

# SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

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October 23, 2009

**TO:** Commissioners and Alternates

**FROM:** Will Travis, Executive Director (415/352-3653 [travis@bcdc.ca.gov](mailto:travis@bcdc.ca.gov))  
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**SUBJECT: Staff Report and Recommendation on Report on the Governance and Financing of Bay Management**  
(For Commission consideration on November 5, 2009)

## Recommendation

The staff recommends that the Commission: (1) endorse the conclusions of the report entitled, *"BCDC's Role in Management and Governance of San Francisco Bay: Should It Be a State or Regional Agency? How should it be Funded?"* prepared by the San Francisco Planning and Urban Research Association and the Bay Area Council Economic Institute; and (2) transmit the report to Governor Schwarzenegger and the California Legislature for their consideration and any further action.

## Staff Report

**Background.** The May 14, 2009 revision to Governor Schwarzenegger's proposed budget for the 2009-10 fiscal year contained the following proposal:

Eliminate the San Francisco Bay Conservation and Development Commission [BCDC] as a state department and realign its functions to a regional entity.

The Commission noted that transforming BCDC into a regional entity could have unintended consequences that could be contrary to the best interests of the state. Therefore, on June 4, 2009, the Commission offered to arrange for an independent analysis to be undertaken to determine how the state's interest in the management of San Francisco Bay can best be accomplished and financed in the long-term. The Legislature considered both the Governor's proposal and the Commission's offer. The Legislature neither approved the Governor's proposal nor required an independent analysis. The final 2009-10 fiscal year budget bill passed by the Legislature and signed by the Governor provided continued General Fund support for BCDC's operations for the full fiscal year.

Although neither the Governor nor the Legislature required BCDC to conduct the study proposed by BCDC, the Commission decided it would be both prudent and appropriate for the Commission to fulfill its offer. To accomplish this, the Commission turned to the San Francisco Planning and Urban Research Association (SPUR) and the Bay Area Council Economic Institute (BACEI) and secured their commitment to prepare a report and recommendations to the Gov-

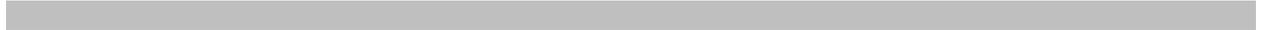


Making San Francisco Bay Better

error and the Legislature regarding the placement of BCDC in the overall organization of government in California and the best means of providing permanent financial support for BCDC's operations.

**Report Conclusions.** Between July and September, 2009, staff and volunteers from SPUR and BACEI, under the oversight of a steering committee made up of stakeholders, held two public meetings, evaluated the issues raised by the Governor's proposal and BCDC, and prepared the attached report entitled, *"BCDC's Role in Management and Governance of San Francisco Bay: Should It Be a State or Regional Agency? How should it be Funded?"* Among the 11 major conclusions of the report are three that are particularly relevant to the issues raised in the Governor's proposal: (1) there are no compelling governance reasons for eliminating BCDC as a state agency, no intrinsic advantages to realigning BCDC as a regional agency, and several potentially detrimental outcomes from such a shift; (2) no alternative funding mechanisms are immediately available that can reliably substitute for General Fund support; and (3) if the Governor and Legislature wish to pursue alternatives to the General Fund for supporting the Commission, extensive additional research will be necessary.

**Staff Recommendation.** The staff recommends that the Commission hold a public hearing on the report prepared by SPUR and BACEI. At the conclusion of the hearing, after addressing any comments made at the hearing, the staff recommend that the Commission transmit the report to the Governor and the Legislature with the Commission's endorsement of the report conclusions. In addition, the staff also recommends that the Commission should indicate that it will fully cooperate with the Governor and the Legislature in any investigation, research and evaluation of the many funding sources enumerated in the report that could, in the long-term, reduce or eliminate the need for General Fund support for the Commission. Among the funding alternates that are most appealing, but are also most legally complex and politically challenging, are creating a regulatory fee or benefit assessment district and toll bridge revenues.



**BCDC's Role in Management and Governance of San Francisco Bay:  
Should It Be a State or Regional Agency?  
How Should It Be Funded?**

**Prepared for the San Francisco Bay Conservation and Development Commission**

**by the**

**San Francisco Planning and Urban Research Association**



**and the**

**Bay Area Council Economic Institute**



**September 2009**

## I. Executive Summary

This report has been prepared for the San Francisco Bay Conservation and Development Commission (BCDC) by the San Francisco Planning and Urban Research Association (SPUR)<sup>1</sup> and the Bay Area Council Economic Institute (BACEI)<sup>2</sup> in response to the Governor's proposal to "[e]liminate the San Francisco Bay Conservation and Development Commission as a state department and realign its functions to a regional entity." In response to this proposal, BCDC recommended that an independent analysis be undertaken to determine how the state's interest in the management of San Francisco Bay can best be accomplished and financed in the long-term. The Legislature has provided continued General Fund support for BCDC through the 2009-2010 fiscal year.

Although neither the Governor nor the Legislature required BCDC to conduct the proposed study, the Commission decided it would be both prudent and appropriate to fulfill its offer to the Governor and the Legislature. Therefore, the Commission turned to SPUR and BACEI and secured their commitment to prepare a report and recommendations to the Governor and the Legislature regarding the placement of BCDC in the overall organization of government in California and the best means of providing permanent financial support for BCDC's operations.

The following are the major conclusions of the report:

- BCDC has been a highly successful and effective government agency and a national model for similar resource management programs. There are no compelling governance reasons for eliminating BCDC as a state agency, no intrinsic advantages to realigning BCDC as a regional agency, and several potentially detrimental outcomes from such a shift.
- The state has a significant interest in the Bay because it is an important economic and natural resource, and because the state has an ownership interest in virtually all of the bay's tidal areas.

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<sup>1</sup> The San Francisco Planning and Urban Research Association (SPUR) was formed in 1959 to fight for the revitalization of San Francisco as the Bay Area's central city. It was given the charge of channeling growth away from suburban sprawl and back into the urban core. Throughout the 1960s, SPUR worked to build support for the land use, transportation and investment strategies that could support center-oriented growth and urban economic vitality. Since then, SPUR has been involved with virtually every major planning decision in the city.

