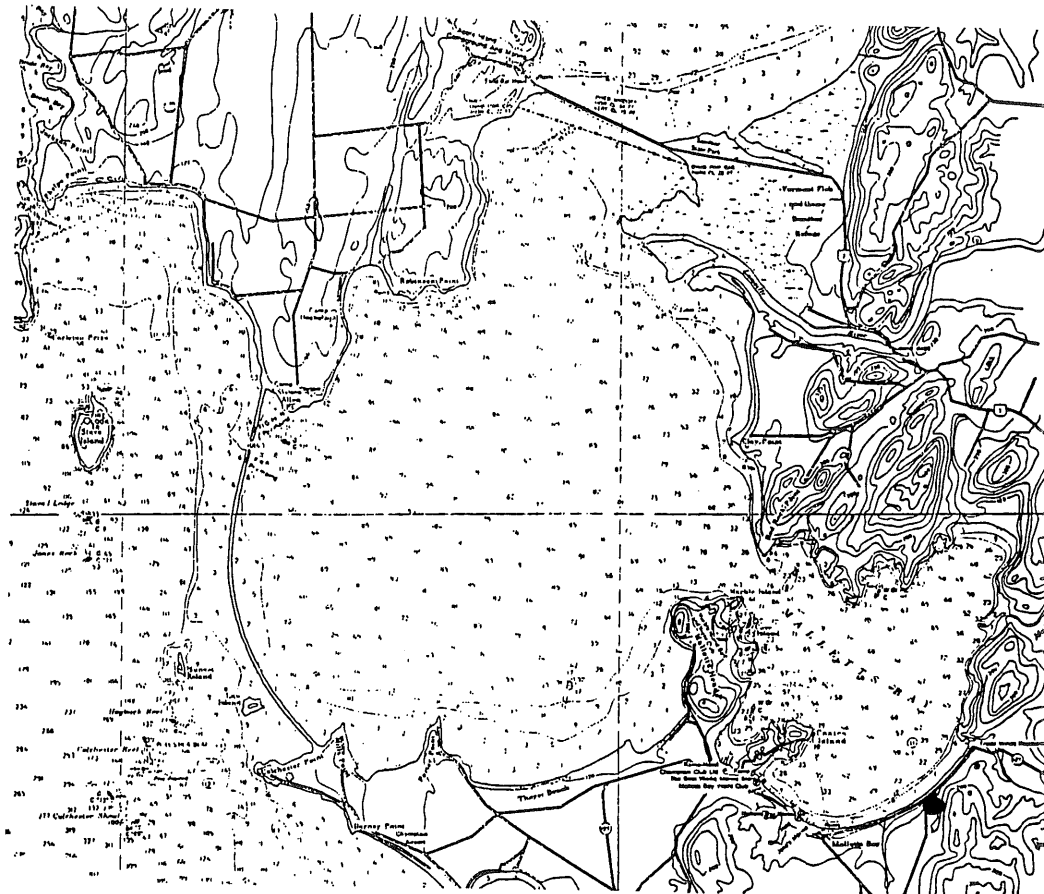


Institutional Review and Analysis - Malletts Bay Recreation Resource Management Plan



**Lake Champlain
Basin Program**



Prepared by
Engineering Ventures

for
Lake Champlain Management Conference

October 1995

This demonstration report is the sixth in a series of reports prepared under the Lake Champlain Basin Program. Those in print are listed below.

Lake Champlain Basin Program Demonstration Reports

1. *Case Study of the Town of Champlain.* Yellow Wood Associates. October 1993.
2. (A) *Demonstration of Local Economic/Other Community Impacts.* Community Case Studies for Economic Plan Elements. The City of Vergennes, Vermont. Economic and Financial Consulting Associates, Inc. October 1993.

