

# San Francisco Bay Conservation and Development Commission

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**TO:** Commissioners and Alternates

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**SUBJECT: Staff Report on Proposed Amendments to Commission Regulations Concerning Administrative/Procedural, Permitting and Planning Matters; Recommendation to Commence the Rulemaking Process to Adopt the Proposed Amendments**  
(For Commission consideration on December 17, 2020)

## Introduction and Summary

The Commission has adopted a set of regulations that are codified at Title 14 of the California Code of Regulations, Division 5, sections 10110-11990. The regulations cover a wide range of topics including, but not limited to: (1) general provisions; (2) the Commission, staff, and advisory review boards; (3) major permit procedures; (4) administrative and emergency permits; (5) amendments to permits; (6) special rules; (7) amendments to the San Francisco Bay Plan or other Commission plans; (8) certification of and amendments to the Suisun Marsh Local Protection Program; (9) marsh development permits issued by local governments and appeals therefrom; (10) enforcement procedures; and (11) implementation of the California Environmental Quality Act (“CEQA”).

BCDC’s Chief Counsel has conducted a comprehensive review of the Commission’s regulations and, in consultation with staff, has identified many necessary or desirable proposed changes to the regulations. Based on that review, BCDC’s Chief Counsel, again in consultation with staff, has drafted the accompanying package proposed amendments to approximately 50 regulations. The proposed amendments relate to numerous administrative or procedural matters, issues related to permitting, and issues related to planning. The proposed amendments do not involve any of the regulations governing enforcement procedures, which are the subject of a separate rulemaking process that the Commission authorized staff to commence on October 15, 2020. The proposed amendments also do not involve the Commission’s regulation governing implementation of CEQA, which will be the subject of a future rulemaking process.

Given the large number of regulations proposed to be amended and the wide range of topics addressed, it is not practical to provide a summary of each of the proposed amendments. However, the subjects of the proposed amendments are identified in the following three lists, which characterize the various proposed amendments as either: (1) administrative/procedural; (2) permitting; or (3) planning. Following this summary listing, the remainder of this staff report provides a section-by-section description of the proposed amendments in each of these categories (with minor exceptions as noted below).

### **Administrative/Procedural**

- A. Revise requirements regarding recording Commission meetings and minutes of Commission meetings. Sections 10244 and 10245. (All section references are to the section of the Commission's regulations in Title 14 of the California Code of Regulations, Division 5.)
- B. Clarify and revise requirements regarding ex parte communications and disclosure of ex parte communications. Sections 10283 and 10284.
- C. Clarify and revise requirements regarding the function and membership of the Design Review Board ("DRB") and Engineering Criteria Review Board ("ECRB") and the submittal of materials for DRB and ECRB review. Sections: 10270, 10271, 10315, and 10316.
- D. Revise the regulation governing the distribution of an application for a major permit. Section 10360.
- E. Revise the regulation governing the contents of a resolution granting a major permit. Section 10501.
- F. Revise the regulation governing Commission findings on permits. Section 10514.
- G. Revise the regulation regarding applications for administrative permits. Section 10610.
- H. Revise the regulation governing the Executive Director's and the Commission's action on an administrative permit after listing. Section 10621.
- I. Revise a number of regulations to provide for certain notices or other documents that are currently required to be sent by regular mail to be mailed by email or first-class mail and also posted on the Commission's website. Sections 10213, 10214, 10504, 10505, 10620, 11001, 11002, 11005, 11020, 11101, 11202, 11203, 11204, and 11205.
- J. Revise a number of regulations to clarify that when there are two or more co-permittees, all permittees must sign any application or letter request for a permit amendment or amendment to a permit application. Sections: 10370, 10371, 10612, 10810 and 10820.

### **Permitting**

- A. Clarify and revise requirements related to the issuance of an emergency permit. Sections 10120, 10652 and 10653.
- B. Revise the regulation regarding Commission's Bay and certain waterways jurisdictions. Section 10121.

- C. Revise the regulation regarding areas excluded from Commission jurisdiction. Section 10123.
- D. Revise the regulation regarding what constitutes a substantial change in use. Section 10125.
- E. Revise the regulation that describes the categories of activities that constitute “minor repairs or improvements” that the Executive Director may authorize by an administrative permit. Section 10601.
- F. Revise the regulation regarding minor fills for improving shoreline appearance (specifically with respect to a pre-existing residential structure). Section 10701.
- G. Repeal the regulation regarding using the Bay as a “design asset.” Section 10702.
- H. Repeal one regulation and a portion of a second regulation regarding a no-longer-authorized user fee for the disposal of dredged material. Sections 10521 and 10522.
- I. Add a new regulation regarding assignment of permits. Section 10830.

### **Planning**

- A. Revise the regulation governing the initiation of an amendment to the San Francisco Bay Plan or other Commission plan to clarify the agencies to receive copies of the brief descriptive notice. Section 11002.
- B. Revise the regulation governing the contents of the staff planning report on a plan amendment. Section 11003.
- C. Revise the regulation governing the contents of the staff planning recommendation on a plan amendment. Section 11005.
- D. Revise the regulation governing the payment of costs of processing an amendment to a Commission planning document. Section 11008.
- E. Revise the regulation governing Commission distribution of the Suisun Marsh Local Protection Program (“LPP”), a component thereof, or an amendment thereto. Section 11202.
- F. Revise the regulation governing the contents of the staff recommendation on an amendment to the Suisun Marsh LPP or a component thereof. Section 11205.

- G. Revise the regulation governing the contents of a marsh development authorization issued by a local government. Section 11420.
- H. Revise the regulation governing an appeal to the Commission of a marsh development authorization issued by a local government. Section 11421.

## **Proposed Amendments to the Commissions Regulations**

Following is a section-by-section description of the proposed amendments in each of three categories listed above, with the exception of two categories of administrative/procedural amendments. The exceptions are that a section-by-section description is not provided of the similar revisions to numerous regulations solely to: (1) provide for certain notices or other documents that are currently required to be sent by regular mail to be mailed by email or first class mail and also posted on the Commission's website; or (2) clarify that when there are two or more co-permittees, all permittees must sign any application or letter request for a permit amendment or amendment to a permit application.

The proposed amendments are discussed below by topic and regulation section in the order listed in the preceding summary. In the accompanying document setting forth the proposed amendments, with added text shown in underscore and deleted text shown in strikethrough, the regulations are in numerical order as they appear in Title 14 of the California Code of Regulations, Division 5, because this is the manner in which the proposed amendments are to be submitted to the Office of Administrative Law for review in the rulemaking process.

### **I. ADMINISTRATIVE/PROCEDURAL**

#### **A. Recording Commission Meetings and Minutes of Commission Meetings**

##### **Section 10244 -- Recording of Meetings**

This section provides that Commission meetings shall be recorded electronically, and that staff shall retain each recording for at least one year and make the recording available for replaying at the Commission's offices. The Bagley-Keene Open Meeting Act does not require that meetings of a state body be recorded, but provides that any recording of such a meeting made by a state body shall be retained for 30 days and made available for inspection on equipment made available to the public by the state body. Gov't Code § 11124.1(b). Given the prevalence of personal computers and ease of internet access, this section would be amended to state that, in addition to making the recording of a Commission meeting available for replaying at the Commission's offices, staff shall also post or provide access to the recording of each Commission meeting on the Commission's website.

##### **Section 10245 -- Minutes of Meetings**

This section provides that the Commission shall keep full and accurate minutes of its meetings and that the minutes as signed by the Executive Director and Chair shall be the original evidence of actions taken by the Commission. For a number of reasons, this section would be amended to provide that instead of full and accurate written minutes, the Commission shall keep minutes of all Commission actions taken and its meetings. First, the Bagley-Keene Open Meeting Act does not require a state body to prepare or maintain minutes of the state body's meetings, except that for closed sessions minutes are required to provide a record of the topics discussed and any decisions made. See Gov't Code § 11126.1. Second, the electronic recording of a Commission meeting that is made and will continue to be made pursuant to section 10244 of the regulations is sufficient to provide a full and accurate record of a Commission meeting. If necessary, a written transcript of some or all of a Commission meeting can be made from the electronic recording. Finally, the proposed amendment would allow the Commission to avoid the costs of retaining a court reporter to attend and separately record (in addition to the recording made by staff) each Commission meeting and then prepare complete written minutes of essentially everything said on the record at each meeting.