<sup>2</sup> The Bay Area Council Economic Institute is a public-private partnership of business, labor, government and higher education, which works to support the economic vitality and competitiveness of California and the Bay Area. Its work builds on the twenty-year record of fact-based economic analysis and policy leadership of the Bay Area Economic Forum, which merged with the Bay Area Council in January 2008.

- Global climate change impacts, which are likely to be acute in San Francisco Bay, can best be addressed if BCDC is exercising state authority as part of the state's overall effort to address climate change.
- Precisely because of the unique spectrum of representation on BCDC, even the local representatives on BCDC tend to participate in planning and permit decisions from a regional perspective.
- A regional entity cannot implement the "federal consistency" authority provided by federal law, and transferring BCDC's federal role to another state agency would increase costs to the state.
- There would likely be no net cost savings to BCDC's operations if it were a regional agency.
- BCDC produces high effectiveness for a very low cost to the state's General Fund.
- Of the many possibilities examined in 1995 and evaluated in 2009, no alternative funding mechanisms are immediately available that can reliably substitute for General Fund support.
- The most appealing funding alternatives—a state-imposed regulatory fee or a state-imposed benefit assessment district—while theoretically feasible, still entail high levels of legal, political and practical uncertainty.
- A comprehensive review of BCDC's role in regulating dredging and sand mining was recently completed; while an issue was raised regarding BCDC's jurisdiction in this area, a majority of the Steering Committee concluded that such a reevaluation was beyond the scope and the resources available for this report.
- The Committee was not able to evaluate every alternative funding option or address the significant legal uncertainties and political challenges that exist in the funding options the Committee was able to consider. Some of the legal issues may be clarified as the law evolves; however, if the Governor and Legislature wish to pursue alternatives to the General Fund for supporting the Commission in the short term, extensive additional research will be necessary.

## II. Background

**Purpose of BCDC.** San Francisco Bay is a natural and economic asset of regional, state and national importance. The Bay provides opportunities for recreation, moderates the climate, combats air pollution, filters pollutants, supports countless species of fish and wildlife, provides for the scenic enjoyment of millions of residents and visitors, supports goods movement, and helps sustain the economy of the region and beyond. However, history has demonstrated that local governments acting alone cannot be expected to protect the regional, state and national interest in the Bay. Between 1850 and 1960, under local control and encouraged by 19th century sales by the state of vast tracts of state tidelands into private ownership, about a third of the open water of the Bay was filled or diked. Each local government was allowing—and, in fact, facilitated—this shrinking of the Bay because it made fiscal sense to do so. Local garbage dumps ringed the Bay, and landfill operations provided space for communities to grow and created real estate that local governments could tax. The result was the relentless destruction of a state and national treasure—San Francisco Bay. This phenomenon is often referred to as “The Tragedy of the Commons,” a dilemma in which multiple individuals acting independently in their own self-interest can ultimately destroy a shared, limited resource even when it is clear that it is not in anyone's individual long-term interest for this to happen.

**Structure and Operations of BCDC.** To solve this dilemma, the California Legislature created the San Francisco Bay Conservation and Development Commission (BCDC) as a temporary agency in 1965, and made it permanent in 1969. BCDC has 27 Commissioners: five, including the chair and vice chair, appointed by the Governor; one appointed by the Senate Rules Committee; one appointed by the Assembly Speaker; five appointed by state agencies; two appointed by federal agencies; nine supervisors, one from each of the nine Bay Area counties; and four elected city officials appointed by the Association of Bay Area Governments (ABAG).

Permits are required from BCDC to place fill in the Bay, take material out of the Bay, change the use of the Bay, and do work along the shoreline of the Bay. Federal appointees cannot vote on permits. A majority of voting members—13 votes—is needed to approve a permit.

When the McAteer-Petris Act was passed in 1965 to establish BCDC as a temporary state agency, the Commission was charged with preparing a plan for the long-term use of the Bay and regulating development in the Bay while the plan was being prepared. The *San Francisco Bay Plan*, which was completed in January 1969, contains policies on issues critical to the wise use of the Bay, ranging from ports and public access to design and transportation. The Bay Plan also contains maps of the entire Bay, which designate shoreline areas that should be reserved for high priority, water-oriented uses such as ports, industry, public recreation, airports, and

wildlife refuges. The Bay Plan has received wide acclaim for its clarity, concise style, and comprehensive coverage. In 1969 the McAteer-Petris Act was amended to make BCDC a permanent agency and to make the policies of the Bay Plan enforceable under state law through the BCDC permit process. By a two-thirds majority (18 votes), the Commission can amend the Bay Plan.

In the early 1970s, the need for better management of coastal resources throughout the United States began to be recognized, and in 1972, Congress passed the federal Coastal Zone Management Act (CZMA). The CZMA provided federal funding for coastal states to develop management programs for their coastal zones, and contained many standards for those programs, some of which were modeled on BCDC.

Recognizing the threats to the Suisun Marsh from potential residential, commercial, and industrial development, and the need to preserve this unique wildlife resource for future generations, BCDC and the Department of Fish and Game were directed by the Legislature to prepare the *Suisun Marsh Protection Plan*, which was completed in 1976. The Suisun Marsh Preservation Act was enacted in 1977 to incorporate the findings and policies contained in the Suisun Marsh Protection Plan into state law and to empower the Commission to implement the plan through its regulatory authority.

In 1977, the National Oceanic and Atmospheric Administration (NOAA) of the U.S. Commerce Department approved BCDC's regulatory program under the standards of the CZMA. In 1978, NOAA approved the California Coastal Commission's program for the rest of the California coastal zone. As a result, BCDC, as the federally designated state "coastal management agency for the San Francisco Bay segment of the California coastal zone," can use the "federal consistency authority" under Section 307 of the CZMA. This authority makes it possible for BCDC to ensure that federal projects and activities, which would otherwise generally not require BCDC or other state or local authorization, are consistent with the policies of the Bay Plan and state law.