(B) *Demonstration of Local Economic/Other Community Impacts.* Community Case Studies for Economic Plan Elements. Appendix. The City of Vergennes, Vermont. Economic and Financial Consulting Associates, Inc. October 1993.
3. *The Archeology on the Farm Project.* Improving Cultural Resource Protection on Agricultural Lands: A Vermont Example. Jack Rossen. May 1994.
4. (A) *The 1992 Fort Ticonderoga-Mount Independence Submerged Cultural Resource Survey. Executive Summary.* Arthur Cohn. May 1995.

(B) *The 1992 Fort Ticonderoga-Mount Independence Submerged Cultural Resource Survey.* Arthur Cohn. May 1995.
5. *Implementation, Demonstration, and Evaluation of BMPs for Water Quality: Application Methods ("Manure Injections") for Improved Management of Manure Nutrients.* Bill Jokela, Sid Bosworth and Don Meals. September 1995.
6. (A) *Malletts Bay Recreation Resource Management Plan.* T.J. Boyle and Associates, Resource Systems Group, Associates in Rural Development and Engineering Ventures. October 1995.

(B) *Malletts Bay Recreation Resource Management Plan. Executive Summary.* T.J. Boyle and Associates. October 1995.

(C) *Review and Relevant Studies. Malletts Bay Recreation Resource Management Plan.* T.J. Boyle and Associates. October 1995.

(D) *Natural and Built Resources Inventory: Data Documentation. Malletts Bay Recreation Resource Management Plan.* Associates in Rural Development. October 1995.

(E) *Survey Implementation and Analysis. Malletts Bay Recreation Resource Management Plan.* Resource Systems Group. October 1995.

(F) *Institutional Review and Analysis. Malletts Bay Recreation Resource Management Plan.* Engineering Ventures. October 1995.

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TASK 3 - INSTITUTIONAL ANALYSIS

INSTITUTIONAL REVIEW
and
ANALYSIS

as part of the

MALLETTS BAY
RECREATION RESOURCE
MANAGEMENT PLAN

MAY 1995

Submitted to:

The Lake Champlain Management Conference
and
the United States Environmental Protection Agency

Prepared by:

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Engineering Ventures, Inc.

MALLETTS BAY

TASK 3 - INSTITUTIONAL ANALYSIS

TASK 3 INSTITUTIONAL REVIEW and ANALYSIS

"TASK 3 - Institutional Review and Analysis - This task shall research and succinctly document the federal, state and local laws, policies, rules, authority, etc. for the following:

- A. Where does the authority to create and implement this plan come from?
- B. What can or cannot be planned?
- C. What can or cannot be waived?
- D. Define overlapping federal, state and local jurisdictions for recreation management (i.e., encroachments/docks - Agency of Natural Resources, Water Resources Board, Colchester Planning Commission, enforcement of boating laws --U.S. Coast Guard, State Police, Town of Colchester Police; permits - Corps of Engineers, Agency of Natural Resources, Town of Colchester).
- E. Recommendations to resolve overlapping jurisdictions?
- F. What is the authority to implement the plan?
- G. What is the authority to enforce the plan?"

"The purpose of the project is to determine how the public waters in Malletts Bay are to be managed in the best interest of the citizens of the state through providing a critical analysis of the integration of recreational uses, natural and cultural resources, land uses and **jurisdictional laws and regulations** to formulate a Recreation Resource Management Plan for Malletts Bay to serve as a "model" for other areas of Lake Champlain."

Task 3 serves as a foundation to the Plan. The Plan must be well based in authority. The Plan proposals and recommendations must be reasonable in terms of the institutional and jurisdictional reality now and as these constraints may evolve. Finally, the Plan must be implementable and enforceable in its final form.

A. AUTHORITY TO CREATE PLAN

As reviewed in the Lake Champlain Management

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Conference Annual Report, the development of planning and implementation authority on Lake Champlain has had a long evolution. 45 years ago, the issues surrounding Lake Champlain as a valuable regional resource were recognized and a joint Vermont - New York State commission was set up to address regional planning issues for the Lake Champlain basin. By the 1970's a study of lake issues was undertaken by the New England River Basin Commission and led to a five year management plan in 1979. In 1988, Quebec joined Vermont and New York in a cooperative pledge to address the issues in the larger region. While the efforts to date were meaningful in recognizing the issues, they lacked the clout and funding to make real changes.

