

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

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TO: Commissioners, Alternates and Interested Parties

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**SUBJECT: Staff Report on Optional Strategic Approaches for Addressing
Proposed Bay Plan Amendment No. 1-08 Concerning Climate Change**
(For Commission consideration on November 18, 2010 and December 2, 2010)

Recommendation

The staff recommends that the Commission consider the merits and drawbacks of a series of optional approaches for addressing the concerns expressed about amending the Bay Plan to address climate change and provide the staff with policy direction as to which approach the Commission prefers.

Staff Report

On September 3, 2010 the staff released its third preliminary recommendation on *San Francisco Bay Plan* Amendment No. 1-08 along with a notice for an October 7, 2010 public hearing on the proposed amendment. The Commission kept the public hearing open through its October 21, 2010, November 2, 2010, November 4, 2010, and November 18, 2010 meetings. In addition, at its November 4, 2010 meeting the Commission endorsed a staff proposal to expand the public outreach on the amendment process by: (1) holding workshops in all nine Bay Area counties during November and December 2010; (2) providing Commission direction to the staff on preferred amendment language in December 2010; (3) holding a public hearing on a fourth preliminary staff recommendation in February or March 2011; and (4) voting on the Bay Plan amendments in early April 2011.

There has been considerable controversy over the third preliminary recommendation, and opposition has been expressed to the Commission about adopting the proposed Bay Plan amendments recommended by the staff. Beyond concerns about the exact language proposed by the staff, some critics have recommended that the Commission should not amend the Bay Plan to address climate change at all. Others have suggested the Commission should limit any amendments so they clearly and exclusively apply to the Commission and its regulatory decisions within its current jurisdiction. Some have suggested that any advice the Commission has for local governments as to how they can deal with sea level rise should come in the form of stand-alone guidelines, rather than be embodied in the Bay Plan.

Based on these comments, the staff has identified six possible optional approaches the Commission could pursue to respond to the concerns expressed.

1. Revise the proposed language in response to comments from the public as part of the process of updating the 21-year-old sea level rise findings and policies in the Bay Plan and adding a new section to the Plan to deal more broadly with climate change and adapting to sea level rise.



2. Abandon the process of updating the Bay Plan and leave the current sea level rise findings and policies in place.
3. Amend the Bay Plan to delete the current sea level rise findings and policies.
4. Amend the Bay Plan to update the current sea level rise findings and policies in a new section dealing with climate change and adapting to sea level rise, and clearly specify that once adopted, the new provisions will be used exclusively to guide the Commission in making regulatory decisions within its permit jurisdiction and are not intended to be advisory for local governments.
5. Amend the Bay Plan to update the current sea level rise findings and policies in a new climate change section that calls for the preparation of a long-term regional sea level rise adaptation strategy. The amendments would not include any interim guidance for the Commission or advice for local governments to use when dealing with the planning or regulation of development in areas vulnerable to flooding.
6. In combination with any of the options above, develop a guidance document that can be used by the Commission, local governments and others when dealing with sea level rise. The document would explicitly state that the guidelines are not binding or enforceable.

To advance the public debate on the proposed Bay Plan amendments and to assist the staff in developing a fourth preliminary recommendation, the staff recommends that: (1) at its November 18, 2010 meeting the Commission should discuss these optional approaches (as well as others or variants identified by the Commission or the public) and encourage the public to offer its views on the optional approaches; and (2) at its December 2, 2010 meeting the Commission should provide direction to the staff as to which approach the Commission believes will best respond to the controversy and address the stated concerns about the third preliminary staff recommendation.

To assist the Commission in reaching a thoughtful conclusion, following is an analysis of the pros and cons of each optional approach.

Option #1. *Revise the proposed language in response to comments from the public as part of the process of updating the 21-year-old sea level rise findings and policies in the Bay Plan and adding a new section to the Plan to deal more broadly with climate change and adapting to sea level rise.*

Pro: Some critics have suggested that adopting the proposed amendments would vastly increase the BCDC's regulatory authority, usurp local autonomy, bring about a moratorium on development in low-lying areas, and could be used by so-called NIMBYs to oppose development proposals. These critics have also claimed that through their interpretation of federal coastal law, the Commission could circumvent the limitations on its own authority under state law and subject all development that might be impacted by flooding over the next century to compliance with the Bay Plan sea level rise policies. To deal with these concerns, these critics have recommended that the Commission use some means other than amending the Bay Plan to address sea level rise.

