

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

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TO: Commissioners and Alternates

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SUBJECT: Staff Report on Optional Schedules for Further Action on Bay Plan Amendment No. 1-08 Dealing with Climate Change
(For Commission consideration on April 21, 2011)

Summary

This report: (1) summarizes meetings the staff has had with local governments, business community, environmental organizations and members of the Commission since the last public hearing on Bay Plan Amendment No. 1-08 in December 2010; (2) explains why the environmental assessment on the Amendment may need to be revised; and (3) suggests for Commission consideration optional schedules and approaches for completing the adoption of the proposed Bay Plan amendment.

Staff Report

Community Outreach Efforts. In an effort to address the concerns raised during the fall 2010 public hearings on Bay Plan Amendment No. 1-08, the staff and members of the Commission have engaged in extensive outreach to better understand the concerns raised and to explore possible options for addressing those concerns. These efforts have been extremely helpful and productive by increasing understanding among parties and helping to work towards a consensus view.

During December 2010 and January 2011, the staff held numerous meetings with local governments throughout the region to answer questions and receive comments on the September 3, 2010 staff recommendation. The meetings included:

County	Association Name	Date and Location
Alameda	Alameda County Mayor's Conference	December 8, 2010 Berkeley
Contra Costa	Contra Costa County Mayor's Association	December 2, 2010 Pittsburg
Marin	Marin County Council of Mayors and Council members	November 18, 2010 Larkspur
Napa	Napa City County Joint Meeting	January 25, 2011 Napa



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County	Association Name	Date and Location
San Mateo	City/County Association of Governments of San Mateo County	December 9, 2010 San Carlos
San Francisco	Mayor's Staff	November and December 2010 BCDC Office
Santa Clara	Santa Clara County Cities Association	January 13, 2011 Sunnyvale
Solano	Suisun City, Fairfield, Solano County, Developers, and Businesses.	January 12, 2011 Suisun City
Sonoma	Sonoma Mayors' and Councilmembers' Association	Unable to Schedule
Alameda/Contra Costa/ Solano	East Bay Economic Development Association	December 15, 2010 Oakland

In March and April, 2011, the staff hosted working sessions to develop optional approaches to policy language to address public concerns and interests. A few Commission members were invited to attend these working sessions. On March 11 and April 7, 2011, a working session was held with several land use attorneys and business and trades advocacy organization representatives. In addition, on March 25, 2010, a working session was held with representatives of environmental advocacy organizations. Chair Randolph and Commissioners Bates, Gibbs, Gioia, Nelson, McGrath, and Wagenknecht attended all three of these meetings, and Vice Chair Halsted and Commissioner Gioia attended the March 11, 2011 and March 25, 2100 meetings. Another meeting with environmental organizations is being planned for late April or early May.

Environmental Assessment. The schedule for taking final action on Bay Plan Amendment No. 1-08 must include sufficient time for the staff to prepare additional documentation to comply with the requirements of the California Environmental Quality Act (CEQA)

BCDC's permitting and planning program is a "certified regulatory program" under Section 21080.5(d) of the California Environmental Quality Act (CEQA) and Section 15250(h) of the CEQA Guidelines. This certification exempts BCDC from the requirement to prepare an Environmental Impact Report (EIR) on its actions, but BCDC's certified regulatory program remains subject to CEQA's broad policy goals and the other substantive requirements. As a result, when BCDC acts as a lead agency, under its regulations it must prepare an Environmental Assessment (EA) for any non-exempt project that may have a significant adverse impact on the physical environment. (14 CCR §11511(c).) The EA is considered the "functional equivalent" of an EIR under CEQA.

When the Commission adopts an amendment to the Bay Plan, BCDC is the lead agency and must comply with the specific regulations governing environmental review of the amendment in three specific ways. First, the staff's initial planning report must include an assessment of environmental impacts and determine either that the proposed amendment will have no significant adverse environmental impacts, or describe any significant adverse environmental impacts and the public benefits of the proposed amendments, feasible mitigation measures, and feasible alternatives to the proposed amendments (14 CCR §11003(a)(6), §11511(b) & (c) and §11521). Second, before the public hearing on the final staff recommendation, the assessment must be revised to address any substantial changes in the staff recommendation that were not addressed in the initial assessment. Third, after the final public hearing on the proposed Bay Plan amendment, the staff must prepare (1) a summary of and responses to significant environmental issues raised in the public process, and (2) any necessary revision to the initial assessment regarding environmental impacts and an analysis of environmental impacts (14 CCR §11005).