Finally in 1990, Congress passed the Lake Champlain Special Designation Act which authorized the EPA to establish and fund a Lake Champlain Management Conference representing NYS and Vermont. Among other responsibilities, this Conference was authorized to prepare plans for the Lake, including demonstration projects. In the same year, the Vermont legislature, through its Act 265 authorized and mandated the Secretary of Natural Resources to develop surface use management plans for the Lake. This Malletts Bay Plan is a step by the Agency of Natural Resources to develop a localized high use area demonstration Plan that can become a learning experience and model for the development of other such use areas for Lake Champlain. The planning effort was approved for funding through the Management Conference.

B. WHAT CAN OR CANNOT BE PLANNED?

From the point of view of jurisdiction and authority, the constraints on planning are few. Planning and recommendations can be made in any area. It is the ability to implement and enforce and the objectives of the overall Plan which dictate what should or should not be planned. The issues of authority break down conveniently into several areas. These would include planning for:

Recreational use activities...

There are no restrictions to use categories as long as there is no breaking of current laws. Some activities would be inadvisable to plan for if they would lead

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Implementation & Enforcement

Planning in this area will be necessary to affect any real change. A strong understanding of jurisdiction and authority will be required relating to existing authority as well as potentially new authority.

C. WHAT CAN OR CANNOT BE WAIVED?

As will be seen in part D on overlapping jurisdictions, there is considerable opportunity to waive requirements. A waiver of many recreational activities, related facility development, general development, and water quality related facilities and activities can be used to avoid unnecessary regulation, enforcement, and control during the implementation of the plan. It will simply be possible to plan and implement beyond threshold limits which would have no significant impact on the overall goals and objectives of the plan.

For example, for...

...recreational use activities. Major boat races may require some control, while local and regular racing programs may not require any control.

...development of facilities. Large groups of privately owned moorings may warrant planning and regulation, but individual moorings for waterfront landowners may not require control.

...water quality. Use of driveway salt near the Bay may be waived from regulation, while use of lawn pesticides and agricultural activities may require some level of monitoring and control.

D. OVERLAPPING JURISDICTIONS FOR RECREATION MANAGEMENT

Management of recreational resources and uses, and of the development of recreational and related facilities, and the implementation and enforcement of these management

TASK 3 - INSTITUTIONAL ANALYSIS

to increased problems such as congestion, pollution - discharge of sewage, or filling of bottoms of the Bay. For instance planning of a jetty for pleasure boat dockage and activity may have such environmental impact as to be considered inappropriate.

On the water, use activities could include sailing and power boating - both cruising and racing, canoeing, jet skiing, skin diving, ice boating, water skiing, bird and waterfowl watching, waterfowl hunting, fishing and ice fishing, snowmobiling, skating and hockey, swimming and swim lessons, and kayaking.

Near the water, these could include hunting, biking, hiking, picnicking, and bathing.

Planning might include limitations on levels or intensity of activities, or exclusion of certain activities, as well as times of use.

Development of facilities...

Again, inappropriate facilities would include facilities which would pollute unreasonably, or would infringe on the customary use of the Bay, or which would be environmentally detrimental.

Directly related facilities are most easily planned. These would include boat ramps and access points, mooring areas, marinas, dockside and nearby restaurants, beaches, and parks.

Other facilities could include public utilities and public facilities which may control the capacity potential for recreation related development and other development. The intensity and type of general land use in the area will also influence the recreational experience on the Bay.

Water Quality

Water quality is a major factor to the experience of almost any of the recreational uses above. Planning here would involve surface use activities as well as onshore facilities and activities, and would restrict water polluting facilities.