#### **B. Ex Parte Communications and Disclosures**

The Commission regulations on ex parte communications, which are set forth in sections 10280-10289, implement requirements of the Government Code governing ex parte communications in adjudicatory proceedings that apply to all state agencies. Gov't Code §§ 11430.10-11430.80. The Government Code provides that while an adjudicatory proceeding is pending there shall be no ex parte communications to the presiding officer (*i.e.*, decision-maker) from an employee or representative of an agency that is a party or from any interested party outside the agency (*id.* § 11430.10), except for certain limited permissible communications (*id.* §§ 11430.20-11430.30).

The Government Code further provides that if the presiding officer receives a prohibited ex parte communication, he or she shall: (1) make part of the record in the proceeding, if the communication was in writing, the communication and any response thereto, or if the communication was oral, a memorandum stating the substance of the communication and any response thereto; (2) notify all parties to the proceeding that the communication has been made a part of the record; and (3) allow any party who requests within ten days of receiving notice an opportunity to comment on the communication (*id.* § 11430.50). The presiding officer also has the discretion to allow a party to present evidence concerning the subject of the communication, including the discretion to reopen any hearing that has been concluded. Finally, the Government Code provides that receipt by the presiding officer of a prohibited ex parte communication may be grounds for disqualification of the presiding officer. *id.* § 11430.50.

#### **Section 10283 -- General Policy and Disclosure of Ex Parte Communications**

Section 10283 of the regulations sets forth the Commission's general policy regarding ex parte communications and the requirements for the disclosure of ex parte communications in accordance with the provisions of the Government Code summarized above. The Commission

proposes to amend this section in a number of respects to clarify the general policy regarding and requirements governing ex parte communications.

First, subsection 10283(a) would be amended to clarify that ex parte communications are prohibited in adjudicatory proceedings except as provided in section 10284, which lists certain permissible ex parte communications. In addition, the second sentence of this subsection would be amended to delete the reference to prohibited communications and provide that if an impermissible ex parte communication occurs, any Commission member who receives or engages in such a communication concerning any adjudicatory matter pending before the Commission shall disclose the content of the communication.

Second, subsection 10283(b) would be amended to clarify that the disclosure of an ex parte communication must occur in writing as provided in subsections (c) or (d) prior to or at the Commission meeting at which it considers the matter that is the subject of the ex parte communication.

Finally, subsections 10283(c) and (d) would each be amended for consistency to provide that compliance with the applicable disclosure requirement, for receipt of an ex parte communication in written form or orally, respectively, shall be accomplished in both cases by providing specified documentation to the Executive Director “as soon as practicable for inclusion into the record of the matter that is the subject of the ex parte communication.”

#### **Section 10284 -- Permissible Ex Parte Communications**

This section lists a number of types of ex parte communications that are not prohibited and do not require any type of disclosure into the record. This section would be amended to add a new subsection 10284(f) to state that an ex parte communication is not prohibited and does not require disclosure if the communication is in writing to the full Commission or any Commission member and the recipient of the communication responds only by acknowledging receipt of the communication, thanking the sender for his, her, or its interest in the matter, and/or informing the sender that the recipient is unable to comment on or discuss the matter due to the Commission’s regulations prohibiting ex parte communications.

#### **Section 10284 -- Notification of Parties and Interested Persons**

Subsection 10284(a) currently provides that the Executive Director shall, as soon as is practicable, notify in writing all interested parties that a Commissioner has received an impermissible ex parte communication. This section would be amended to clarify the Executive Director’s notification obligations depending on whether the disclosure occurs prior to or at the Commission meeting at which the Commission considers the matter that is the subject of the ex parte communication. If the disclosure occurs prior to the Commission meeting, the Executive Director shall provide notice by mail or email and by posting notice of the disclosure on the Commission’s website with the supplemental materials for that Commission meeting. If the disclosure occurs at the Commission meeting, the Executive Director shall provide notice of the disclosure orally on the record when the

agenda item that is the subject of the ex parte communication is called for consideration by the Commission.

Subsection 10284(c) would be amended to clarify that if the communication was received in writing, the Executive Director's notification shall include a copy of the written communication "and any response to the communication as required by section 10283(c)."

Subsection (d) would be amended to clarify that the Executive Director's notice shall state that the party or person being notified may request an opportunity to address the Commission concerning the communication at the Commission meeting at which the Commission considers the matter that is the subject of the communication and must request such an opportunity within 10 days of receiving the notice or the party or person shall waive the opportunity to address the Commission. The 10-day post-notice period for an interested party to request to address the Commission regarding an ex parte disclosure is required by Government Code section 11430.50.

#### **Section 10287 -- Party Opportunity to Respond to an Ex Parte Communication**

Consistent with the proposed amendments to subsection 10284(d) discussed above, section 10287 would be amended to clarify that a party may request an opportunity to address the Commission concerning an ex parte communication at the Commission meeting at which the Commission considers the matter that is the subject of the communication or within 10 days of receiving notice of the communication.

#### **Section 10288 -- Ex Parte Communications After the Close of the Public Hearing and After the End of the Time Period for Receipt of Written Communications; Public Comments and Responses.**

Subsection 10288(a) currently provides that if an oral ex parte communication occurs after the close of the public hearing or if a written ex parte communication occurs after the deadline for submitting written comments, the ex parte communication shall be disclosed as required by section 10283. This subsection, and the other provisions of section 10288, apply only in limited circumstances where the Commission does not act on an adjudicatory matter at the same meeting at which it holds a public hearing, including where the Commission extends the time period for submitting written comments on a pending matter. Subsection 10288(a) would be amended to clarify that it applies to any ex parte communication that occurs after the public hearing is closed or the deadline for submitting written comments "but before the Commission has voted on the matter that is the subject of the communication." In addition, this subsection would be amended to clarify that following disclosure of the communication as required by section 10283, notice of the communication shall be provided as required by Section 10286.

### **C. Design Review Board and Engineering Criteria Review Board**

### **Section 10270 -- Membership and Function of Design Review Board**

This section addresses the membership and function of the Design Review Board (“DRB”), one of the Commission’s advisory bodies. This section would be amended in a number of respects to provide clarity regarding DRB membership and the standards governing the DRB.

First, subsection 10270(d) would be amended to state that the Commission Chair may designate with the concurrence of the Commission up to seven individuals to serve as a pool of alternates to substitute for current members who cannot participate in any DRB meeting, rather than the Commission itself designating such alternates. This process for designating alternates reflects the process for designation of members of the DRB in accordance with regulation section 10250(b).

Second, subsection 10270(d) would also be amended to eliminate the current limitation that restricts the pool of alternates to former DRB members. Experience has demonstrated that, after serving on the DRB for many years, former DRB members may have little interest in continuing to serve as alternates or may be unavailable to do so. Restricting the pool of alternates to former DRB members has resulted in there being too few alternates available to substitute for current members and situations where there have been difficulties with having a quorum of DRB members (including alternates) for particular meetings. Amending this section to broaden the pool of alternates to include qualified individuals who have not previously served on the DRB is intended to eliminate these problems and also assist in the recruitment of prospective future DRB members.

Third, subsection 10270(e) would be amended to delete the reference to a pool of alternates being established “by the Commission” and instead simply refer to the pool established pursuant to subsection 10270(d).

Fourth, subsection 10270(h) would be added to specify five years as the length of the term of appointment to the DRB and that such term may be renewable for two successive five-year periods. Section 10270 is currently silent on length of the term of appointment to the DRB and, therefore, this amendment would provide clarity on that issue.

Fifth, subsection 10270(i) would be added to state that DRB members are subject to the Commission’s regulations relating to ex parte communications (14 C.C.R. §§ 10280-10289.) By their terms, the Commission’s regulations relating to ex parte communications apply only to Commissioners. However, the same considerations that support the applicability of these regulations to Commissioners (*see* regulation section 10280) apply with equal validity to members of the Commission’s advisory boards, including the DRB. Moreover, in practice, Commission counsel have consistently advised DRB members that these regulations apply to them. Therefore, reflecting ongoing practice, this amendment will expressly make DRB members subject to the Commission’s regulations regarding ex parte communications.