The Commission and the staff have tried to address these concerns by explaining that the opponents' stated reasons for challenging the amendment process are not supported by fact. State law establishes the process the Commission must use to keep the Bay Plan up to date.¹ State

¹ Government Code Section 66651 of the McAteer-Petris Act acknowledges that the Commission adopted the *San Francisco Bay Plan* and requires that the Commission use the Plan policies for reviewing and acting on projects requiring approval by the Commission. To keep the Plan current Government Code Section 66652 empowers the Commission to amend, or repeal and adopt a new form of, all or any part of the Plan. The *San Francisco Bay Plan* summarizes these legal requirements in the following statement: "The Commission is directed to make continuing studies of any matters related to the Bay that, in the Commission's judgment, are necessary to keep the Bay Plan policies and Bay Plan maps up to date."

law also establishes the Commission's permit jurisdiction.² This law would have to be changed to give the Commission authority over a larger area, and the Commission has not asked that its authority be expanded. The proposed policies could only be applied by the Commission within its existing jurisdiction using its existing regulatory authority. State law definitively establishes that the policies are advisory only beyond the Commission's regulatory jurisdiction.³ The proposed policies would modify the current policies that broadly discourage building in low-lying areas.⁴ In contrast, the proposed amendments would promote the type of development that is needed to reduce greenhouse gas emissions. In areas suitable for development, the proposed modified policies would allow small projects, continued in-fill development, redevelopment of closed military bases, remediation of contaminated sites, construction of critical infrastructure, and adaptive use of low-lying areas planned in a manner that addresses the dangers of accelerated sea level rise. In areas with high natural habitat value, the proposed amendments would encourage habitat protection and enhancement.

Those who claim the Commission could use federal law to usurp local control over projects under the proposed new policies base their assertion on an erroneous interpretation of the federal Coastal Zone Management Act.⁵ Similarly misleading are allegations that the modified Bay Plan policies climate change policies would create a new opportunity for abuse by opponents of in-fill projects to challenge the approval of the projects under the California Environmental Quality Act.⁶ In both cases, the critics do not acknowledge that the situation

² Government Code Section 66610 specifies the of areas of permit jurisdiction of the Commission to be: (a) San Francisco Bay; (b) a shoreline band extending 100 feet landward of the bay; (c) salt ponds; (d) managed wetlands diked off from the bay and used as a duck hunting preserve, game refuge or for agriculture; and (e) certain specified waterways.

³ Both Government Code Section 66653 and the Bay Plan explicitly state that outside the area of the Commission's permit jurisdiction the provisions of the Plan are advisory only.

⁴ The current Bay Plan sea level rise findings and policies were added to the Plan in 1989. They reflect the state of scientific understanding of climate change that existed a quarter a century ago and establish as policy that most common types of development should generally be discouraged in all areas vulnerable to flooding.

⁵ The Commission has the authority under the federal Coastal Zone Management Act (CZMA) to review federal, federally-funded and federally-permitted activities that affect the land and water uses of the California coastal zone (i.e. the Bay, shoreline band, salt ponds, managed wetlands, and priority use areas) for consistency with the "enforceable policies" of the California Coastal Zone Management Program (i.e. the McAtteer-Petris Act, the Bay Plan and BCDC's other laws and regulations). The CZMA consistency review authority does not apply to projects located outside the Commission's jurisdiction if they do not affect the land and water uses of the Bay, and the review is limited to "enforceable"--not advisory--policies. Some critics contend that the Commission could use its CZMA authority to extend its regulatory reach over all development in areas that are vulnerable to flooding from sea level rise. To support their assertion the critics cite a 1986 court case dealing with a proposed landfill in Contra Costa County (*Acme Fill Corporation v. San Francisco Bay Conservation and Development Commission*, 187 Cal.App.3d 1056). In that case the court ruled that although the landfill was inland of the Commission's permit jurisdiction, the Bay Plan policies prohibiting the landfill were enforceable because the landfill was located within a designated water-oriented priority use area. Priority uses are specified in state law as those the Commission can permit Bay filling to accommodate. The purpose of priority use areas is reduce the need to fill the Bay by reserving adequate shoreline space for water-related uses. Pursuant to the *Acme* case, the Commission has authority to apply the Bay Plan policies applicable to priority use areas beyond the 100-foot shoreline band. The court ruling in the *Acme* case rested on the fact that the landfill was proposed within a Bay Plan-designated water-oriented industry priority use area. The water-oriented industry policies of the Bay Plan are enforceable in those areas, and the CZMA allows the Commission to require consistency with these policies beyond its shoreline band jurisdiction. The opponents of the Bay Plan policies have not explained how the CZMA would allow the Commission to require consistency with advisory policies in shoreline areas outside its jurisdiction that are not designated for a water-oriented priority use.