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strategies requires review and approval through an often confusing system of regulatory and enforcement agencies. Planning for such management, and realistically implementing a plan necessarily requires an understanding of this authority which comes from Federal, State, and Local levels.

Each of these governmental levels have jurisdiction over at least some of the Recreational Use Activities, Development of Facilities, Water Quality Issues, and Enforcement.

Following is a summary which briefly identifies the overlapping jurisdictions in each these primary planning areas:

RECREATIONAL USE ACTIVITIES

Many agencies are involved with the actual uses going on in the Bay. Fishing regulations and boating laws often come to mind, but the authority is in place to regulate any and all uses.

Much like a municipality may regulate the uses in a public park, many agencies have authority to regulate the uses, time of activity, and location of activity on the water.

FEDERAL

United States Coast Guard - The Coast Guard has authority to place and maintain navigational aids, and enforce federal boating laws. They also may establish special anchorage areas where boats may anchor without night lights. They are also on call for anyone in distress on the waterway. The Coast Guard is active on Lake Champlain, based on the waterfront in Burlington. The Coast Guard regularly patrols Malletts Bay and assists local and State Police when necessary.

United States Fish and Wildlife Service - This Agency develops federal fishing regulations and management programs. These programs are managed by Federal wardens who cooperate with Vermont and New York through the Lake Champlain Fisheries Management Cooperative.

United States Environmental Protection Agency - The EPA through the Clean Water Act could prohibit activities which would cause undue pollution in the Bay.

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STATE

Vermont Water Resources Board - The Board is a citizen board responsible for managing and regulating the surface use of public waters in the state, including Malletts Bay. It is also responsible to protect the wetlands in the state. It adopts rules and hears appeals as a quasi-judicial body. As with its mooring authority on Malletts Bay, it can delegate its management and regulatory control.

It may limit specific uses in specific areas and under specific terms. For example it may limit boat horsepower, or specify hours of operation. Given this broad authority, no single agency or board has greater potential control of recreational use than the Water Resources Board.

Vermont Fish and Wildlife - This department is responsible for fishing and hunting regulations.

Vt. Dept. of Forests, Parks, and Recreation - This agency is responsible for statewide recreation planning, and development and management of state recreation programs, including the Management Plan for Malletts Bay.

Department of Environmental Conservation - Wetlands Division - This agency can regulate uses and activity which would be detrimental to wetlands.

Department of Motor Vehicles - This agency is responsible for developing and updating boating rules and regulations.

LOCAL - TOWN OF COLCHESTER

The Town has considerable authority to impact the recreational use of the Bay. This authority comes in terms of the ability to police the uses on the Bay which are regulated by any laws. It also has authority from the mooring management responsibility it has accepted from the State, and from the land use control and other development control it can exercise around the Bay.

Harbor Police - The Town has authority to police the laws of the Town, the State, and the Federal government on the Bay. The Town exercises this authority and patrols in accordance with the intensity of activity.

Mooring Management - The Town has applied for, and received, authority from the State of Vermont to manage moorings on the Bay. An ordinance is in process and is in the final stages of review prior to implementation. The Town may apply for additional control of surface uses in the Bay from the Vermont Water Resources Board. This could transfer broad and

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significant authority regarding the management of the Bay.

Land Use and Development Controls - Most of the recreational uses on the Bay depend on access and support facilities. The Town regulates the land uses which provide this support.

JURISDICTIONAL OVERLAP

Three tiers of government laws, regulations, rules, and guidelines overlap and affect many recreational uses. A few examples can illustrate the point:

Power Boating - At the Federal level, power boating is regulated by navigational limitations set by the Coast Guard. Furthermore operation and economics of these boats is influenced by EPA emissions and discharge standards. At the State, the Water Resources Board can set rules for the size of motors, the hours of use, and the locations where power boating is allowed. Fish and Wildlife fishing rules could also restrict power boat operation near fishing areas. Parks and Recreation through its planning efforts can identify areas of use regarding power boat usage. The Wetlands Division can restrict wakes from these boats. The Department of Motor Vehicles through its boating regulations can dramatically affect power boat use and operation. Finally the Town police can set policies regarding this use and can influence areas of operation through its mooring management program.