### **Section 10271 -- Membership and Function of Engineering Criteria Review Board**

This section addresses the membership and function of the Engineering Criteria Review Board (“ECRB”), one of the Commission’s advisory bodies. This section would be amended in a number of respects to provide clarity regarding ECRB membership and the standards governing the ECRB. In addition, this section would be amended to provide an equivalent level of detail regarding the membership and functioning of the ECRB as is provided in section 10270 for the DRB.

Currently, the first sentence of section 10271 specifies the qualifications of certain members of the ECRB, and the second sentence of this section describes the problems relating to the safety of fills on which the ECRB advises the Commission. Section 10271 would be amended to create two subsections from the existing text -- section 10271(a) to address the qualifications of certain ECRB members and section 10271(b) to describe the problems on which the ECRB advises the Commission. The new section 10271(a) would add one “coastal engineer” to the list of professional qualifications that are required to be represented on the ECRB. This change will enhance the ECRB’s ability to address issues relating to the critical challenges associated with adaptation to sea level rise.

The new subsection 10271(b) would clarify that the ECRB shall advise the Commission on problems relating to the safety of fill and of structures on fill on projects within the Commission’s Bay or certain waterways jurisdictions for which a Commission permit or consideration of a consistency determination is needed. These changes reflect current and past practice as to the scope of the ECRB’s review of projects, consistent with the “fill policy” established by Government Code section 66605(e), which requires “that fill be constructed in accordance with sound safety standards.”

New subsection 10271(c) would be added to specify that six members shall constitute a quorum for ECRB meetings and shall be the minimum necessary for the ECRB to consider any matter. These additions are intended to provide clarity regarding the standards for the ECRB and to make section 10271(c) consistent with the analogous section 10270(c) governing the DRB.

New subsection 10270(d) would be added to state that the Commission Chair may designate with the concurrence of the Commission up to seven individuals to serve as a pool of alternates to substitute for current members who cannot participate in any ECRB meeting, rather than the Commission itself designating such alternates. This process for designating alternates reflects the process for designation of members of the ECRB in accordance with regulation section 10250(b).

New subsection 10271(e) would be added to provide that when fewer than all eleven members will be available to participate in the ECRB’s consideration of a matter, the Executive Director may designate one or more alternate members selected from the pool of alternates established by subsection 10271(d) to substitute for the member or members who cannot participate in the ECRB’s consideration of the matter. This addition is intended to provide clarity regarding the process for the Executive Director to designate alternates to substitute for unavailable ECRB members and to make subsection 10271(e) consistent with the analogous subsection 10270(d) governing the DRB.

New subsection 10271(f) would be added to state that when designating an alternate ECRB member pursuant to paragraph subsection 10271(e), the Executive Director shall select an individual in a professional discipline and with professional experience as much as possible like those of the member who cannot participate in the ECRB's consideration of a particular matter. This addition is intended to provide clarity regarding the standard to be applied by the Executive Director in designating alternates to substitute for unavailable ECRB members and to make subsection 10271(f) consistent with the analogous subsection 10270(f) governing the DRB.

New subsection 10271(g) would be added to state that alternate members designated pursuant to sections 10271(e) and (f) shall have the same powers and authority to participate in the ECRB's consideration and action on any matter as a regular ECRB member. This addition is intended to provide clarity regarding the authority of alternates to participate in the ECRB's consideration of any matter in the same manner as regular ECRB members and to make subsection 10271(g) consistent with the analogous subsection 10270(g) governing the DRB.

New subsection 10271(h) would be added to specify five years as the length of the term of appointment to the ECRB and that such term may be renewable for two successive five-year periods. Section 10271 is currently silent on length of the term of appointment to the DRB and, therefore, this amendment would provide clarity on that issue.

Finally, new subsection 10271(i) would be added to state that ECRB members are subject to the Commission's regulations relating to ex parte communications (14 C.C.R. §§ 10280-10289.) By their terms, the Commission's regulations relating to ex parte communications apply only to Commissioners. However, the same considerations that support the applicability of these regulations to Commissioners (*see* regulation section 10280) apply with equal validity to members of the Commission's advisory boards, including the ECRB. Moreover, in practice, Commission counsel have consistently advised ECRB members that these regulations apply to them. Therefore, reflecting ongoing practice, this amendment will expressly make ECRB members subject to the Commission's regulations regarding ex parte communications.

### **Section 10315 -- Submittal of Design Review Board Materials**

This section lists the materials required to be submitted by an applicant for a project that requires review by the DRB. The list of materials required to be submitted by this regulation is both extensive and detailed, and in practice, BCDC staff does not refer applicants for a project that requires DRB review to this regulation or require the submission of all materials listed in this regulation prior to DRB review of a project. For these reasons, this section would be amended to: (1) delete the existing lengthy list of materials required by this regulation; and (2) instead require submission of required documents as identified or described in the Commission pamphlet entitled "BCDC's Design Review Board: What It Is, How it Works" (or any successor pamphlet) or all documents requested in writing by or on behalf of the Executive Director as necessary for DRB evaluation of the proposed project. In addition, because DRB review may be conducted before an

application for a BCDC permit is submitted, this section would be amended to refer to the documents to be submitted by an applicant “or prospective applicant” for a permit.

### **Section 10316 -- Submittal of Engineering Criteria Review Board Materials**

This section lists the materials required to be submitted by an applicant for a project that requires review by the ECRB and would be amended in a number of respects. First, this section would be amended to clarify that the submission shall include the following basis of engineering design criteria needed to accommodate ECRB review: all geotechnical reports and geologic findings, structural plans, engineering analyses including any coastal engineering analysis, design calculations, if required to support analyses, and architectural renderings of the proposed project. Second, to allow adequate time for ECRB review, this section would be amended to increase the time for submittal of such materials from at least 14 days to at least 30 prior to the scheduled meeting at which the ECRB will review the project. Third, the existing requirement to submit 13 copies of required materials would be deleted. Since materials are now typically submitted in electronic format, submission of multiple copies, one for each ECRB member, is no longer necessary. Finally, because ECRB review may be conducted before an application for a BCDC permit is submitted, this section would be amended to refer to the materials to be submitted by an applicant “or prospective applicant” for a permit.

#### **D. Section 10360 -- Distribution of Applications**

This section requires the Executive Director to distribute one copy of an application for a major permit and associated “drawings” to six listed government agencies and the Deputy Attorney General assigned to the Commission. This section is intended to provide notice to the listed agencies regarding a project that is the subject of a BCDC permit application, but is not intended to require Commission staff to provide to other agencies comprehensive information about a proposed project and copies of all associated documentation submitted to the Commission in the application process. For this reason, this section would be amended to clarify that the Executive Director is required to distribute to the listed agencies only copies of the fully completed and properly executed permit application form, any attachments or exhibits that provide a complete project description, and the project site plan, but not any and all attachments, exhibits or other supporting documents submitted with an application.

This section would also be amended to delete the requirement that the Executive Director provide these application materials to the Deputy Attorney assigned to the Commission because the Deputy Attorney General is not involved in reviewing and advising Commission staff regarding permit applications. The Deputy Attorney assigned to the Commission would continue to receive copies of the application summary and staff recommendation on a major permit application in accordance with sections 10381(a) and 10504 of the regulations, respectively. Finally, this section would be amended to require the Executive Director to distribute copies of the application materials to the listed agencies not less than 28 days prior to the Commission hearing on the application because, under section 10400 of the regulations, this is generally the minimum time

period following receipt of an application before the Commission may hold a public hearing on the application.

#### **E. Section 10501 -- Contents of Resolution of Approval**

Section 10501 addresses the required contents of a resolution of approval of a major permit application, which typically are set forth in the staff recommendation on an application. Section 10501 would be amended in a number of respects.

First, as currently written, subsections 10501(d)(1)(B) and 10501(d)(1)(C) impose different findings requirements when the Commission acts on an application for a marsh development permit under the Suisun Marsh Preservation Act (“SMPA”) depending on whether or not Solano County has adopted, and the Commission has certified, a Local Protection Program (“LPP”) for the Suisun Marsh. However, Solano County has in fact adopted and the Commission has certified the Suisun Marsh LPP under the SMPA. Accordingly, subsection 10501(d)(1)(B), which is premised on the assumption that there is no certified LPP, would be deleted and existing section 10501(d)(1)(C) would be redesignated as section 10501(d)(1)(B).