⁶ Guidelines have been established for use by lead agencies in determining whether an Environmental Impact Report or Negative Declaration is necessary for a project to comply with the California Environmental Quality

would be no different in the future after the proposed amendments are approved than it is now and has been in the past. If the Commission's intention is to use the CZMA to increase its jurisdictional reach, why has the Commission not tried to achieve this goal over the past two decades when the Bay Plan has included policies that discourage most development in low-lying areas? If opponents of in-fill development choose to use the proposed advisory policies as a basis of CEQA challenges they can do so under the current Bay Plan policies. Moreover, the leading advocates of abandoning the Bay Plan amendment process, who have been actively participating in crafting the amendment language over the past two years, have not explained why a process that was acceptable to them a few months ago has suddenly become unacceptable.

To deal with these objections, the Commission could continue its efforts to work with the public to ensure that the Plan reflects the most current scientific information on climate change. Doing so would adhere to the process established and required by state law and would advance the California Climate Adaptation Strategy (SCS).⁷ Revising the Bay Plan policies to support the goals of the SCS would be consistent with state law mandating a reduction in greenhouse gas emissions and would continue the Commission's mutually beneficial partnership with three other regional agencies. Finally, adopting policies that local governments could use as advice when dealing with development in low-lying areas would be fully consistent with state law.

Con: Even though opposition to amending the Bay Plan is based on exaggerated and misleading claims, opponents have succeeded in raising concerns and opposition from local governments, developers, the business community and others. Thus, whatever their reasons, the opposition is shaping public perception of the proposed Bay Plan amendments. In politics, perception can become reality, which can change the political landscape. Broad political support and a shared commitment will be needed for the Bay Area to develop an integrated climate change strategy that both reduces greenhouse gases and adapts to the climate change impacts, like sea level rise, that cannot be avoided. If amending the Bay Plan becomes an obstacle to generating this political support and developing a shared regional vision, the Commission may want to consider a different course of action that does not include amending the Bay Plan as proposed.

Option #2. *Abandon the process of updating the Bay Plan and leave the current sea level rise findings and policies in place.*

Pro: Simply abandoning the current update of the Bay Plan might placate the political opposition to the amendment process and bring about a political accord that could advance the formulation of a long-term regional climate change strategy.

Con: Leaving the existing findings in place would result in a Bay Plan that does not reflect the current state of the scientific knowledge about climate change, and leaving the existing policies

Act (CEQA). Section IX of the Appendix G Checklist in the CEQA Guidelines lists a "[c]onflict with any applicable land use plan, policy or regulation" as an issue for lead agencies to evaluate for projects proposed *within* BCDC's permit jurisdiction. However, a conflict would not arise if the project is inconsistent with a policy that is merely advisory. The CEQA Guidelines also require "an examination" of whether the project would be consistent with "existing zoning, plans and other applicable plans." If a lead agency undertakes such an "examination" of Bay Plan policies for a project outside the Commission's jurisdiction, the advisory policies remain advisory. That said, nothing in law can prevent a NIMBY from contending that mitigation measures must be adopted or an EIR must be prepared because, among other things, the project appears to be inconsistent with a Bay Plan policy--or any other state climate policy. However, nothing in CEQA can convert BCDC's advisory policies into mandatory ones.

⁷ In 2009 Governor Schwarzenegger released the California Climate Adaptation Strategy, which along with an Executive Order encourage state agencies, like BCDC, that have regulatory authority to incorporate the provisions of the state strategy into the policies that guide their regulatory decisions.

in place would generally discourage development in all low-lying areas, including those that are suitable for the type of development that would reduce greenhouse gas emissions.

Option #3. *Amend the Bay Plan to delete the current sea level rise findings and policies.*

Pro: The problem of potentially discouraging development in areas that would reduce greenhouse gas emissions, cited above for not pursuing Option #2, could be overcome by deleting the existing provisions.

Con: To comply with the California Environmental Quality Act, when amending the Bay Plan the Commission must have evidence that the amendments will not have a significant adverse impact to the environment. This evidence is largely provided in a background report on the proposed amendment prepared by the staff. In the case of the current proposed Bay Plan amendments, this report is entitled "Living with A Rising Bay." That report provides scientific evidence and a legal rationale for the proposed amendments; it does not provide a foundation for eliminating the current findings and policies. Moreover, in the face of an ever-increasing body of knowledge about climate change, it is doubtful that such evidence--evidence that could withstand a legal challenge--could be produced.