Sailing - Sailing in the Bay could be very restricted by navigational decisions of the Coast Guard. For example, restricting the flow and direction of travel through the Narrows could affect general cruising sailing as well as restrict sailing races between the inner and outer Bays. The Water Resources Board could limit sailboat racing in very congested areas such as the inner Bay, if it determined that such formal uses as defined race courses were not compatible with a broad mix of other uses in confined areas. In addition, the Town could limit sailing activity by restricting the mooring of such boats.

In addition to directly regulating the uses, the multiple tiers of agencies can also affect these uses by controlling the development of the facilities that support these uses. This can be a very powerful tool in managing the recreation use and the degree of conflict and congestion in the Bay.

DEVELOPMENT OF FACILITIES

As opposed to regulating actual active uses, the related facilities to recreational uses can be controlled and influenced by many agencies. This control then impacts the uses which in many cases rely heavily on support facilities. For instance, if no boat ramps were allowed, there would in fact be much less use of the Bay.

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FEDERAL

U.S. Army Corps of Engineers - This is the primary federal agency with authority to regulate any work or structures which encroach in the Bay, as a navigable water, below the ordinary high water elevation of 98 feet. Their jurisdiction and authority is very significant. Rules are covered in detail in the Federal Register. The Corps also publishes a "Guide for Permit Applications" and "Are You Planning Work in a Waterway."

Under Section 10 of the Rivers and Harbors Act, it reviews applications for structures and work in navigable waters of the United States. This would cover piers and docks, wharves, weirs, booms, permanent mooring structures, bank protection, transmission lines, aids to navigation, any permanent or semi-permanent obstacles, dredging, fills, utility lines, reefs, breakwaters, boat ramps and a broad range of other similar types of projects.

Under Section 404 of the Clean Water Act, it reviews fills, excavations, causeways, artificial islands, beach construction, and mechanized land clearing.

Under these two Acts, a dock would require only a Section 10 review, while a crib fill or wharf would require reviews under both Sections 10 and 404.

The Corps issues General Permits without much review which cover such items as small private docks. They also issue Nationwide Permits which require more review than General Permits but which are still fairly routine. Some of these are classified as "non-reporting" for such items as a single mooring, certain maintenance, structures in anchorage areas, limited bank stabilization, minor dredging, and clean up activities. "Reporting" permits are for such items as a sewage outfall structure, large bank stabilization projects, utility lines through wetlands, certain temporary construction.

The Corps of Engineers is the clearinghouse for these projects and includes the review of any other federal agencies which it deems appropriate. Typically, this will include the EPA, the U.S. Fish and Wildlife Service, and the Coast Guard.

Corps of Engineers permit requirements are very specific and detailed even to the extent of requiring odd sized paper for submission. A thorough permit is required to avoid delays.

U.S. Department of the Interior - This agency approves funding for recreation projects including acquisition and development.

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STATE

Water Resources Board - Public Trust Doctrine - The Vermont courts have established that "the bed or soil of boatable lakes in this state is held by the people in their character as sovereign in trust for public uses for which they are adapted." Considerable controversy has surrounded the interpretation of these kinds of interpretations of the public trust doctrine. The Water Resources Board has taken a position in one of its recent cases that "the Vermont cases clearly establish the existence of a private right to reasonable use of the public waters." The issue surrounds the concept of use versus control, and the degree to which the use must be for public purposes. The Board has ruled that "most private activity has at least some public benefit" and this is the basis for allowing private activity.