Second, the Commission proposed to amend former subsection 10501(d)(1)(C) (redesignated as section 10501(d)(1)(B)) to delete superfluous language referring to “if a certified local protection program exists” because, as discussed above, Solano County has adopted and the Commission has certified the Suisun Marsh LPP.

Third, subsection 10501(d)(3), which addresses the findings the Commission is to make when acting as a responsible agency under the CEQA, would be amended to clarify that: (1) the CEQA lead agency determines whether a project is statutorily or categorically exempt and prepares the CEQA environmental review document on which the Commission relies; (2) that negative declarations are adopted, not certified; and (3) that if the lead agency prepares and certifies an environmental impact report, the Commission’s resolution of approval will include the rationale for any Commission findings made pursuant to sections 15091(a) and 15093(b) of the CEQA Guidelines (14 C.C.R. §§ 15091(a) and 15093(b).) The changes are proposed to make subsection 10501(d)(3) consistent with the CEQA Guidelines.

Fourth, subsection 10501(d)(4), which addresses the findings the Commission is to make when acting as the CEQA lead agency, would be amended to clarify that: (1) the Executive Director determines whether a project is statutorily or categorically exempt or will not have any significant adverse effect on the environment and the Commission prepares an environmental assessment that complies with the Commission’s regulations governing preparation of such a document; and (2) if the Commission prepares an environmental assessment, the resolution of approval will include the basis for any Commission findings made pursuant to Public Resources Code section 21081 and sections 15091(a) and 15093(b) of the CEQA Guidelines (14 C.C.R. §§ 15091(a) and 15093(b).) Finally, this section would be amended to delete the ambiguous existing language referring to “the terms and conditions of the Commission permit together with

the actions of other agencies” making the project consistent with CEQA. CEQA establishes certain procedural and substantive requirements that must be met in the environmental review and project approval process, but it is not appropriate or correct to refer to a project as being consistent with CEQA. These changes will make subsection 10501(d)(4) conform to the Commission’s regulations governing implementation of CEQA (Title 14 of the California Code of Regulations, Div. 5, ch. 15), particularly sections 11500, 11501, 11511, and 11521, as well as with the CEQA Guidelines.

#### **F. Section 10514 -- Commission Findings on Permits**

This section addresses the Commission’s findings on permits. Subsection 10514(a) applies when the Commission vote is consistent with the Executive Director’s recommendation. Subsection 10514(b) applies when the Commission approves an application with additional or different terms or conditions than those recommended by the Executive Director. Subsections 10514(c) and (d) apply when the Commission vote is not consistent with the Executive Director’s recommendation. Subsection 10514(e) addresses the Executive Director’s preparation of draft findings when the Commission has voted on a permit application in a manner that is not consistent with the Executive Director’s recommendation.

Subsections 10514(b), (c), and (d) would each be amended to provide that: (1) any Commissioners who vote in a manner different than recommended by the Executive Director “may,” rather than “shall,” state their reasons for doing so after the vote becomes final; and (2) any such Commissioner who fails to state the reasons for his or her vote shall be presumed to have based his or her vote on the testimony or other evidence in the record that the supports the Commission’s action. The Commission typically votes in a manner consistent with the Executive Director’s recommendation. For example, the most recent occasion in which the Commission voted to deny an application for which the Executive Director recommended approval was in February 2017. The Commission vote on that matter highlighted the impracticability of subsections 10514(b), (c), and (d) as currently written, which each require all Commissioners to state their reasons for voting for additional or different conditions or contrary to the Executive Director’s recommendation after the vote becomes final.

This existing requirement is impractical because: (1) Commissioners discuss an application, including questions, concerns, and comments before a vote, not after; (2) not all Commissioners indicate how they intend to vote or the reasons for their vote; (3) until the vote is taken, it is not known whether the Commission has voted in a manner consistent or inconsistent with the Executive Director’s recommendation; (4) until the vote is taken, it is not known which Commissioners voted in a manner inconsistent with the Executive Director’s recommendation; and (5) after the Commission votes the Commission promptly moves to the next agenda item rather than providing for each Commissioner who voted in a manner inconsistent with the Executive Director’s recommendation to state his or her reason for doing so. For all of these reasons, it is appropriate to amend Subsections 10514(b), (c), and (d) to: (1) allow, but not require, each Commissioner who voted in a manner inconsistent with the Executive Director’s

recommendation to state his or her reasons for doing so; and (2) provide that any Commissioner who fails to do so shall be presumed to have based his or her vote on the testimony or other evidence in the record that the supports the Commission's action.

Finally, subsection 10514(e), which addresses the Executive Director's preparation of draft findings when the Commission has voted in a manner that is not consistent with the Executive Director's recommendation, would be amended to provide clarity and consistency with the amended language of subsections 10514(b), (c), and (d), by substituting the phrase "testimony or other evidence in the record" for "materials" in describing the information that the Executive Director may consider in preparing such findings.

#### **G. Section 10610 -- Application**

Section 10610 describes the materials to be submitted by an applicant for an administrative permit. This section would be amended to add a new subsection 10610(f) to clarify that the provisions of Commission regulation section 10311, which authorize the Executive Director to waive or modify certain permit application filing requirements for a major permit application, also apply to applications for an administrative permit. The Executive Director's discretion to waive or modify certain application filing requirements, as specified in section 10311, should also apply to an administrative permit application. Moreover, this proposed change would reflect current practice under which the Executive Director has waived or modified certain filing requirements for administrative permits when necessary or appropriate to do so.

#### **H. Section 10621 -- Executive Director's and Commission's Action After Listing**

Section 10621 addresses the Executive Director's and Commission's action on an application for an administrative permit after an administrative listing. Section 10621 would be amended in three respects. First, subsection 10621(b) would be amended to correct a typographic error by changing the word "with" to "within" toward the end of the sentence. As revised the sentence would end: "...time period within which the McAteer-Petris Act requires action on a permit application."

Second, as presently written, subsection 10621(d) requires the Executive Director to act on an application for an administrative permit within five working days after it is determined that the Commission will not consider the application. The five-working-day deadline for issuance of an administrative permit provides a disincentive for staff to list an application for an administrative permit early because after listing staff must finalize and issue the permit promptly, even if doing so conflicts with other, more pressing work priorities. In addition, the five-working-day deadline may be inconsistent (and considerably shorter than) the 90-day period provided for the Commission to act on a permit application under Government Code section 66632(f). For these reasons, subsection 10621(d) would be amended to enlarge the time period by which the Executive Director must act on an administrative permit to the 90-day period provided by Government Code section 66632(f).

Third, section 10421 of the regulations allows for the withdrawal of an application for a major permit or the removal of such an application from active consideration by the Commission. The regulations governing administrative permits currently do not address these issues. Therefore, a new subsection 10621(e) would be added to allow for the withdraw of an application for an administrative permit or the removal of such an application from active consideration by the Commission. In addition, subsection 10621(e) would state that the provisions of section 10421 shall apply to the permanent withdrawal or temporary removal from active consideration of an application for an administrative permit.

## II. PERMITTING

### A. Emergency Permits

#### **Section 10120 -- Emergency**

The first sentence of section 10120 defines the term “emergency” as used in the McAteer-Petris Act (“MPA”), the SMPA, and the Commission’s regulations. This definition would be amended to add the words “sudden” and “unexpected” to the description of a situation that poses an emergency. The second sentence of this section provides examples of situations that satisfy the definition of an “emergency” set forth in the preceding sentence, including “an accident, sabotage, vandalism, fire, flood, earthquake, or soil or geological movements.” All of these examples have in common the attribute that the phenomena they describe are sudden and unexpected. Thus, it is appropriate to insert the words “sudden” and “unexpected” in the definition of “emergency” in order to enhance the regulation’s clarity and internal consistency. In addition, adding the words “sudden” and “unexpected” to the definition of “emergency” is intended to prevent property owners from avoiding or circumventing the Commission’s regular permitting application requirements and procedures by allowing shoreline protective devices and/or other structures to deteriorate over an extended period of time through neglect or deferred maintenance to the point where an “emergency” can improperly be claimed to exist that demands immediate corrective action that would need to be authorized by an expedited emergency permit issued under section 10652 of the regulations. Amending this section as proposed would also make the Commission’s regulations consistent with the Coastal Commission’s regulations defining “emergency” for purposes of permitting and with the CEQA Guidelines definition of the term “emergency.” *See* 14 C.C.R. §§ 13009 (Coastal Commission regulation defines emergency as a “sudden unexpected occurrence”) and 15359 (CEQA Guidelines defines emergency as a “sudden, unexpected occurrence”).