BCDC also has the authority to impose civil penalties for violations of its regulations, can issue cease and desist orders to stop violations or initiate remediation activities, and can refer serious violations to the State Attorney General for prosecution.

The 2009-10 fiscal year budget for BCDC is about \$5.8 million. The state General Fund provides \$4.1 million (71%). The remainder comes from federal grants and other special sources of funds and reimbursements. BCDC currently has 42 staff. However, state-mandated furloughs have effectively reduced the total staff to the equivalent of 35.

**Effectiveness of BCDC.** By almost any measure, BCDC has been one of America's most successful and effective government agencies. It has achieved its primary objectives of preventing the Bay from getting smaller and dramatically increasing public access to the Bay. Over 24 square miles of Bay habitat have been restored, and public trails and parks have been opened along 117 miles of the Bay shoreline. It has been used as a model for other resource management agencies around the world. It is rarely sued, and when it is, it usually wins. BCDC is continuously evolving to address current issues and problems.

**Governor's May Revise Proposal of 2009.** The May 14<sup>th</sup> revision of Governor Schwarzenegger's budget included a number of proposals for government reform and consolidation. One of them was: "Eliminate the San Francisco Bay Conservation and Development Commission as a state department and realign its functions to a regional entity." The exact intent of this proposal is unclear. Since it came out of a proposal to address the General Fund deficit, the idea appeared to be that BCDC should continue to exist, but as a regional rather than state agency, paid for by some source of revenue other than the General Fund.

**Commission Response.** At its public meeting on June 4, 2009, the Commission voted 17-1-1 to adopt the following position on the Governor's proposal:

The Commission believes the Governor's proposal does not acknowledge either the important role that BCDC plays in the governance of valuable state resources in the Bay or BCDC's ability to advance state interests under federal law through BCDC's federally-approved coastal management program for the Bay. Therefore, transforming BCDC into a regional entity could have unintended consequences that would be contrary to the best interests of the state. Accordingly, in order to decide whether BCDC should remain a state department or become a regional entity, an independent and comprehensive analysis should be undertaken to determine how the state's interest in the management of San Francisco Bay can best be accomplished and financed in the long-term. This study can be accomplished at no additional cost to the state and can be completed within six months so the Governor and the Legislature can consider and incorporate the study's conclusions and recommendations into the development of California's 2010-11 fiscal year state budget.

The Commission provided the Governor and the Legislature with an analysis supporting its position.<sup>3</sup>

**Legislature's Deliberations.** The Governor's proposal and the Commission's response were considered by policy committees in both houses of the California Legislature (the Senate Committee on Natural Resources and Water, and the Assembly Natural Resources Committee) as well as the Conference Committee on the Budget. The policy committees recommended that the Governor's proposal be rejected and the Commission's offer to undertake a study be supported. The Conference Committee simply declined to approve the Governor's proposal. The final 2009-10 fiscal year budget bill passed by the Legislature and signed by the Governor provides continued General Fund support for BCDC's operations for the full fiscal year.

### III. Realignment Analysis Project

**Purpose and Scope of Analysis.** Although neither the Governor nor the Legislature required BCDC to conduct the study proposed by BCDC, the Commission decided it would be both prudent and appropriate for the Commission to fulfill its offer to the Governor and the Legislature. Therefore, the Commission turned to SPUR and BACEI and secured their commitment to prepare a report and recommendations to the Governor and the Legislature regarding the placement of BCDC in the overall organization of government in California and the best means of providing permanent financial support for BCDC's operations.

**Steering Committee.** Overall management of the project and final integration of the two project components was provided by a Steering Committee composed of:

- (1) Two members of the SPUR Board of Directors;
- (2) Two members of the BACEI Board of Trustees;
- (3) Two members of the BCDC Commission;
- (4) One representative from Save the Bay;<sup>4</sup>
- (5) One representative from the Bay Planning Coalition;<sup>5</sup> and

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<sup>3</sup> Status Report on the Governor's Proposal to Realign BCDC, July 9, 2009.

<sup>4</sup> Save The Bay is the largest regional organization working to protect, restore and celebrate San Francisco Bay. As its leading champion since 1961, Save The Bay protects the Bay from pollution and inappropriate shoreline development, making it cleaner and healthier for people and wildlife. Save the Bay restores habitat and secure strong policies to re-establish 100,000 acres of wetlands that are essential for a healthy Bay.

<sup>5</sup> The mission of the Bay Planning Coalition is to ensure that commerce, recreation and the natural environment thrive in the San Francisco Bay-Delta region. Founded in 1983, the BPC is a non-profit, membership-based organization representing a broad spectrum of Bay public and private sector entities including the maritime industry and related shoreline business, ports and local governments, landowners, recreational users,

(6) One representative from the Department of Finance.<sup>6, 7</sup>

At the recommendation of the Bay Planning Coalition, the Little Hoover Commission<sup>8</sup> was also invited to participate on the Steering Committee, but declined. Two noted experts on state finance, Fred Silva from California Forward and Dean Misczynski of the Public Policy Institute of California, were invited by BACEI to contribute to the Steering Committee's deliberations on financial options.

**Schedule.** The Realignment Analysis Project was undertaken with the goal of completing the project in about four and one half months pursuant to the following schedule:

- July 13-17 Steering committee members selected.
- July 20-24 Steering committee review, revision and approval of draft work program.
- July 27-August 31 SPUR and BACEI prepare first draft of required analyses.
- September 1-11 Steering committee review and comment on first draft.
- September 14-October 2 SPUR and BACEI produce final draft report that responds to steering committee comments.
- October 23 Final draft report released to the public.
- November 5 BCDC public hearing on final draft report.
- November 9-27 SPUR and BACEI revise final draft report in response to comments received at BCDC public hearing.
- November 30 Final report and recommendations delivered to the Governor and the Legislature.

**Steering Committee Meetings.** The Steering Committee held two meetings: the first on August 6, 2009 at SPUR, which focused on of Bay governance, and a second on August 13, 2009

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environmental and business organizations, labor unions and professional service firms in engineering, construction, law, planning, and environmental sciences.