Dept. of Environmental Conservation - DEC administers the Lakes and Ponds Shoreline Encroachment Program for the state through its Water Quality Division. It is authorized under Title 29, Chapter 11. The program covers a defined list of encroachments as well as a list of waived items. Waivered items include certain small docks, small water supply pipes, temporary structures required by low water, ordinary repairs and maintenance, duck blinds, floats, rafts and bouys. The agency publishes "Planning a Project on Your LAKESHORE - What You Need to Know", and the DEC "Interim Procedures for the Issuance or Denial of Encroachment Permits". It is interesting to note that these procedures include a "Public Trust Determination" section but that this section has been omitted in the current version.

DEC also administers the Act 250 program for review of development projects. As the State clearinghouse for these projects, this review would engage all other appropriate state agencies in the review of a significant shoreland development. With regard to marinas, and other similar recreation oriented facilities, this program could have a strong role to play in recreation development. Criteria generally include consideration of water and air pollution, availability of water, burden on water supply, soil and land erosion, traffic, impact on educational service, municipal services, scenic and natural beauty, and conformity with local and regional plans and capital programs. The process can be very thorough, expensive, and time consuming.

Historic Preservation - Responsible for management of historic sites and areas. These could include underwater and shoreline sites.

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Shoreline Zoning Enabling Legislation - This allows Towns like Colchester to adopt special zoning requirements along shorelines in the Town, but does not mandate such provisions.

Vermont Fish and Wildlife - This department maintains the fishing access areas.

LOCAL - TOWN OF COLCHESTER

While the Town cannot regulate the development of facilities beyond the 95.5 ft. contour, except for moorings, it does have considerable authority to impact the development of related on shore facilities. This authority comes from the land use control and other development control it can exercise around the Bay. By controlling land use and development of public facilities such as sewer, water and roads, the Town takes a strong role in determining the development of facilities which are otherwise regulated by the state and federal agencies.

JURISDICTIONAL OVERLAP

Again the tiers of government authority can have a major impact on the reality of constructing or improving facilities. Most facilities at or beyond the water's edge will face a long list of these regulations and review. Virtually every conceivable issue will be addressed by one of the reviewing agencies.

Marinas - For instance a marina could require approvals from almost every agency. The Corps of Engineers would review the docks, the shoreline protection, the moorings, the dredging, etc.. The Water Resources Board might consider the Public Trust Doctrine. The use of the water surface and the use of the lake bottoms could be conceivably restricted or rejected under this doctrine. DEC would review all the waterfront related construction under the Lakes and Ponds Encroachment Program, in addition to the requirements of the Corps of Engineers. It would also likely review the project under Act 250 with all ten of its primary criteria and many secondary issues. Depending on the site, other agencies such as Historic Preservation might have a role. Finally, the Town of Colchester would review the project under its zoning and land use rules.

Mooring Areas - The Coast Guard would review mooring areas as special anchorage areas. The Corps of Engineers would require a permit for public and private mooring fields. While the State doesn't actively utilize its authority to regulate these mooring

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areas, it could decide to do so, or it could use the Public Trust Doctrine to rule on the regulation of these facilities. The Town of Colchester under its current authority can also regulate, permit, and control these facilities.

WATER QUALITY

FEDERAL

U.S. E.P.A. - The EPA administers the Clean Water Act - Public Law 92-500. This act started the Clean Lakes Program which includes authority from investigative studies to implementation and funding of restoration programs.

U.S. Soil Conservation Service - The SCS addresses and assists in managing agricultural projects to prevent or reduce impacts on water quality from agricultural activities.

STATE

Dept. of Environmental Conservation - DEC administers the EPA Clean Water Program under the Clean Water Act. They set water quality standards, engage in water quality studies, deal with marine nuisance control, provide financial assistance, and manage the sewage treatment program.

LOCAL - TOWN OF COLCHESTER

The Town administers a health and safety ordinance to regulate water supply and sewage disposal. The Bay is used for private water supply. Without public sewers in the Town, management of this program is critical to the water quality of the Bay.