Two years have passed since the release of the staff background report entitled *Living with a Rising Bay*, and the staff recommendation has gone through three substantive revisions. Over 200 unique public comment letters were received during the most recent public hearing period, many more than the Commission usually receives on proposed Bay Plan amendments. At least a month is needed to revise the background report, respond to public comments, and supplement the initial environmental assessment.

Moreover, two recent court challenges highlight the need for this assessment to be as robust as possible. In November 2010, the California Building Industry Association filed suit against the Bay Area Air Quality Management District alleging it violated CEQA in adopting thresholds for determining the significance of impacts from the emission of greenhouse gases (GHG), toxic air contaminants and fine particulates from new development (*California Building Industry Association v. BAAQMD*, Case No. RG 10548693, November 29, 2010). The second case challenges the functional equivalent document prepared by the California Air Resources Board (CARB) under its certified regulatory program, alleging that CARB's program-level environmental review failed to consider a reasonable range of alternatives for the adoption of a cap and trade program to implement AB 32 (*Assn. of Irrigated Residents, et al v. California Air Resources Board*, March 18, 2011, Case No. CPF-09-509562).

The proposed Bay Plan climate change amendment is a programmatic policy change rather than a specific project with quantifiable impacts, similar to a first-tier programmatic environmental document prepared for a series of subsequent actions under the CEQA Guidelines (14 CCR §15168). Recent court decisions confirm that "programmatic" or "tiered" environmental documents allow the environmental effects to be analyzed in general terms, without the level of detail appropriate for second-tier review (*In re Bay Delta*, 43 Cal. 4th 1143, 1169 (2008)). This is because the impacts of specific projects undertaken after the adoption of the proposed amendments are subject to more detailed environmental analysis under CEQA.

CEQA requires the Commission to determine whether the adoption of the Bay Plan amendment will have a "significant effect on the environment," which is defined as "a substantial, or potentially substantial, adverse change in the environment." (Public Resources Code § 21068) If an EA identifies significant environmental impacts, CEQA requires that feasible alternatives or mitigation measures be adopted to avoid or reduce such effects unless specific economic, social or other conditions make infeasible such alternatives and mitigation measures (Public Resources Code §21002). While the proposed Bay Plan amendment itself may not have any significant environmental effects, projects reviewed under the amendment policies may have such impacts. However, the impacts of such projects will be assessed by the lead agency under CEQA before the project is reviewed by the Commission, so the Commission will be able to use the environmental review conducted by the lead agency as part of the Commission's decision-making process. Where the Commission is the lead agency for a project, it will undertake its own EA to evaluate environmental impacts and develop reasonable alternatives and mitigation measures to avoid or reduce those impacts.

If an EA identifies significant environmental impacts, it must consider feasible alternatives and mitigation measures to lessen those impacts, unless specific economic, social or other conditions make such alternatives and mitigation measures infeasible. Although a program-level environmental review need not be as detailed as a project level review, it must still analyze the potential impacts of various alternatives and provide the public with a clear indication based on a factual analysis as to why one alternative was chosen over another. For example, in a programmatic EA, CEQA does not require discussion of site-specific impacts of each alternative if these impacts are speculative and remote. However, if an alternatives analysis is required, it must discuss a range of alternatives adequate to inform the public and decision makers.

The EA need not analyze speculative impacts or *all possible* alternatives. CEQA guidelines provide that impacts must be "reasonably foreseeable" (14 CCR §15152), and that an agency only need consider a reasonable range of alternatives that can "feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project." (14 CCR §15126.6(a)) "Feasible" means that the alternatives "are capable of being

accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors.” (14 CCR §15364) Therefore, the Commission need not consider alternatives that do not meet the basic project objectives, are infeasible, or do not avoid significant environmental impacts (14 CCR §15126.6(c)). The CEQA guidelines specifically call for the evaluation of a “no project” alternative to allow decision-makers to compare the impacts of the approving the proposed project with the impacts of not approving the proposed project (14 CCR §15126.6(e)). If the environmentally superior alternative is the “no project” alternative, an environmentally superior alternative must also be identified among the other alternatives considered.