<sup>6</sup> The Department of Finance agreed to send a representative to the Steering Committee meetings as a resource.

<sup>7</sup> The Legislative Analyst's Office was invited to serve on the Steering Committee, but did not attend the meetings. Instead a representative of the LAO monitored the deliberations of the Steering Committee by phone but did not participate in the discussions.

<sup>8</sup> The Little Hoover Commission, formally known as the Milton Marks "Little Hoover" Commission on California State Government Organization and Economy, is an independent state oversight agency that was created in 1962. The Commission's mission is to investigate state government operations and – through reports, recommendations and legislative proposals – promote efficiency, economy and improved service. The full Commission selects study topics that come to its attention from citizens, legislators and other sources. In addition, it has a statutory obligation to review and make recommendations on proposed government reorganization plans.

at BACEI, which focused on financial options for supporting Bay governance. Notice of the meetings was provided to the public, and public participation in the committee deliberations was encouraged.

#### **IV. Steering Committee Conclusions: Should BCDC be a State or Regional Agency?**

**Legal Authority.** Although BCDC receives General Fund support and its staff are state employees, the State Legislature could reconstitute BCDC as a regional district along the lines of the Metropolitan Transportation Commission (MTC)<sup>9</sup> or the Bay Area Air Quality Management District (BAAQMD),<sup>10</sup> and BCDC could, with some possibly significant exceptions (discussed below), still administer the same state laws. But other than possibly providing a source of funding independent of the General Fund (also discussed below), the Committee concluded that there was little intrinsically to be gained by reconstituting BCDC as a regional agency.

Such a change would presumably contemplate a change in the composition of the Commission to more closely resemble the governing boards of the BAAQMD or MTC. While the boards of each of these agencies may be optimally constituted from the perspective of their responsibilities, the Committee did not believe a governing board similar to either one of those agencies was as likely to be as effective as the Commission in advancing state and regional interests in San Francisco Bay. In the Committee's view, the boards of existing regional agencies lack BCDC's unique balance of public, local, regional, state and federal representation necessary for effective, *regional* regulation of the Bay. Moreover, precisely *because of* the unique spectrum of representation on BCDC, even the local representatives on BCDC tend to shed whatever preconceptions they may have and participate in planning and permit decisions from a regional perspective.

In addition, BCDC has duties and powers (administration of the public trust and federal consistency authority under the Coastal Zone Management Act) that are traditionally, and probably legally as well, solely state prerogatives. In this connection, Mr. John King, Chief of the Coastal Programs Division of NOAA, in an August 12, 2009 letter, stated that transforming BCDC into a regional agency would raise significant legal and procedural problems. A regional entity cannot implement federal consistency, and therefore BCDC's federal consistency

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<sup>9</sup> Created by the state Legislature in 1970 (California Government Code § 66500 et seq.), the Metropolitan Transportation Commission (MTC) is the transportation planning, coordinating and financing agency for the nine-county San Francisco Bay Area.

<sup>10</sup> The California Legislature created the Air District in 1955 as the first regional air pollution control agency in the country, recognizing that air emissions overflow political boundaries. The Bay Area Air Quality Management District is the public agency entrusted with regulating stationary sources of air pollution in the nine counties that surround San Francisco Bay: Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, southwestern Solano, and southern Sonoma counties.

authorities would have to be transferred to, or overseen by another state agency.<sup>11</sup> Additional costs to the state would be incurred if this authority were exercised by another agency.

**Cost Factors.** On the other hand, there could be some internal administrative advantages of transforming BCDC into a regional agency. Over 20% of BCDC's budget goes to administrative support. These costs are higher than would be necessary were BCDC a regional agency because most BCDC internal administrative decisions must be approved by state control agencies. Securing these approvals adds to BCDC's transactional costs. BCDC also has to pay the control agencies for the services they provide. These costs could be largely eliminated if BCDC were a regional agency.

Further, the salaries of BCDC's staff are set by the California Department of Personnel Administration based on statewide data. As a result, the state agency salaries are not competitive with salaries paid in the Bay Area. In fact, they are about 30-50% lower than regional agencies and local government salaries. Salaries account for about two-thirds of BCDC's total budget. If BCDC were a special district, the Commission could set its own staff salaries to make them more comparable with other public agencies in the Bay region. However, there is no evidence that salary levels have prevented BCDC from attracting and retaining high quality staff.

As a regional agency, BCDC would no longer be represented by the California Attorney General's Office unless special legislation called for that representation. Even in that case, BCDC would have to pay for the legal services. Over the past three years, Attorney General services provided to BCDC have averaged \$67,000 a year, but this figure could be substantially more if court costs and legal retainers for private firms or additional legal staff are required to defend the Commission. Moreover, representation by the Attorney General, particularly at the appellate level, has been pivotal to BCDC's success. The appellate courts, and particularly the California Supreme Court, look to the Attorney General as a spokesperson for the public interest in important land use cases.

The BCDC staff estimates that if BCDC were a regional agency, savings in transactional costs would probably be offset by higher salary and legal costs, and there would likely be no overall cost savings. In the time available, the Committee was not able to independently verify this assessment.

**Advancement of Objectives.** The state has a significant interest in the Bay because it is an economic and natural resource of statewide and national importance and because the state

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<sup>11</sup> Probably the California Coastal Commission.

owns, or has an ownership interest in virtually all of the tidal areas of the Bay, and many filled tidelands as well. While BCDC's focus is on one region, the Bay is no less a resource of state importance than are Lake Tahoe, the Colorado River, the Santa Monica Mountains, or the California coast, all of which are overseen by other state agencies. Furthermore, as noted above, the balance and breadth of public, local, state and federal representation on BCDC tend to encourage decision-making from a regional and statewide, rather than local perspective.

