

# 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 for Implementation of the California Environmental Quality Act; Recommendation to Commence the Rulemaking Process to Adopt the Proposed Amendments**  
(For Commission consideration on April 1, 2021)

## 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. Chapter 15 of the regulations is entitled “Implementation of California Environmental Quality Act” (“CEQA”), and includes two subchapters: Subchapter 1, entitled “When the Commission is the Lead Agency,” and Subchapter 2, entitled “When the Commission is a Responsible Agency.” The CEQA lead agency is the public agency that “has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment.” Pub. Res. Code § 21067; 14 C.C.R. § 15367. A responsible agency is a public agency other than the lead agency which has responsibility for carrying out or approving a project. Pub. Res. Code § 21069; 14 C.C.R. § 15381.

In the permitting context, BCDC typically is a responsible agency because by statute (Gov’t Code 66632(b)), the city or county that has jurisdiction over a proposed project is required to grant its local discretionary approval before the Commission acts on a permit application. Therefore, the local jurisdiction is usually the lead agency and prepares the CEQA environmental document on which BCDC relies as a responsible agency. On rare occasions, BCDC may act as the lead agency in considering a permitting application. In the planning context, BCDC may be either the lead agency or a responsible agency, depending on the nature of the planning project and/or the identity of the project proponent. For example, BCDC is the lead agency for proposed amendments to the San Francisco Bay Plan or to any of the special area plans adopted by the Commission. BCDC is a responsible agency when considering amendments to a component of the Suisun Marsh Local Protection Program proposed by Solano County or a local jurisdiction in Suisun Marsh and may be a responsible agency on other planning matters.

Public Resources Code Section 21080.5 provides that, when a state agency is acting as the lead agency, a regulatory program of a state agency shall be certified by the Secretary of the Resources Agency (“Secretary”) as being exempt from the CEQA requirements for preparing environmental impact reports, negative declarations, and initial studies if the Secretary finds that the program meets the criteria contained in that code section. Pub. Res. Code § 21080.5(a); 14 C.C.R. § 15250.



A certified program remains subject to other provisions of CEQA such as the requirement that an activity will not be approved as proposed if there are feasible alternatives or feasible mitigation measures available that would substantially lessen any significant adverse effects that the activity may have on the environment. Pub. Res. Code § 21080.5(d)(2)(A); 14 C.C.R. § 15250. In addition, the regulations adopted by an agency administering a certified program are required to include provisions for the orderly evaluation of proposed activities and the preparation of written documentation in a manner consistent with the environmental protection purposes of the regulatory program. Pub. Res. Code § 21080.5(d)(2)(B); 14 C.C.R. § 15252.

In July 1979, the Secretary certified the Commission's permitting and planning programs under the McAteer-Petris Act ("MPA") and the Suisun Marsh Preservation Act ("SMPA") as meeting all the requirements for certification under Public Resources Code Section 21080.5. See 14 C.C.R. § 15251 (h). The Commission's certified programs include its permitting and planning regulations as well as its regulations for implementation of CEQA. Among other provisions, the Commission's regulations for implementation of CEQA provide for preparation of a substitute document, in lieu of an environmental impact report or a negative declaration, when the Commission is the lead agency on a proposed activity. Specifically, when the Executive Director determines that a proposed activity is not statutorily or categorically exempt from CEQA and may have a significant adverse effect on the environment, the regulations provide that the Commission shall prepare an environmental assessment that contains specified information and shall include the environmental assessment in the permit application summary or the staff planning report. 14 C.C.R. §§ 11511, 11521.

BCDC's Chief Counsel has conducted a comprehensive review of the Commission's regulations for implementation of CEQA, which were last amended in 1996. Based on that review, many necessary or desirable changes to the regulations were identified. In consultation with staff counsel, BCDC's Chief Counsel has drafted the accompanying set of proposed amendments to these regulations.