The objective of the proposed amendment is to update the Bay Plan to better reflect scientific understanding of sea level rise and climate change, and to provide further guidance to minimize adverse impacts from climate change. Other objectives identified by the staff, based on input from Commissioners and the public, include: (1) reduce risks by developing adaptation strategies that will increase the resilience of the built and natural environment to the effects of climate change; and (2) develop a regional strategy for conservation and development that integrates climate change mitigation and adaptation.

Possible feasible alternatives that could be evaluated in the EA include: (1) no amendments to the Bay Plan findings and policies to address climate change (i.e. the “no project” alternative); (2) amendments only to Bay Plan findings to provide guidance to the Commission; or (3) amendments only for the purpose of calling for the adoption of a regional climate change strategy. The Commission could consider these or other reasonable alternatives to promote the objectives of its Bay Plan amendments and lessen any significant environmental impacts if such impacts caused by the amendments are identified.

On April 7, 2009, prior to the first public hearing on the proposed Bay Plan climate change amendments, the staff distributed a staff report addressing the proposed amendments, which concluded that the amendments would have no significant adverse environmental impacts. Additional environmental analysis will need to be provided in the staff’s fourth revised recommendation prior to a public hearing as well as in the final recommendation to the Commission. In the final recommendation, staff must provide a summary of and responses to significant environmental issues that were not addressed in prior reports. Additionally, the final recommendation must comment on the prior finding of no significant environmental impacts and provide additional analysis if necessary. The Commission must then adopt a Final Resolution of Approval finding that the amendments conform to the policies of the McAteer-Petris Act, and that they either have no significant adverse impacts or that those impacts have been substantially lessened by feasible alternatives or mitigation measures (14 CCR §11006).

Optional Schedules for Adoption of Bay Plan Amendment 1-08. To maintain the positive momentum on the project, the staff is providing the Commission with two alternative schedules and optional approaches for the Commission’s consideration and discussion. The intended goal of both schedules is to complete the amendment process by the fall of 2011, and both provide sufficient time for the staff to revise and supplement as needed the initial environmental assessment prepared two years ago.

The first optional schedule includes a workshop at the May 19, 2011 meeting that would allow for a discussion between representatives of environmental and business interests with the Commission to provide guidance to staff in crafting its revised recommendation.

The second option omits the workshop and would complete the project one month earlier. However, the vote would take place in late August when attendance at Commission meetings is usually lower than normal. The staff requests that the Commission provide direction to the staff regarding which schedule the Commission prefers.

Optional Schedule #1.

- May 6, 2011 Staff releases the latest version of the amendment language that reflects the results of the meetings and discussions the staff has had over the past five months.
- May 19, 2011 Commission workshop on latest draft language. Three members of the environmental community and three members of the business community will serve on a panel and offer the Commission their views on the draft and identify the key elements they believe must be included in the language and must not be included. The goal of the workshop is to allow the Commissioners to directly engage with each other and key stakeholders on the draft language. General public comments will be allowed at the end of the workshop. The workshop format also allows the Commission to consider the language more quickly than it could if a public hearing were held because Bay Plan amendment language must be released at least 30 days before a formal public hearing on a proposed Bay Plan amendment.
- May 20–June 30, 2011 Staff revises draft language in response to discussion at the workshop, revises the EA if necessary, and develops a fourth revised staff recommendation.
- July 1, 2011 Staff releases revised recommendation for public review.
- July 2–August 4, 2011 34-day review period. During this period the staff meets with local governments to brief them on the recommendation.
- August 4, 2011 Commission public hearing on fourth revised staff recommendation.
- August 5–September 1, 2011 Staff refines language, responds to comments and revises EA if necessary.
- September 2, 2011 Staff releases final recommendation.
- September 15, 2011 Commission votes on Bay Plan amendment and Final Resolution of Approval.

Optional Schedule #2.

- April 22–June 2, 2011 Building on the discussions that have taken place over the last several months, the staff develops a fourth revised staff recommendation, including a revised EA if necessary.
- June 3, 2011 Staff releases revised recommendation for public review.
- June 4–July 7, 2011 34-day review period. During this period the staff meets with local governments to brief them on the recommendation.
- July 7, 2011 Commission public hearing on fourth revised staff recommendation.
- July 8–August 4, 2011 Staff refines language, responds to comments and revises EA if necessary.
- August 5, 2011 Staff releases final recommendation.
- August 18, 2011 Commission votes on Bay Plan amendment and Final Resolution of Approval.