In addition, the impacts of global climate change resulting from sea level rise are likely to be felt most immediately and acutely along the California coast and in San Francisco Bay. These impacts can best be addressed in the Bay if BCDC is exercising state authority, particularly if it is doing so as part of a state effort reflecting state interests and applicable state laws and regulations. In this regard, state law was amended last year to give BCDC the responsibility and authority to work with local governments and other organizations to address the new challenges posed by the regional impacts of an expanding Bay from sea level rise caused by global climate change. BCDC may actually need additional powers and duties to effectively combat the effects of global climate change. However, the Committee believes this particular issue needs to be considered after further public debate and in the context of the state's overall effort to address climate change. Should that occur, it will be more effective to make changes to BCDC's authority if the point of departure is an organization whose strengths, operations and limitations are well known (i.e., BCDC's existing structure), than if the changes are made to a new regional agency whose structure is uncertain and effectiveness is untested.

**Conclusion.** There are no compelling reasons for eliminating BCDC as a state agency, and several potentially detrimental outcomes could result should the Commission be transformed into a regional agency. BCDC is an excellent example of a state agency that has been able to successfully advance local, regional, state and national objectives. The best, if not the only, argument for making BCDC a regional agency, therefore, is that it could be funded regionally, independent of the state General Fund. However, the issue of funding exists whether BCDC is a state agency, a regional agency or some new hybrid.

## V. Steering Committee Conclusions: How Could BCDC Be Funded?<sup>12</sup>

There is a consensus that BCDC has been highly effective in carrying out its statutory mission, and the cost of its operations low, both in relation to its responsibilities and as a proportion of the state's General Fund. Nevertheless, the ongoing pressure on the General Fund makes it likely that unless a secure source of revenue for BCDC can be established, there will be further calls for BCDC's realignment, merger or consolidation, driven by fiscal rather than public policy objectives. Therefore, it is in the public interest to continue to explore measures that would materially reduce or eliminate the need for General Fund support for BCDC.

Indeed, this issue is not new. In 1995, in response to a proposal to merge BCDC with the Coastal Commission, the Bay Commission adopted a report analyzing ten alternative techniques that could be used to reduce the amount of state General Fund support needed to carry out BCDC's operations. The conclusions reached in 1995 on the following nine alternatives are largely the same today as they were 14 years ago.

The first five of these alternatives could be implemented within BCDC's existing statutory authority or with relatively minor changes to that authority. However, the revenue that could be derived does not appear substantial.

The remaining alternatives are all laden with significant practical, political, and legal impediments and uncertainties. The Committee believes that, while some of these latter alternatives may be worth further study by the Governor and/or the Legislature, none is sufficiently viable at this time to warrant reliance on them as a substitute for continued General Fund support for BCDC.

The following alternatives could be implemented either by BCDC now or with relatively minor changes to state law:

**Retain all revenues generated by BCDC.** The revenue BCDC generates from permit application fees and enforcement penalties is deposited in the state General Fund and the Bay Fill Cleanup and Abatement Fund respectively. The Legislature appropriates money from these funds to support BCDC's operations. Were the Commission to retain the revenues it collects, however, it is likely the appropriations BCDC receives would be reduced by an equal amount. Moreover, if permit revenue declined, state civil service laws and rules make it impossible to

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<sup>12</sup> The Steering Committee's August 13, 2009 deliberations on funding options were greatly enhanced by the participation of two experts on state finance: Dean Mischynski, an adjunct fellow at the Public Policy Institute of California, a private operating foundation that undertakes independent research on major issues impacting California, and Fred Silva, who serves on the staff of Beacon Economics, and is the treasurer of California Forward, a non-partisan initiative to transform state government to provide better representation, smarter budgeting and fiscal management, and higher quality public services.

quickly lay off staff and it is similarly difficult to quickly add staff when permit workload and revenues increase.

**Increase permit fees.** BCDC recently increased its permit fees with the goal of recovering the 20% of BCDC's General Fund support that funds BCDC's regulatory program. The \$540,000 that is expected to be generated this fiscal year amounts to about 13% of BCDC's \$4,135,000 General Fund appropriation. Recovering all of BCDC's regulatory program costs would require the permit fees to be increased five-fold, and recovering all BCDC costs would necessitate an almost eight-fold increase in permit fees. A significant portion of BCDC's permit fees comes from other state agencies, some of which may be supported by special fund sources. Therefore, substantially increasing BCDC's permit fees could result in a net General Fund saving; however, the overall state fiscal savings would probably be substantially less. Also, it is likely that increases would be highly resisted by the regulated community and could result in higher enforcement costs and inequities if the cost of a permit approaches the cost of a small project.

The representative from the Bay Planning Coalition stated that the Coalition has been willing to support (and has in the past supported) higher permit fees and increased funding for BCDC if the organization could be assured that BCDC used the funding provided in a manner consistent with BCDC's mission as established in the McAteer-Petris Act, and staff and operations were carried out in the most cost-effective manner possible. In particular, the Coalition suggested that it might be possible to reduce the overall cost of the Commission's operations if BCDC's dredging and sand mining regulatory responsibilities were transferred to the Regional Water Quality Control Board.

Like many other regulated enterprises in California, dredgers and the sand mining industry operate under a complex regulatory system, one that the regulatory community perceives to be burdensome. Besides BCDC, at least seven other state and federal agencies may have roles in regulating a particular dredging or sand mining operation in the Bay, depending on where the operation takes place, who owns the underlying property, and which species or resources may be impacted by the operation. Therefore, it is not surprising that the sand mining and dredging operators have raised these concerns when the opportunity has presented itself. In this regard, the Coalition made a similar recommendation for regulatory modifications five years ago in response to Governor Schwarzenegger's 2004 Performance Review. To address the Coalition's numerous recommendations, an 18-month comprehensive evaluation of BCDC's regulatory operations was undertaken, facilitated by the Bay Dredging Action Coalition. The outcome of that process was a 19-point plan, which the Coalition agreed in 2006 would address its concerns. The Committee has been provided with that plan, which included a recommendation for additional funding for BCDC so the rest of the plan could be implemented. The Coalition

provided political support for additional funding for BCDC beginning in the 2006-07 fiscal year. These funds have been instrumental in allowing BCDC to fully implement the Coalition's plan.