JURISDICTIONAL OVERLAP

The overlap of jurisdictions for water quality is not much of an issue except as relates to the input to the permit review process for each of the agencies.

ENFORCEMENT

FEDERAL

United States Coast Guard - As noted above, the Coast Guard has federal police power to enforce federal boating and navigational rules and regulations.

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STATE

Dept. of Public Safety - Marine Div. of State Police - The Marine Police patrol the Bay and enforce boating laws.

Agency of Natural Resources - Department of Fish and Wildlife - This Department enforces fishing and hunting laws and regulations.

LOCAL

As noted above, the Town can and does police all applicable laws on the Bay.

JURISDICTIONAL OVERLAP

The overlap for enforcement is not a problem and probably helps to provide a basic means of coverage which otherwise might not be able to be provided by any one jurisdiction itself.

OTHER ORGANIZATIONS

The Lake Champlain Management Conference/Lake Champlain Basin Program - As noted in Section A, above, this group was charged with developing a pollution prevention, control, and restoration plan for Lake Champlain. The work has been and continues to be funded to cover research and monitoring, project administration, and project planning and demonstration. Additional requirements for recreation use and facilities will probably evolve from this process.

E. RECOMMENDATIONS TO RESOLVE OVERLAPPING JURISDICTIONS

There are several concepts which can be foreseen as potentially useful in cutting through the problems associated with overlapping jurisdictions. However, an important issue is that the governmental levels at work here each represent a different level of constituency, perspective, and responsibility, and while the criteria may be similar there may not be a willingness or an appropriateness to give up that representation. For example, the Federal government agencies take a broad regional and national perspective based on national issues. Although the Town may support some of the national ideals, it also may not choose or be able to relate effectively to such broad concerns, and vice versa. The crowding at a local launch site is not appropriately a national issue. It may be short sighted to limit or combine any of these regulatory programs.

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First, since the recommendations of the Plan are to limit some uses, development, or activities, the overlapping jurisdictions may help to do just that. The problems with facing the confusion and detailed requirements of the overlapping processes may serve as a deterrent to over developing the Bay.

However, since the Plan does propose to provide for certain use, development, or activities, then a method to ease the way through the bureaucracy may be necessary for orderly and timely implementation. An achievable scheme would be to leave the official overlap in place but provide a single comprehensive map through the system. Rather than have each agency or authority simply refer participants to the various other known parties in some random order, one entity would prepare, maintain, and explain the complete list of requirements from the multiple jurisdictions. An applicant would start and end with this entity. This entity wouldn't be expected to provide all the review but would put all the rules and procedures in one document as a guide. An applicant or participant in the process would then be able to prepare everything likely to be needed and follow through with less confusion. For example, list the federal and state boating requirements in one document so a boater will know that he/she will meet a Coast Guard inspection as well as a State Police inspection.

Further resolution of the overlap may be found in transferring responsibility. As the Water Resources Board may transfer authority and jurisdiction, so may other agencies be able to transfer authority when it can be shown that one jurisdiction can and will handle the additional responsibility in the interest of the transferring agency.

F. AUTHORITY TO IMPLEMENT THE PLAN

Generally, implementation will come through 1.) voluntary measures encouraged by natural forces or new rules or incentives, and 2.) through the regulatory enabling legislation affecting the various agencies involved.

For example, if a new marina is planned, the natural economic forces may encourage the implementation of such a marina and may define its facilities, and given some encouragement or actual rule changes by the public agencies involved, the marina project may develop without an outside mandate.

In other cases, such as if an actively existing use is to be prohibited, the police powers of enforcement may be required to implement the plan.

G. AUTHORITY TO ENFORCE THE PLAN

Where the authority exists to require implementation, the police powers generally exist to enforce implementation. This may include Coast Guard, State Police,

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Harbor and Town Police, enforcement staff, agents, wardens, and all with the back up of the agencies to file formal legal steps toward implementation through the courts, if necessary.