#### **Section 10652 -- Criteria for Granting Permit**

This section provides the criteria for issuing an emergency permit. Given the emergency situation necessitating the need for an emergency permit, such a permit may be issued based on an expedited review of the limited materials concerning the nature of the emergency, the proposed work, and any associated mitigation measures that are available at the time the emergency permit

is requested, and without such a permit including what might be necessary or appropriate conditions or special conditions. For these reasons, this section would be amended to state that the reasonable terms and conditions of an emergency permit may include an expiration date and a requirement to submit a regular permit application by a specified date. This change will allow for Commission consideration of a regular permit application under normal permitting timeframes, as well as the inclusion of all appropriate permit terms and conditions, where the work authorized by an emergency permit will remain in place indefinitely and should be authorized by a regular permit.

### **Section 10653 -- Documentation Subsequent to Issuance of an Emergency Permit**

This section addresses the documentation to be submitted by a permittee following issuance of an emergency permit. Currently this section requires submission of descriptive material “that is substantially similar to the documentation required in applications for administrative permits.” This language is vague and does not provide clear direction to permittees or staff as to exactly what materials a permittee is required to submit following issuance of an emergency permit. Therefore, this section would be amended to clarify that a permittee shall submit the descriptive materials specifically “requested by the Executive Director when issuing the emergency permit,” as well as all appropriate fees for the emergency permit.

#### **B. Section 10121 -- San Francisco Bay and Certain Waterways Jurisdiction**

Subsection 10121(a) currently states that in areas of tidal marsh, the inland extent of the Commission’s San Francisco Bay jurisdiction, as defined in Government Code section 66610(a), is at “five feet above mean sea level.” This statement does not correctly reflect the language of Government Code section 66610(a), which provides that in areas of tidal marsh the landward limit of the Commission’s area of San Francisco jurisdiction is the inland extent of tidal marsh or five feet above mean sea level. The proposed amendment corrects the language of subsection 10121(a), by referring to the upland edge of tidal marsh up to five feet above sea level, so that it accurately reflects both Government Code section 66610(a) and Government Code section 66610 (e) (the area of the Commission’s certain waterways jurisdiction in marshlands is “up to five feet above mean sea level”).

Subsection 10121(b) describes the bodies of water included in the Commission’s “San Francisco Bay” and “certain waterways” areas of jurisdiction, as established by Government Code sections 66610(a) and 66610(e), respectively. The proposed change adds to subsection 10121(b) the critical jurisdictional criterion from these statutory provisions that what brings a body of water within the Commission’s San Francisco Bay and certain waterways jurisdiction is the attribute of being “subject to tidal action” or tidal influence.

Subsection 10121(c) defines and lists examples of waterways that are included within the Commission’s San Francisco Bay area of jurisdiction because, even though they are known by different names, they are hydrologically connected to the Bay. The proposed changes to this subsection include: (1) adding the critical jurisdiction criterion from Government Code section

66610(a) that the Commission's San Francisco Bay area of jurisdiction extends to all portions of waterways that are hydrologically connected to the Bay because they are subject to "tidal action" or tidal influence; and (2) describes the hydrological connection as these tidally-influenced waterways flowing into the Bay.

### **C. Section 10123 -- Areas Excluded from Commission Jurisdiction**

Subsection 10123(a) recognizes that areas exist that were historically subject to but removed from tidal action by the construction of dikes, levees, or other man-made structures prior to the creation of the Commission and its jurisdiction pursuant to Government Code section 66610. This regulation further recognizes that these areas should not become subject to the Commission's jurisdiction immediately if such man-made structures are damaged or destroyed by natural causes and the areas behind them once again become subject to tidal action. Thus, this regulation balances the public interest in the Bay and the Commission's exercise of its jurisdiction, on the one hand, and a property owner's interest in the regulatory status of the owner's property not changing solely due to the naturally-caused destruction of a man-made structure, on the other hand, by allowing up to one year, or such longer period as may be specified by the Commission, to repair a dike, levee, or other structure before the Commission obtains jurisdiction.

However, as presently written this section inappropriately puts the burden on the Commission to both the learn of the natural destruction of a man-made structure and notify the property owner of the potential extension of the Commission's jurisdiction. The Commission and its staff are not in the position and do not have the resources to monitor or otherwise learn of the condition and potential destruction of man-made structures along the entire perimeter of the areas of the Commission's "Bay" and "certain waterways" jurisdiction and then to identify and notify potentially affected property owners. In contrast, individual property owners are in the best position to know the condition of and learn about damage to or destruction of dikes, levees, or other structures on the owner's property. The property owner also has the incentive to undertake repairs to any damaged or destroyed structures in a timely manner if the owner desires to maintain the property in, or restore the property to, the condition it was in prior to the natural damage to or destruction of such structures.

For these reasons, this subsection would be amended to provide that an area that would fall within the Commission's jurisdiction only as the result of the natural destruction of a man-made structure shall remain excluded from the Commission's either: (1) for a one-year period after the event or occurrence causing the natural destruction; and (2) for such longer period as may be specified by the Commission after the affected property owner gives written notice to the Commission of the event or occurrence causing the natural destruction of a man-made structure and provides an estimate of the time that will be required to complete the repairs. The amended regulation would thus require a property owner requesting more than one year to complete the necessary repairs to provide the Commission written notice within 180 days of the event or occurrence causing the natural destruction of the man-made structure and also provide an estimate of the time that will be required to complete the repairs. Given that a property owner is presumed to be

knowledgeable about the condition of and have a substantial interest in maintaining his or her property, the Commission believes that a 180-day notice period is reasonable and sufficient for a property owner to learn of the natural destruction of a man-made structure on the owner's property and to determine what will be necessary to repair the structure and estimate the time that will be required to do so.

#### **D. Section 10125 -- Substantial Change**

Government Code section 66632(a) requires a permit from the Commission "to place fill, to extract materials, or to make any substantial change in use of any water, land or structure, within the area of the commission's jurisdiction." Section 10125 of the regulations describes what is encompassed by the term "substantial change in use" under Government Code section 66632(a) as applied to the different areas of the Commission's jurisdiction established by Government Code section 66610. Subsection 10125(a) describes what is included as "substantial change in use" as to any salt pond or managed wetland, and subsection 10125(b) describes "substantial change in use" as to all other areas of the Commission's jurisdiction (*i.e.*, Bay, shoreline band, and certain waterways). The Commission proposes to amend Subsection 10125(b) in a number of respects.

First, the introductory clause of subsection 10125(b) would be amended to clarify that the terms "construction," "reconstruction," and "alteration" all relate to changes to "a structure" and that, in addition to any such changes to a structure, the section also requires independent consideration of "any other activity, whether or not involving a structure." Second, the introductory clause of section 10125(b) would be amended to clarify that the five subsections 10125(b)(1) through (b)(5) are to be considered both as to: (1) any construction, reconstruction, or alteration of a structure; or (2) any other activity, whether or not involving a structure.

Third, subsection 10125(b)(1) would be amended to increase the estimated cost threshold for a substantial change in use from \$250,000 to \$500,000. The Port of San Francisco requested this change in a letter to the Commission's Chief Counsel dated October 17, 2019 and suggested that the increased cost threshold is warranted due to both inflation and increased construction costs since this regulation was last amended in 1996. The Commission concurs that this change is warranted for the reasons stated by the Port of San Francisco.

Fourth, as currently written, subsection 10125(b)(2) refers only to "a structure" or "land" in describing a change in the general category of use. This section would be amended to add "water" to the existing references to "a structure" and "land." The addition of "water" to this subsection is necessary to make this regulation consistent with the statutory language of Government Code section 66632(a), which requires a Commission permit for, among other things, "any substantial change in use of any water, land, or structure."

Fifth, subsection 10125(b)(3) would be amended to clarify that a substantial change in the intensity of use could be either a substantially greater or a substantially lesser change in intensity of use.