The Commission adopted its current sea level rise findings and policies, in part, to implement McAtter-Petris Act requirements that public health, safety and welfare are protected, and "that fill be constructed in accordance with sound safety standards which will afford reasonable protection to persons and property against the hazards of unstable geologic or soil conditions or of flood or storm waters." Eliminating the existing policies would weaken the Commission's policy guidance for making decisions on permit applications to protect public health, safety and welfare.

Option #4. *Amend the Bay Plan to update the current sea level rise findings and policies in a new section dealing with climate change and adapting to sea level rise, and clearly specify that once adopted, the new provisions will be used exclusively to guide the Commission in making regulatory decisions within its permit jurisdiction and are not intended to be advisory for local governments.*

Pro: By making it clear that the Commission does not intend that the findings and policies in the Bay Plan are offered as advice to local governments, the Commission could address the concerns expressed about the Commission expanding its authority and usurping local autonomy. At the same time, the Commission could still update the policies that guide it when making regulatory decisions on projects within its existing jurisdiction. The Commission might even go so far as to state that it has no intention of using its federal consistency authority to apply the sea level rise policies inland of its current permit jurisdiction. These assurances might temper the political opposition to amending the Bay Plan even though in reality nothing would prevent a local government from using the policies as advice if it chooses to do so.

Con: The impacts of sea level rise will clearly extend inland of the Commission's permit jurisdiction. Having studied the issue of sea level rise on a regional basis, the Commission is uniquely well suited to offer its advice on this issue. Also, because current law explicitly places no obligation on local governments to pay heed to the Bay Plan policies, it is unclear whether the Commission telling local governments to ignore something they do not have to pay attention to would transform the opponents into supporters.

Moreover, just as the Commission cannot increase the status of Bay Plan policies from that given to them by state law (e.g., make Bay Plan policies binding or enforceable where the law provides that they are advisory only), the Commission cannot through administrative action reduce the status that the state law gives to the Bay Plan policies by simply proclaiming that they "are not intended" to have such a status.

Option #5. *Amend the Bay Plan to update the current sea level rise findings and policies in a new climate change section that calls for the preparation of a long-term regional sea level rise adaptation strategy. The amendments would not include any interim guidance for the Commission or advice for local governments to use when dealing with the planning or regulation of development in areas vulnerable to flooding.*

Pro: As called for in proposed Bay Plan climate change policy #5, there seems to be general agreement that the Commission, other regional agencies, local governments, and a broad array of stakeholders need to work together to formulate a long-term regional climate change strategy for the Bay Area. However, there is some opposition to proposed Bay Plan climate change policy #6, which would establish interim guidance on the types of development that should be allowed in areas vulnerable to flooding while the regional strategy is being formulated. Dropping the interim guidance could build political support for the remainder of the proposed Bay Plan amendments.

Con: Developing a comprehensive regional strategy with broad stakeholder involvement will be a long and costly undertaking. There is currently no legal requirement that such a strategy be prepared, nor is any funding earmarked for the endeavor. Therefore, it is doubtful the strategy could be completed in less than five years. It is entirely possible a decade or more will pass before the strategy is in place. In the meantime, it would be imprudent to ignore current scientific science, which shows that sea levels that are rising at an accelerated rate, when planning and permitting development in areas vulnerable to flooding.

Option #6. *In combination with any of the options above, develop a guidance document that can be used by the Commission, local governments and others when dealing with sea level rise. The document would explicitly state that the guidelines are not binding or enforceable.*

Pro: Placing the sea level rise policies in a stand-alone document, much like the Commission's public access design guidelines, would provide the Commission with a means of sharing its expertise and advice with local governments, developers and others in a manner that might not face the political opposition to the same guidance if it were included in the Bay Plan.

Con: State law prohibits any "guidelines" from being used in a routine on-going basis in making regulatory decisions. Guidelines used in such a manner are considered "underground regulations" that are violations of the Administrative Procedures Act. When BCDC adopted guidelines to guide its staff when commenting on proposals in diked historic baylands, the Bay Planning Coalition sued the Commission alleging the Commission had approved underground regulations. While the Commission prevailed in that lawsuit, the legal challenge demonstrates that the adoption and the application of guidelines to address sea level rise might face similar challenges, especially since the purpose of adopting the guidelines would be to avoid amending the Bay Plan in a manner prescribed by state law.