A majority of the Steering Committee concluded that undertaking yet another evaluation of the Coalition's regulatory recommendations now was not feasible. The issues are complex, and considerable time and attention has been given to these issues by BCDC and other agencies in the recent past. Moreover, even under the best of circumstances, a reevaluation of the magnitude required was beyond the scope of, and resources available for, this report.

**Increase penalties.** In the 2008 calendar year, the Commission collected \$113,000 in penalties, which, as required by law, were deposited in the Bay Fill Cleanup and Abatement Fund. In the 2009-10 fiscal year, the Commission will receive an appropriation of \$211,000 from this Fund, which covers most of the \$258,000 cost of BCDC's enforcement activities. Higher fines and penalties would probably deter conscious violations of the law. However, BCDC's experience is that most violations result more from unawareness of legal requirements and poor management oversight of regulatory responsibilities than from willful disobedience. Nevertheless, there may be some deterrence benefit from enacting legislation that would require BCDC to use the cost of pursuing a violation as the minimum figure in setting a penalty.

**Apply for grants and special funds.** Over the past decade the Commission's staff has been highly entrepreneurial in its quest for external funding. As a result, grants from other state and federal agencies, along with reimbursements, generate about 25 percent of the funding needed to support the Commission's operations.

**Establish a special license plate.** In 1995, the Commission recommended that legislation be enacted to authorize a special "Treasure San Francisco Bay" license plate to be produced and sold to support BCDC operations along with other Bay management programs. Although this proposal was not implemented, more recently a special Bay Area "Nature within Reach" plate was authorized to generate funds needed for open space acquisition and habitat restoration within the region. None of this funding is available to BCDC, and not enough of the plates have been sold to reach the point where the program is operational.

The following alternatives would require changes to state law, and despite some appealing elements, confront serious questions of feasibility:

**Impose a fill impact fee.** A fill impact fee could theoretically both generate additional revenue and use the market to achieve the policy goal of reducing Bay fill. There are several flaws in this concept, however. First, BCDC's objective is to stop unneeded Bay fill, not prohibit all Bay fill. An impact fee would not differentiate between good and bad fill. Second, if the

impact fee is effective in serving as a disincentive to fill proposals, the funding BCDC would be counting on from the fee would not become available, and BCDC could face a budget deficit. In fact, to the extent BCDC became dependent on fill impact fees for its fiscal survival, there could be a perverse incentive to authorize fill.<sup>13</sup> Third, there is no agreement or even any precedent on how “fill impacts” should be quantified and translated into a dollar amount. Lastly, a fill impact fee would suffer the same political difficulties as increased permit fees.

**Impose a shoreline user fee.** Bayfront developers receive an economic benefit through their location adjacent to a public resource. Therefore, it may be possible to impose a shoreline user fee on development projects, which reflects this added value and is equitably imposed, perhaps in proportion to the amount of shoreline occupied by each project.

Nevertheless, the Committee is not aware of any precedent or clear legal authority for such a fee, and it would undoubtedly be tested in court. Further, a shoreline user fee might also be in conflict with BCDC’s mitigation and public access policies. In particular, two problems present themselves. First, would the combination of a mitigation requirement, a public access requirement, and a user fee effectively charge a permittee three times for the same project? Second, at the least, public access and mitigation projects themselves would undoubtedly have to be exempted from the shoreline fee. It would be somewhat inequitable to require a permittee both to provide shoreline public access or undertake mitigation efforts along the shoreline and also to charge a user fee for the shoreline area needed to meet these requirements. Addressing this inequity by exempting public access and mitigation projects from the user fee could generate requests to bifurcate development projects from associated access and mitigation activities and result in more complex permit administration and increased regulatory duties. Lastly, there would be the same political difficulties as with the fill mitigation fee.

**Share costs with local governments.** The notion that local governments would be willing to take on some of the costs of BCDC’s operations, while possible, collides with two critical political realities. First, local governments already believe it is unfair that the state has reduced the financial support it provides to local governments in order to retain funds needed for state operations. Second, there is ample historic evidence that from a purely fiscal perspective, it has not been in the interest of local governments to limit the filling of San Francisco Bay.

**Explore Regional Funding Opportunities.** BCDC, along with other agencies that are responsible for managing natural resources and enhancing the quality of life in the Bay region could develop a comprehensive program for generating additional funds to be shared by the

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<sup>13</sup> The concept was rejected for that reason by the temporary Bay Commission in its deliberations over preparation of the Bay Plan and related recommendations to the Legislature from 1965 to 1969.

agencies. To further evaluate this idea, the Commission could work with willing partner agencies, which could include the Bay Area Air Quality Management District, the Regional Water Quality Control Board, the Association of Bay Area Governments, the Metropolitan Transportation Commission, the Bay Area Water Emergency Transit Authority, the Bay Area Conservancy Program, and the San Francisco Bay Restoration Authority. These partners could develop a comprehensive financial program aimed at generating revenue to supplant General Fund support or other unreliable funding sources. In developing the program, the agencies could investigate voluntary income tax and property tax check-offs, a regional property transfer tax, a motor vehicle registration surcharge and a surcharge on utilities used in the region. The program could be embodied in legislation that would be sponsored jointly by the partner agencies.

Whatever merit this idea has in concept, some of the potential funding sources raise legal issues; some might be perceived to be tapping into revenue streams that are committed to other purposes; some might not generate large amounts of funding; and the administration and distribution of the funds between the partner agencies could be complex and acrimonious.

**Create a Bay Area Special Regulatory Fee or Benefit Assessment District.** The 1995 report also explored the idea of creating a special benefit assessment district, and BCDC's staff suggested to the Committee that a state-imposed regulatory fee district be considered.

The law surrounding the establishment and operation of assessment districts, or alternatively a regulatory fee district, is complex and continuing to evolve. A detailed analysis of these issues is beyond the scope of this report, given the time and resources available. Suffice it to say that it appears reasonably clear the state can impose fees to raise revenues to support a specific state regulatory program, and the state can also create benefit assessment districts, both without complying with procedural and voting requirements imposed on the state and local agencies by Proposition 13 and on local agencies by Proposition 218. In this connection, the California Supreme Court has ruled in *Sinclair Paint v. State Board of Equalization*<sup>14</sup> that a fee to fund a regulatory program is not a tax subject to a two-thirds vote of the Legislature provided that, among other things, the purpose of the fee is to fund the regulatory program rather than to simply generate revenue. The fee must be directly related to and not exceed the cost of the regulatory program and cannot be used for other purposes. This direction from the court appears to be step in the direction of permitting General Fund support for regulatory agencies to be replaced by a fee-based approach targeted to the users and beneficiaries of the program. However, beyond that, a plethora of legal, political and practical questions arise.