Sixth, as currently written, subsection 10125(b)(4) is ambiguous as to whether, to constitute a substantial change in use, any adverse effects on public access must be to either existing or future public access as shown on a Commission permit or Commission planning document. Subsection 10125(b) would be amended to insert the subdivision (i) before the words “existing public access” and subdivision (ii) before the words “future public access,” to clarify the Commission’s existing interpretation of this section that it is only “future public access” (as distinguished from “existing public access”) that must be shown on a Commission permit or planning document in order for an adverse effect on such access to constitute a “substantial change in use.” Thus, this amendment would clarify that adverse impacts to any existing public access would constitute a substantial change in use and that adverse impacts to future public access as shown on any Commission permit or planning document would constitute a substantial change of use.

#### **E. Section 10601 -- Minor Repairs or Improvements**

Section 10601 describes the categories of activities within the different areas of the Commission’s jurisdiction that constitute “minor repairs or improvements” that the Executive Director may authorize by an administrative permit after the application for such a permit is listed for the Commission’s consideration. This section would be amended in a number of respects to provide greater specificity and clarity regarding the activities that may be authorized by an administrative permit.

Subsection 10601(a) currently applies to certain activities within the Commission’s “Bay” jurisdiction and would be amended to also encompass those same activities within the Commission’s “certain waterways” jurisdiction. The omission of any reference to activities within the Commission’s “certain waterways” jurisdiction in any of the subsections of section 10601 appears to be an oversight and has required staff to consider activities within the Commission’s “certain waterways” jurisdiction under the general provision of subsection 10601(e), which applies to “activities anywhere in the Commission’s jurisdiction.” It is appropriate for subsection (a) to apply to specified activities in both the Commission’s “Bay” and “certain waterways” jurisdictions because both jurisdictional areas are similarly defined in Government Code section 66610 as being subject to tidal action and as including submerged lands, tidelands, and marshlands up to five feet above mean sea level.

Subsection 10601(a)(1) allows construction of a new single boat dock no larger than 1,000 square feet to be authorized by an administrative permit. This square footage limitation has been exceeded in some cases, particularly when associated facilities such as boat lifts and gangways are taken into account, that has led to uncertainty whether a somewhat larger single dock may be authorized administratively or would require consideration by the Commission as a major permit application. Therefore, it is proposed to increase the allowable square footage for a single dock to 1,500 square feet and to clarify that this limit includes associated docking facilities. This subsection would also be amended to clarify that the 5,000 square foot limitation for a new multiple dock includes associated facilities.

Subsection 10601(a)(2) allows the installation of new shoreline protective works and repairs to existing protective works, such as bulkhead and riprap, that meet specified criteria to be authorized by an administrative permit. This subsection would be amended to specifically reference levees and natural or nature-based features as protective works that may be authorized administratively. In addition, subsection 10601(a)(2)(A) would be amended to add the words “of fill” after the words “minimum amount” to clarify that the criterion is that the size of the protective works would constitute the minimum amount of fill necessary. Subsection 10601(a)(2)(B) would also be amended to replace the existing vague reference to 10,000 square feet of coverage “of the horizontal projection of the work below the shoreline,” with a clearer and more direct reference to coverage “of the Bay or a certain waterway.”

Subsection 10601(a)(5), which refers to the placement of utility cables on or under the bottom of the Bay, would be amended to: (1) include the placement of pipelines; and (2) add a reference to on or under the bottom of a certain waterway.

Subsection 10601(a)(6), which refers to “routine repairs, reconstruction, replacement, removal, *and* maintenance, would be amended to change the conjunction “and” to “or” and to clarify that each these activities would be conducted in relation to “a structure.”

Subsection 10601(a)(8) allows minor fill for improving public access that does not exceed 1,000 square feet in area to be authorized by an administrative permit. The 1,000 square foot limitation may result in unnecessary Commission review of relatively small beneficial projects involving minor fill for public access. Therefore, this section would be amended to increase to 5,000 square feet the area of minor fill for improving public access that may be authorized administratively.

New subsection 10601(a)(9) would be added to allow minor fill for habitat restoration that would cover less than 10,000 square feet of the Bay or a certain waterway to be authorized by an administrative permit. This amendment is consistent with the Commission’s recently adopted Bay Plan policies regarding fill for habitat. In addition, the 10,000 square foot limitation is consistent with the same area limitation for new shoreline protective works and repairs to existing protective works under subsection 10601(a)(2)(B).

New subsection 10601(a)(10) would be added to allow the extraction or dredging of no more than 10,000 cubic yards of materials to enhance tidal connectivity or restore habitat or the disposal of such materials within an existing site for such purposes to be authorized by an administrative permit. As with new subsection (a)(9), this amendment is consistent with the Commission’s recently adopted Bay Plan policies regarding fill for habitat.

Subsection 10601(b) applies to certain activities within the Commission’s 100-foot shoreline band jurisdiction. More specifically, subsection 10601(b)(1) allows the placement of small amounts of fill, the extraction of small amounts of materials, or a substantial change of use of any area so long as such activities do not have a significant adverse effect on, among other things, public access. This subsection would be amended for clarity to refer to existing or possible future public access and delete as potentially confusing the existing reference to maximum feasible public access to the

Bay consistent with the project. This subsection would also be amended to replace the existing vague and incorrect reference to a designated “priority water-related use,” with the term designated “water-oriented priority land use,” consistent with the terminology used in Government Code section 66611. Finally, this subsection would be amended to change the conjunction “and” at the end of the sentence to “or” to clarify that a significant adverse effect as to any of the three described considerations would preclude authorization by an administrative permit.

Subsection 10601(b)(4) allows the installation of new shoreline protective works and repairs to existing protective works, such as bulkhead and riprap, that meet specified criteria to be authorized by an administrative permit. Consistent with the proposed amendments to subsection 10601(a)(2) discussed above, this subsection would be amended to specifically reference levees and natural or nature-based features as protective works that may be authorized administratively.

Consistent with the proposed amendments to subsection 10601(a)(6) discussed above, subsection 10601(b)(5), which also refers to “routine repairs, reconstruction, replacement, removal, *and* maintenance, would be amended to change the conjunction “and” to “or” and to clarify that each these activities would be conducted in relation to “a structure.”

Subsection 10601(c) applies to certain activities within the Commission’s salt ponds and managed wetlands jurisdictions. More specifically, subsection 10601(c)(2) allows certain repairs to protective works as necessary to stabilize existing dikes or provide improved wildlife habitat to be authorized by an administrative permit. To be consistent with amended subsections 10601(a)(2) and (b)(4), discussed above, this subsection would be amended to: (1) apply to both the installation of new shoreline protective works and repairs to existing protective works; (2) refer to protective works such as bulkheads, levees, natural or nature-based features, and riprap; and (3) add the words “of fill” after the words “minimum amount” to clarify that the criterion is that the protective works would constitute the minimum amount of fill necessary.

New subsection 10601(c)(3) would be added to allow minor fill for habitat restoration that would cover less than 10,000 square feet of a salt pond or managed wetlands to be authorized by an administrative permit. This amendment would be consistent with the Commission’s recently adopted Bay Plan policies regarding fill for habitat and with new subsection 10601(a)(9), discussed above.

New subsection 10601(c)(4) would be added to allow the extraction or dredging of no more than 10,000 cubic yards of materials to enhance tidal connectivity or restore habitat or the disposal of such materials within an existing site for such purposes to be authorized by an administrative permit. This amendment would be consistent with the Commission’s recently adopted Bay Plan policies regarding fill for habitat and with new subsection 10601(a)(10), discussed above.

**F. Section 10700 -- Minor Fills for Improving Shoreline Appearance**

This section allows the Commission to approve the placement of minor fill to improve shoreline appearance, including but not limited to the repair, maintenance, renovation, remodeling, rehabilitation, or replacement of a pre-existing residential structure, only if the Commission makes the findings required by this section, in addition to the other findings required by Government Code section 66605 and the Bay Plan. Two of the findings required by this section are that the amount of filling is the minimum necessary to improve shoreline appearance (subsection 10700(b)) and the project would improve the shoreline appearance (subsection 10700(c)). Furthermore, subsection 10700(e) provides that with regard to a pre-existing residential structure, the requirements of subsections (b) and (c) will be deemed met if four specified conditions apply.

