley 1977). Clapper rails are sexually dimorphic, the males are slightly larger than females (Garcia 1995). Juveniles have a pale bill and dark plumage.

Clapper rails are typically found in the intertidal zone and sloughs of salt and brackish marshes dominated by pickleweed, Pacific cordgrass (*Spartina foliosa*), gumplant (*Grindelia spp.*), salt grass, jaumea (*Jaumea carnosa*) and adjacent upland refugia. They may also occupy habitats with other vegetative components, which include, but are not limited to bulrush (*Scirpus americanus* and *S. maritimus*), cattails (*Typha spp.*), and Baltic rush (*Juncus balticus*).

Clapper rails are capable of producing several vocalizations, most common of which is a series of keks or claps. Pair bonds are typically established during the month of February, and nesting typically occurs from March through August. Estimates of clapper rail clutch size range from 5-14 eggs (DeGroot 1927, Gill 1972). The clapper rail builds a bowl shaped platform nest of marsh vegetation and detritus (DeGroot 1927, Zucca 1954, Gill 1972, Harvey 1980, Foerster *et al.* 1990, Garcia 1995). The clapper rail typically feeds on benthic invertebrates, but its diet is wide ranging, and includes seeds, and occasionally small mammals such as the harvest mouse.

Suitable habitat for clapper rails has been significantly reduced by approximately 84 percent of historic in the San Francisco Bay Area due to habitat conversions for urban and agricultural uses, and is a primary factor in the species decline. Additional impacts which have contributed to the

Mr. Calvin C. Fong

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decline in clapper rail populations include over-harvesting, environmental contaminants, and erosion or subsidence of habitat.

According to the BA, Stege Marsh was surveyed for clapper rails from February 10 to March 11, 2003, consistent with a Service-approved protocol. Clapper rails were detected in the marsh both north and south of the East Bay Regional Park District trail and on either side of Meeker Slough. Surveyors witnessed courtship and copulation between a pair of rails. Based upon vocalizations and visual observations surveyors estimated the presence of 1-2 pairs. Existing contaminants have degraded conditions for clapper rails in areas to be remediated. Some areas do not support vegetation or a benthic invertebrate community, and thus lack foraging habitat and hiding cover.

Effects of the Proposed Action

The Remediation Project will likely result in temporary direct impacts to occupied clapper rail habitat, and may result in harassment of non-breeding clapper rails. According to the BA, the removal of contaminants of concern will result in the temporary direct loss of 5.23 acres of suitable clapper rail habitat if Alternative 1 is implemented. According to the BA, Alternative 2 would result in the temporary direct loss of 3.71 acres of suitable clapper rail habitat. However, because neither alternative has been selected to be implemented, it is assumed that 5.23 acres of suitable clapper rail habitat will be impacted.

The Remediation Project is not likely to impact breeding clapper rails because the applicants will not conduct work during the clapper rail's breeding season. Dispersing or non-breeding clapper rails could be harassed by use of construction equipment and other work activities during the remediation of contaminants in Stege Marsh.

Remediation of contaminants in this portion of Stege Marsh will likely benefit the clapper rail by removing contaminants of concern, which currently reduce the quality of habitat for cover and foraging. Restoration of impacted sites will likely result in habitat of higher quality than what is impacted. The clapper rail will likely also benefit from newly created habitat. The amount of restoration and creation varied according to the alternative implemented. The clapper rail will benefit from the restoration of up to 5.23 acres of habitat and the creation of up to 4.07 acres of suitable clapper rail habitat.

Clapper rails could be harmed if disturbed tidal marsh habitat impacted by remediation and restoration is colonized by non-native plant species, especially *Lepidium* and non-native *Spartina* species.

Cumulative Effects

Cumulative effects include the effects of future State, Tribal, local or private actions affecting listed species and their critical habitat that are reasonably certain to occur in the action area considered in this biological opinion. Future Federal actions that are unrelated to the proposed

Mr. Calvin C. Fong

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action are not considered in this section because they require separate consultation pursuant to section 7 of the Act.

Numerous activities continue to impact habitats of clapper rails in the action area. Habitat loss and degradation affecting the flora and fauna continues as a result of urbanization and trail usage and contaminant inputs. Clapper rails are also affected by increased predation associated with human development, and reduction of food sources. All of these non-Federal activities are expected to continue to adversely affect these listed species in the action area.

Conclusion

After reviewing the current status of the clapper rail, the environmental baseline for the action area, the effects of the proposed action and cumulative effects, it is the Service's biological opinion that the Remediation Project, as proposed, is not likely to jeopardize the continued existence of clapper rail. No critical habitat has been designated for the clapper rail, therefore none will be affected.

INCIDENTAL TAKE STATEMENT

Section 9(a)(1) of the Act and Federal regulation pursuant to section 4(d) of the Act prohibit the take of endangered and threatened fish and wildlife species without special exemption. Take is defined as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. Harass is defined by the Service as an intentional or negligent act or omission which creates the likelihood of injury to a listed species by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. Harm is defined by the Service to include significant habitat modification or degradation that results in death or injury to listed species by impairing behavioral patterns including breeding, feeding, or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered to be prohibited taking under the Act provided that such taking is in compliance with this Incidental Take Statement.