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<sup>14</sup> (1997) 15 Cal.4<sup>th</sup> 866.

The two threshold questions would be (1) whether the Commission, even if it remains a state department, is treated as a local or state agency; and (2) whether the revenue is raised by a tax, an assessment or a fee.

If, for the purposes of collecting revenues, the Commission were found to be local agency, it would be subject to Proposition 218, which provides three main ways to generate revenue: taxes, assessments and fees. The rules for applying these differ. A special tax would require a two-thirds vote of the affected residents. An assessment on real property would require a majority vote, weighted in proportion to the assessment liability. Assessments on property would need to be proportional to the cost and benefits provided to the parcel and cannot be assessed unless “special benefits” are provided to a property, not just a general public benefit or increase in property value. A fee would require a vote of either a majority of property owners or two-thirds of the electorate. Fees on property would need to meet the proportionality test as well and cannot be imposed for general governmental services or one not used by the property owner.

But even if BCDC were not considered a local agency for purposes of a regulatory fee or benefit assessment, many difficult questions would remain:

- On whom could any regulatory fee or benefit assessment be imposed; in other words, who are the beneficiaries and/or the users? Those who live within the Commission’s jurisdiction and benefit most directly from the preservation of the Bay as an amenity? Those who live within the historic Bay margin and may be most directly affected rising sea levels resulting from global climate change? Everyone in the nine Bay Area counties, since all benefit from preservation from the Bay as a scenic amenity and as an economic and environmental resource, particularly insofar as the Bay moderates temperatures and contributes to better air quality? Those who live within the airshed or the watershed of the Bay for the same reasons?
- If the fee or benefit assessment were imposed on any of the foregoing, would it pass muster in court under the nexus, proportionality, and reasonableness tests that are continuing to evolve with respect to the limitations on the application of such fees and assessments?
- How would the fee or assessment be imposed? Would a public vote be required or desirable? If so, what would be the required majority?
- How would the fee or assessment be collected and by whom? For example, the simplest way of collecting such as fee would be through a small surcharge on property taxes. But there is some possibility that court might find that a fee or

assessment collected by a local tax assessor should be treated as a local fee or assessment, and thus have to meet the requirements of Proposition 218, rather than a state fee or assessment, which can be established by a majority vote of the Legislature.

In short, there is considerable uncertainty surrounding imposition by the state of either a regulatory fee or a benefit assessment. There have been few fees implemented pursuant to the Sinclair Paint decision, and another case<sup>15</sup> is now pending regarding the legality of such a fee approach. Moreover, the more recent case of *Silicon Valley Taxpayers Assn, Inc. v. Santa Clara County Open Space District*<sup>16</sup> indicates that the scope of what may be included in a benefit assessment district is narrower than previously thought, and, while the decision is not necessarily applicable to state-imposed assessments, it at least suggests the possibility that such assessments could not include BCDC regulatory overhead. In fact about the only “certainty” associated with the imposition of either a regulatory fee or a benefit assessment to support BCDC is that either would likely be vigorously challenged in court, and it would take a number of years, possibly including an appeal to the California Supreme Court, before the final result would be known. Moreover, any fee, and possibly any assessment as well, would have to be established by state legislation, and future legislatures, dealing with future state fiscal crises, might seek to “borrow” the revenue for other purposes for some period, thereby impairing BCDC’s ability to carry out its program. And in any event, using a regulatory fee for purposes other than funding the Commission’s regulatory program would appear to violate the parameters that the courts have specified for this type of fees.

**Special Tax.** The State Legislature could also establish, by a two-thirds vote, a new special tax to fund the Commission. The tax could be imposed on all Californians, only Bay Area residents, or some portion of the Bay Area. Given the political realities today, however, it would be difficult to secure support in the Legislature to enact such a tax.

In addition to the ten general revenue sources discussed above, another source of revenue to support BCDC could be considered:

**Bridge Tolls.** Seven state-owned toll bridges cross the Bay. Tolls are collected from vehicles using the bridges pursuant to a toll schedule established by the Bay Area Toll Authority<sup>17</sup> and

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<sup>15</sup> *California Farm Bureau Federation v. California State Water Resources Control Board* (2007) 146 Cal. App. 4<sup>th</sup> 1126.

<sup>16</sup> (2008) 44 Cal.4<sup>th</sup> 431.

<sup>17</sup> The Bay Area Toll Authority (BATA) was created by the California Legislature in 1997 to administer the base \$1 auto toll on the San Francisco Bay Area's seven state-owned toll bridges. On Jan. 1, 1998, the Metropolitan Transportation Commission (MTC)—the transportation planning, financing and coordinating agency for the nine-county region—began operations as BATA. In August 2005, the California Legislature expanded BATA’s responsibilities to include administration of all toll revenue and joint oversight of the toll bridge construction

the California Legislature. Each year, 125 million vehicles cross the bridges in the Bay Area, generating approximately \$475 million in total toll revenues—including \$135 million in base toll revenues, \$115 million in Regional Measure 2 revenues and \$225 million in seismic retrofit surcharge revenues.

The base toll revenues are used first to cover the ongoing operations, toll facilities maintenance and administration of the bridges. Remaining toll revenues fund debt service on Regional Measure 1 project financing and various transit and traffic-relieving capital projects that serve the bridge corridors. Regional Measure 2 funds are used to fund the Regional Measure 2 projects. The seismic surcharge toll revenues are used to fund a multibillion-dollar seismic retrofit program to strengthen and reinforce bridge structures and roadways on five of the seven state-owned Bay Area bridges, including replacing the eastern span of the San Francisco-Oakland Bay Bridge.