Subsection 10700(e) would be amended in two respects. First, four subdivision designations (i.e., (i), (ii), (iii), and (iv)) would be inserted to clearly identify the four applicable conditions. Second, the third condition would be amended to change “will cover less of” to “will cover no more of” the Bay surface than the pre-existing structure. As amended, subsection 10700(e) would read:

(e) with regard to a pre-existing residential structure, the requirements of subdivisions (b) and (c) above will be deemed met if (i) the repair, maintenance, rehabilitation, renovation, remodeling or replacement will not substantially enlarge the size of the pre-existing structure, (ii) will not be out of character or scale with any nearby structures, (iii) will cover ~~less~~ no more of the Bay surface than the pre-existing structure, and (iv) will not change the use of the pre-existing structure.

Amending the third condition in this subsection by changing “will cover less of” to “will cover no more of” the Bay surface than the pre-existing structure represents a significant change from past and current Commission policy. The existing regulation currently requires a rehabilitated, renovated, or replacement residential structure to cover less of the Bay surface than the pre-existing structure (*i.e.*, to be reduced in size over the Bay) in recognition of that fact that residential use of the Bay is a nonconforming use inconsistent with both the water-oriented use test under Government Code section 66605(a) and the Public Trust Doctrine. In contrast, the proposed amendment would allow a rehabilitated, renovated, or replacement residential structure to continue to cover the same area of Bay surface (*i.e.*, to not be reduced in size over the Bay) and reflect that although a nonconforming use, pre-existing residential uses will be allowed to continue to occupy their current footprint over the Bay indefinitely.

**G. Section 10702 -- Using the Bay as a Design Asset**

This section allows the Commission to approve the extension of an accessory structure, such as a boat dock, and portions of a principal structure on pilings over water when the Commission makes the findings required by this section, in addition to the other findings required by Government Code section 66605 and the Bay Plan, including those that require Bay fill to be either for a water-oriented use, minor fill to improve shoreline appearance, or minor fill to improve public access. Among other factors, this section requires the Commission to find either that: (1) the extension is

necessary to allow actual use of the water (*i.e.*, for mooring boats); or (2) the extension is designed by means such as location, window placement, and size to afford to occupants of the structure a feeling of closeness to the surface of the Bay waters that cannot be achieved except by the extension of portions of structures over water on piles.

Section 10702 was adopted in 1987 to implement Bay Plan “Other Uses of the Bay and Shoreline” Policy 2, which provides:

Accessory structures such as boat docks and portions of a principal structure may extend on piles over water when such extension is necessary to enable actual use of the water, e.g., for mooring boats or “*to use the Bay as an asset in the design of the structure.*” (emphasis added).

For the following reasons, it is proposed to repeal this regulation. First, to the extent this section allows the extension of an accessory structure over water to allow access to the actual use of the water, such as for mooring boats, this regulation is unnecessary; such an extension may be authorized as a water-oriented use and also in appropriate circumstances under section 10700 of the regulations as minor fill for improving shoreline appearance. Second, to the extent this section allows the extension of an accessory or principal structure on the grounds that the extension is designed to afford to occupants of the structure a feeling of closeness to the surface of the Bay waters that cannot be achieved except by the extension of portions of the structures over water on piles, there is no statutory authority for regulating the Bay as a “design asset” under the McAteer-Petris Act. Third, if the accessory or principal structure is used for a non-water-oriented use (such as residential, general office, or equipment storage), the extension could not be authorized under this section, which also requires findings under the fill tests established by Government Code 66605 and that the extension would not be inconsistent with the public trust. Finally, and as a related matter, this regulation appears to be unnecessary given that, to the best of the knowledge of current BCDC staff, this regulation has never been relied upon by the Commission to approve an extension of an accessory or principal structure on pilings over the Bay as a design asset.

In conjunction with the repeal of section 10702, for the reasons discussed above, staff would propose that by a future Bay Plan amendment, the Commission amend or repeal “Other Uses of the Bay and Shoreline” Policy 2 to delete the policy of allowing the extension of an accessory or principal structure on piles over water when necessary “to use the Bay as an asset in the design of the structure.”

#### **H. Unauthorized User Fee for the Disposal of Dredged Material**

##### **Section 10521 -- Mailing to Permittee(s)**

Subsection 10521(a) requires the Executive Director to sign and mail a permit to all permittees within 15 working days following approval of the permit. The Commission proposes to amend this subsection to delete the existing text which further provides that if the permit authorizes the

disposal of any dredged material into an area of the Commission's "Bay" or "certain waterways" jurisdiction, the applicant must also submit a user fee as provided for in section 10522 before the Executive Director shall sign and mail the permit. The Commission was previously authorized by statute to impose a user fee upon any public agency or person who proposed to dispose of dredged material in specified areas, not to exceed a total amount of such fees of \$210,000, to be used by the Commission to implement the Long Term Management Strategy for the disposal of dredge material. The statutory authorization for that fee expired on January 1, 1999, and the Commission has not imposed such a user fee since that time. 1995 Cal. Stats. Ch. 951 (1995). Therefore, the portion of this regulation requiring submission of such a user fee in certain circumstances should be deleted as no longer authorized, necessary, or appropriate.

### **Section 10522 -- User Fee for Disposal of Dredged Material into Commission's "Bay" or "Certain Waterways" Jurisdictions**

This section governed the submission of a user fee for the disposal of dredged material into the Commission's "Bay" or "certain waterways" jurisdiction. As noted above, the Commission was previously authorized by statute to impose a user fee upon any public agency or person who proposed to dispose of dredged material in specified areas, not to exceed a total amount of such fees of \$210,000, to be used by the Commission to implement the Long Term Management Strategy for the disposal of dredge material. The statutory authorization for that fee expired on January 1, 1999, and the Commission has not imposed such a user fee since that time. 1995 Cal. Stats. Ch. 951 (1995). Therefore, this regulation requiring submission of such a user fee in certain circumstances should be deleted as no longer authorized, necessary, or appropriate.

#### **I. Section 10830 -- Permit Assignment**

Commission permits typically contain a standard condition developed by staff stating that the rights, duties, and obligations contained in the permit are assignable provided that the permittee/assignor and the assignee execute and submit to the Commission a permit assignment form acceptable to the Executive Director and the Executive Director approves the assignment. The Commission proposes to add a new Section 10830 to authorize permit assignments by regulation and to state the conditions that must be met for an assignment to be effective.

### **III. PLANNING**

#### **A. Section 11002 -- Commission Determination to Initiate Amendment Process; Adoption and Mailing of Descriptive Notice**

Section 11002 addresses the Commission's determination to initiate an amendment to a plan administered by the Commission. As currently written, subsection 11002(d) requires the Executive Director to mail the approved descriptive notice to, among other parties, each of the six government agencies listed in section 10360. To provide clarity to the cross-reference to section 10360, subsection 11002(d) would be amended to add a parenthetical identifying the six

government agencies listed in section 10360. The Commission also proposes to amend subsection 11002(d) to provide that, at least 30 days prior to the date of the public hearing on the proposed amendment, the Executive Director shall mail a copy of any approved descriptive notice by first class mail or electronic mail, and shall also make the approved descriptive notice available on the Commission's website.

#### **B. Section 11003 -- Staff Planning Report**

Subsection 11003(b) describes the required contents of a staff planning report on a proposed plan amendment. Among other information, subsection 11003(b)(6) requires a staff planning report to contain an environmental assessment. This subsection would be amended to clarify that the environmental assessment on a plan amendment is required to contain the information described in section 11521 (entitled Contents of an Environmental Assessment) of the regulations.

In addition, as currently written, subsection 11003(b)(7) requires a summary of written comments received following distribution of the descriptive notice but at least 10 days prior to the mailing of the staff planning report and responses to those comments; and subsection 11003(b)(8) requires a summary of and responses to all significant environmental points raised up to the time the staff planning report is mailed. These two subsections are redundant because in practice a staff planning report includes a summary of and responses to all comments received following distribution of the descriptive notice up to the time the staff planning report is mailed. Therefore, it is proposed to: (1) combine these two subsections by amending subsection 11003(b)(7) to encompass the existing requirements of subsection 11003(b)(8); (2) delete existing subsection 11003(b)(8); and (3) renumber existing subsections 11003(b)(9) and 11003(b)(10) accordingly.