The incidental take statement accompanying this biological opinion exempts take of the clapper rail carried out in accordance with the following reasonable and prudent measures and terms and conditions from the prohibitions contained in section 9 of the Endangered Species Act. It does not address the restrictions or requirements of other applicable laws.

The measures described below are non-discretionary, and must be implemented by the agency so that they become binding conditions of any grant or permit issued to the applicant, as appropriate, in order for the exemption in section 7(o)(2) to apply. The Corps has a continuing duty to regulate the activity covered by this incidental take statement. If the Corps (1) fails to

Mr. Calvin C. Fong

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require the applicant to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant document, and/or (2) fails to retain oversight to ensure compliance with these terms and conditions, the protective coverage of section 7(o)(2) may lapse.

Amount or Extent of Take

Conservation measures proposed by the project proponent and described above in the Description of the Proposed Action will reduce, but do not eliminate, the potential for incidental taking of this species during the project. The Service anticipates incidental take of the clapper rail will be difficult to detect or quantify because the elusive nature of these species, their small size, and cryptic coloration make the finding of a dead specimen unlikely. The Service considers the number of clapper rails subject to harassment from noise and vibrations to be impracticable to estimate. The Service, therefore, anticipates the following levels of take as a result of the proposed project. The proposed project would result in the temporary loss of 5.23 acres of tidal wetlands currently available to clapper rails, and would likely result in harassment of non-breeding clapper rails within 250 feet of project activities in tidal wetlands.

Effect of the Take

In the accompanying biological opinion the Service determined that the level of anticipated take is not likely to jeopardize the continued existence of the clapper rail, or result in destruction or adverse modification of critical habitat for this species.

Reasonable and Prudent Measure

The Service believes the following reasonable and prudent measure is necessary and appropriate to minimize the impact of take on the clapper rail:

Minimize the potential for harm and harassment of clapper rails.

Terms and Conditions

To be exempt from the prohibitions of section 9 of Act, the Corps must comply with the following terms and conditions, which implement the reasonable and prudent measures described above. These terms and conditions are nondiscretionary.

The Corps and UC Berkeley shall develop a management plan for non native species within the area of Stege Marsh within UC Berkeley's jurisdiction. This management plan shall address control of non-native species, including *Lepidium* and non-native *Spartina* species. The plan shall also address management of feral animals at the Richmond Field

Mr. Calvin C. Fong

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Station. The final Service-approved plan shall be completed, and implementation begun, by February 1, 2004.

Reporting Requirements

The Service must be notified within 24 hours of the finding of any injured or dead clapper rail or any unanticipated damage to listed species habitat associated with project construction. Notification must include the date, time, and precise location of the specimen/incident, and any other pertinent information. The Service contact person is Division Chief, Endangered Species Program in the Sacramento Fish and Wildlife Office, at (916) 414-6600. Any dead or injured specimens shall be repositied with the Service's Division of Law Enforcement, 2800 Cottage Way, Room W-2928, Sacramento, California 95825, telephone (916) 414-6660.

CONSERVATION RECOMMENDATIONS

Section 7(a)(1) of the Endangered Species Act directs Federal agencies to utilize their authorities to further the purpose of the Act by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities that can be implemented to further the purposes of the Act, such as preservation of endangered species habitat, implementation of recovery actions, or development of information and database.

For the Service to be kept informed of actions minimizing or avoiding adverse effects or benefitting listed species or their habitats, the Service requests notification of the implementation of any conservation recommendations. We propose the following conservation recommendations:

1. Assist the Service in implementing recovery actions identified within most current clapper rail and salt marsh harvest mouse recovery plan.
2. Encourage participation of prospective permittees in a program being developed by Federal and State resource agencies to limit and reverse the spread on non-native *Spartina* within the San Francisco Bay Estuary.

REINITIATION STATEMENT

This concludes formal consultation on the action outlined in your request. As provided in 50 CFR § 402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered

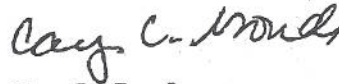
Mr. Calvin C. Fong

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in this opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in this opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, the Corps shall not issue authorizations under this biological opinion.

If you have any questions regarding this opinion, please contact Dan Buford of the Sacramento Fish and Wildlife Office at (916) 414-6625.

Sincerely,



Cay C. Goude
Acting Field Supervisor

cc:

CDFG, Yountville, CA
SFB Regional Board, Oakland, CA

LITERATURE CITED

- Dedrick, K. 1993. San Francisco Bay tidal marshland acreages: recent and historic values. In O.T. Magoon (ed.): Proceedings of the Sixth Symposium on Coastal and Ocean Management (Coastal Zone '89). Charleston, South Carolina, July 11-14, 1989. Publ. by Am. Society of Civil Eng.
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- Garcia, E.J. 1995. Conservation of the California clapper rail: An analysis of survey methods and habitat use in Marin County, California. Master Thesis, University of California-Davis. 135 pp.
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