BCDC's operations could be fully supported by a 4¢ fee charged for each vehicle crossing the Bay, either redirected from existing tolls or as part of a general toll increase. This modest fee could be established by the Bay Area Toll Authority or directed by the Legislature. However, the courts would likely view this fee as a form of user fee. Therefore, its imposition would have to be supported by appropriate findings, i.e., sea level rise will increase the risk of Bay flooding and potentially damage vital road and transit routes over and adjacent to the Bay and the user fee will assist in planning how Bay Area transportation infrastructure will be protected.

Even if the required findings were made, any attempt to divert existing toll revenues to BCDC would likely raise opposition, notwithstanding the relatively small amount involved.

## **VI. Conclusion.**

While there are a variety of possible mechanisms for funding the Commission, all of them face challenges. For these reasons, the Committee concluded that none of the alternatives presented a realistic or practical replacement for BCDC's existing General Fund support. The most appealing of these, either a state-imposed regulatory fee or a state-imposed benefit assessment district, do not appear feasible in the short-term, and possibly not at all. Both alternatives are so fraught with legal, political and practical uncertainty that it is unlikely either would produce any revenue for several years. Therefore, neither could be recommended at this time, though both are perhaps worth further in-depth exploration and consideration by the Legislature and the Governor as the applicable legal standards become clearer.

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program with Caltrans and the California Transportation Commission. Caltrans owns and operates the state-owned bridges.

Thus, the Committee believes there is no real alternative to continued state General Fund support for BCDC until either the Legislature and/or the Governor can analyze in much greater depth the legal and practical challenges presented by the alternatives to General Fund support, and until the practical and legal uncertainties surrounding them can be either clarified or eliminated.

**Background Information Considered by Steering Committee.**

- *San Francisco Bay Conservation and Development Commission*, a public information brochure describing BCDC.
- BCDC 1970-2009 permit data and 2009-10 fiscal year budget information.
- Current BCDC permit application fee schedule.
- *Status Report on the Governor's Proposal to Realign BCDC*, July 9, 2009.
- *Options for Financing Coastal and Ocean Conservation in California*, prepared for the California Ocean Protection Council by Redefining Progress, May 2009.
- *San Francisco Bay Restoration Authority Funding Options Report*, prepared for Save the Bay by SCI Consulting Group, July 2009.
- *Report on Possible Ways to Reduce the State's Share of BCDC's Budget*, prepared for the Governor and the Legislature by BCDC, August 17, 1995.
- *Fixing the Delta: How Will We Pay for It?* Dean Misczynski, Public Policy Institute of California, August 2009.
- Recommendations to the Secretary for Resources from the California Environmental Trust regarding Governor Wilson's proposal to transfer BCDC's responsibilities to the Coastal Commission and the Regional Water Quality Control Board, March 13, 1995.
- March 1995 report by Bay Planning Coalition and Save the Bay describing improvements that would make BCDC's operations more effective.
- August 6, 2009 status report on 19-point plan developed by Bay Planning Coalition and environmental groups on further steps that would improve BCDC's operations. All the recommendations in the plan have been implemented.
- August 12, 2009 letter from John King of the National Oceanic and Atmospheric Administration regarding the effect that transforming BCDC into a regional entity would have on BCDC's ability to carry out the federal Coastal Zone Management Act.

**Meeting Attendees:****August 6, 2009 – SPUR, Discussion about Governance**

Matt Almy, Principal Program Budget Analyst, California Department of Finance  
 Joseph E. Bodovitz, President, California Environmental Trust  
 Steve Goldbeck, Deputy Director for Climate Change and legislation, BCDC  
 Anne Halsted, BCDC Commissioner  
 Ellen Johnck, Executive Director, Bay Planning Coalition  
 David Lewis, Executive Director, Save the Bay  
 Jim McGrath, BCDC Commissioner  
 Gabriel Metcalf, President and Executive Director, SPUR  
 Andrew Michael, Vice President, Sustainable Development, Bay Area Council  
 Sean Randolph, President and CEO, Bay Area Council Economic Institute  
 Paul Sedway, Sedway and Associates, Co-Chair SPUR Advisory Council  
 Caitlin Sweeney, Chief Deputy Director, BCDC  
 Will Travis, Executive Director, BCDC  
 Michael B. Wilmar, Sheppard, Mullin, Richter & Hampton, Co-Chair SPUR Advisory Council

## Observers

Tim Eichenberg, Chief Counsel, BCDC  
 Joe LaClair, Chief Planning Officer, BCDC  
 Mamie Lai, Assistant Executive Director for Administrative Services, BCDC  
 Sharon Louie, Human Resources Officer, BCDC  
 Dasha Mikic, intern, SPUR  
 Richard Ng, Chief Financial Officer, BCDC

**August 13, 2009 – BACEI, Discussion about Finance**

Matt Almy, Principal Program Budget Analyst, California Department of Finance  
 Joseph E. Bodovitz, President, California Environmental Trust  
 Henry Gardner, Executive Director, ABAG  
 Steve Goldbeck, Deputy Director for Climate Change and legislation, BCDC  
 Anne Halsted, BCDC Commissioner  
 Ellen Johnck, Executive Director, Bay Planning Coalition  
 David Lewis, Executive Director, Save the Bay  
 Joan Lundstrom, BCDC Commissioner

Jim McGrath, BCDC Commissioner

Gabriel Metcalf, President and Executive Director, SPUR

Andrew Michael, Vice President, Sustainable Development, Bay Area Council

Dean Misczynski, Adjunct Fellow, Public Policy Institute of California

Sean Randolph, President and CEO, Bay Area Council Economic Institute

Paul Sedway, Sedway and Associates, Co-Chair SPUR Advisory Council

Fred Silva, Beacon Economics

Caitlin Sweeney, Chief Deputy Director, BCDC

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Observers:

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Joe LaClair, Chief Planning Officer, BCDC

Mamie Lai, Assistant Executive Director for Administrative Services, BCDC

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Dasha Mikic, intern, SPUR

Richard Ng, Chief Financial Officer, BCDC