#### **C. Section 11005 -- Staff Planning Recommendation**

Subsection 11005(b) describes the required contents of a staff planning recommendation on a proposed plan amendment. As currently written, subsection 11005(b)(1) requires a summary of comments and response to all comments received either prior to the close of the public comment period or at the public hearing which were not already summarized and responded to in the staff planning report; and subsection 11005(b)(2) requires a summary of and responses to all significant environmental points raised but not summarized and responded to in the staff planning report. These two subsections are redundant because in practice a staff planning recommendation includes a summary of and responses to all comments received following issuance of the staff planning report, including all comments received at the public hearing and prior to the close of the public comment period. Therefore, it is proposed to: (1) delete existing subsection 11005(b)(2) as unnecessary and encompassed within subsection 11005(b)(1); and (2) renumber existing subsections 11003(b)(3), 11003(b)(4), 11003(b)(5), and 11003(b)(6) accordingly. In addition, existing subsection 11005(b)(3) – renumbered as subsection 11003(b)(2) – would be amended to clarify that the reference to the Executive Director's "initial assessment" is to the "initial environmental assessment" prepared pursuant to section 11003(b)(6) of the regulations.

Subsection 11005(c) addresses mailing of the staff planning recommendation. The Commission proposes to amend subsection 11005(c) to provide that the Executive Director shall mail a copy of the staff planning recommendation by first class mail or electronic mail and shall also make the staff planning recommendation available on the Commission's website.

**D. Section 11008 -- Payment of Costs of Processing of an Amendment to a Commission Planning Document**

Section 11008 addresses an applicant's payment of the costs of processing an amendment to a Commission planning document. As presently written, subsection 11008(b) requires an applicant, at the time of submitting an amendment application, to submit a cashier's check for \$5,000 as a deposit toward future costs and to execute an agreement that obligates the applicant to pay all Commission costs of processing and acting on an application. This subsection would be amended to delete as unnecessary the requirement that an applicant submit a \$5,000 deposit check. This requirement is unnecessary because the applicant will be obligated to pay all costs of processing and acting on the application by the agreement also required by this subsection and because in the Commission's experience applicants comply with their contractual obligation to pay such costs without the need for payment of a deposit. In addition, this requirement is impractical because in light of the time that may be required to process and act on an amendment application, a deposit check will often expire before being applied toward possible payment of unpaid costs, in accordance with subsection 11008(g) as currently written.

The Commission also proposes to amend subsection 11008(c) to change "quarterly" to "monthly," to reflect the Commission's existing practice of preparing and submitting bills for such costs on a monthly basis.

Consistent with the proposed amendments to subsection 11008(c) discussed above, subsection 11008(g) would be amended to delete references to a \$5,000 deposit paid by the applicant and to the potential application or refunding of some or all of the deposit. As discussed above, payment of a deposit is unnecessary because applicants are contractually obligated to pay all costs to process and act upon an amendment application. Submission of a deposit check also is impractical because, in light of the time that may be required to process and act on an application, checks submitted as a deposit often expire before being applied toward payment of unpaid costs.

**E. Section 11202 -- Commission Distribution of an Endorsed Local Protection Program or Components Thereof**

Section 11202 addresses Commission distribution of the Suisun Marsh LPP, or a component thereof, prepared and endorsed by Solano County. Subsection 11202(a) would be amended to provide that the Commission shall mail the LPP or component thereof to specified parties by first class mail or electronic mail and shall also make the LPP or component thereof available on the Commission's website. The Commission also proposes to: (1) amend subsection 11202(a)(1) to reflect the correct name of the California Department of Fish and Wildlife; (2) add a new subsection 11202(a)(8)

requiring distribution of the LPP or a component thereof to the Delta Stewardship Council; and (3) renumber existing subsection 11202(a)(8) to 11202(a)(9).

The Commission also proposes to amend subsection 11202(b) to delete as unnecessary the existing requirement that the Commission publish in a newspaper of general circulation for at least two weeks, beginning at least 30 days prior to the public hearing, notice of the availability of the endorsed LPP or a component thereof for public inspection at the Commission's office. Instead, this subsection would be amended to provide that the Commission shall make available on the Commission's website no later than 30 days prior to the public hearing a notice of availability of the endorsed LPP or a component thereof for public inspection both at the Commission's offices and on the Commission's website. Given the prevalence of personal computers and the ease of public access to information from online sources, including the Commission's website, and given the decline in newspapers of general circulation as a source of public notices, the posting a notice of availability of the endorsed LPP or a component thereof on the Commission's website will be more effective than providing such notice by publication in a newspaper of general circulation.

#### **F. Section 11205 -- Staff Recommendation**

Section 11205 addresses the staff recommendation on the proposed Suisun Marsh LPP, a component thereof, or an amendment thereto. The Commission proposes to delete as unnecessary, inaccurate, and potentially confusing existing subsection 11205(b)(2), which requires a staff recommendation to contain, among other information, "any necessary revisions to the initial environmental assessment." As reflected elsewhere in the Commission's regulations governing certification of the Suisun Marsh LPP, a component thereof, or an amendment thereto, the local government submitting such a document to the Commission for certification will be the CEQA lead agency and, therefore, will prepare an environmental assessment or other CEQA document and will also be responsible for making any necessary revisions to the CEQA document in response to public comments. See 14 C.C.R. §§ 11200(a), (b), and (c). The Executive Director's staff summary will include "a summary of all environmental documentation that the lead agency has prepared." *Id.* § 11203(b)(2). In addition, the Executive Director's staff recommendation will contain responses to all comments received at the public hearing before the Commission, including comments related to potential environmental impacts of the proposed action. However, because the Executive Director will not prepare an environmental assessment or revise the environmental documentation prepared by the lead agency, the existing text stating that the staff recommendation will include "any necessary revisions to the initial environmental assessment" should be deleted.

In addition, the Commission proposes to amend subsection 11205(c) to provide that the Executive Director shall mail the staff recommendation by first class mail or electronic mail and also make the staff recommendation available on the Commission's website.

#### **G. Section 11420 -- Contents of Local Marsh Development Authorization**

This section addresses the required contents of a marsh development authorization (*i.e.*, permit) issued by a local government. As currently written, this section imposes different findings

requirements depending on whether the Commission has certified the Suisun Marsh LPP. Subsection 11420(c) would be amended to delete as unnecessary the references to findings relating to the project if the Commission has not yet certified the LLP because Solano County has in fact adopted and the Commission has certified the Suisun Marsh LPP. The Commission also proposes to amend this section to refer to the LPP as the “Suisun Marsh Local Protection Program” for consistency with other references to the LPP in its regulations. *See, e.g.*, Title 14, California Code of Regulations, Div. 5, ch. 12 (title refers to the Suisun Marsh LPP); *id.* at ch. 12, article 2 (same); 14 C.C.R. § 11421 (referring to the Suisun Marsh LPP).

#### **H. Section 11421 -- Finality of Local Marsh Development Authorization**

This section addresses the finality of a local marsh development authorization (i.e., permit). This section would be amended to reflect the fact that an appeal can be filed by any aggrieved person as well as by any two members of the Commission (as opposed to by “the Commission,” as incorrectly currently stated in section 11421). *See* Pub. Res. Code section 29522 (a). Also, as currently written, this section appears to establish incorrectly two different standards for determining whether an appeal raises a substantial issue, depending on whether the Commission has certified the Suisun Marsh LPP. However Public Resources Code section 29523 provides that in determining whether an appeal raises a substantial issue the Commission is to consider the conformity of a proposed development with the provisions of the Suisun Marsh Preservation Act, the LPP (if in existence), and the policies of the Suisun Marsh Protection Plan. Therefore, section 11421 would be amended to track the language of Public Resources Code section 29523 regarding determining whether an appeal raises a substantial issue while also deleting the existing text referring to “if no certified Suisun Marsh [LPP] exists” because, as discussed above, Solano County has in fact adopted and the Commission has certified the Suisun Marsh LPP.

#### **Recommendation**

Staff recommends that the Commission authorize staff to initiate the rulemaking process, in accordance with the Administrative Procedure Act, to adopt the proposed amendments described in this staff report.