In summary, the proposed amendments to the regulations governing when the Commission is the lead agency would:

- Add a regulation to address the Commission's obligations, upon completion of an environmental assessment, to consult with other public agencies having jurisdiction by law with respect to the proposed activity or which exercise authority over resources that may be affected by the proposed activity.
- Add a regulation to address how an environmental assessment will be made available for public review, clarify the requirement to prepare written responses to comments, and address how the written responses to comments will be made available prior to the Commission's consideration of a proposed activity.
- Add a regulation to: (1) address the Commission's consideration and approval of an environmental assessment; (2) identify the documents that comprise the final environmental assessment; (3) address the findings to be made by the Commission if an environmental assessment identifies one or more significant environmental effects of a proposed activity; and (4) provide for adoption of a program for monitoring or reporting on revisions the Commission has required in a project or the measures it has imposed as conditions of approval to mitigate or avoid significant environmental effects.

- Add a regulation to restate the requirements, which are currently set forth in the Commission's permitting and planning regulations, to file a notice of decision on a proposed activity with the Secretary.
- Clarify the three possible arrangements for retaining a consultant, when necessary and as selected by the Executive Director, to prepare an environmental assessment; delete the existing requirement that a consultant establish a fixed cost for preparation of an environmental assessment; and clarify that, notwithstanding the maximum fees and costs estimated by the selected consultant, the applicant shall be responsible for all consultant fees and costs to prepare the environmental assessment.
- Confirm that before using an environmental assessment prepared by a consultant, the Commission shall subject the environmental assessment to the agency's own independent review and analysis.
- Eliminate existing provisions that establish nominal fees that are intended, but clearly are insufficient, to cover the Commission's costs to prepare an environmental assessment, and instead authorize the Commission to assess fees sufficient to recover its full costs to prepare an environmental assessment. Provide for monthly billing of costs incurred by the Commission and staff for preparation of an environmental assessment and require the applicant to pay such bills within 30 days of receipt.

In summary, the proposed amendment to the regulations governing when the Commission is a responsible agency would:

- Acknowledge the duty of the Commission to respond to any request for consultation by the lead agency to ensure that the lead agency prepares an environmental document that meets the informational needs of the Commission.
- Delete as unnecessary and burdensome, to the applicant and staff, the existing requirement that an applicant prepare a written summary of any environmental document prepared by the lead agency.
- Delete as unnecessary and burdensome, to the Commission and staff, the existing requirement that the Executive Director include any final environmental document that is less than 10 pages in length, or a summary thereof if the document is longer than 10 pages in length, with the staff summary of the permit application. Instead, consistent with current practice, require that the Executive Director (through staff) consider the environmental effects of the proposed activity as described in any environmental document prepared by the lead agency and summarize the environmental information contained therein as relevant to the Commission's statutory responsibilities in the application summary and/or staff recommendation on the permit application or in the staff planning report on a planning matter.
- Add provisions to: (1) address the findings to be made by the Commission if the lead agency's environmental document identifies one or more significant environmental effects of a proposed activity; and (2) provide for adoption of a program for monitoring or reporting on revisions the Commission has required in a project or the measures it has imposed as conditions of approval to mitigate or avoid significant environmental effects.

In addition to the changes summarized above, the proposed amendments would:

- Make certain editorial revisions for clarity, consistency, or conciseness.
- Revise the authority and reference citations for certain regulations to correct errors, add appropriate citations, and ensure consistency between or among regulatory provisions on the same topic.

## Proposed Amendments to the Commissions Regulations

Following is a section-by-section description of the proposed amendments.

### **Section 11501 -- Categorical Exemptions**

When the Commission is the CEQA lead agency, section 11501 requires the Executive Director to determine if the proposed activity is categorically exempt under one of the exemptions established by the Guidelines for Implementation of CEQA promulgated by the California Natural Resources Agency (“CEQA Guidelines”), 14 C.C.R. §§ 15300-15333, from the necessity of preparing any environmental documentation. The first sentence of subsection 11501(c) would be amended to delete the words “on the amendment,” after the words “staff planning report,” for clarity and to avoid potential confusion because a staff planning report may be prepared for a new plan document or a planning study, as well as for a plan amendment.

### **Section 11510 -- Executive Director to Prepare Environmental Assessment Information**

When the Commission is the CEQA lead agency, section 11501 requires the Executive Director to decide what information will be necessary to determine the possible environmental impacts of the proposed activity and to prepare an environmental assessment. The title of section 11510 would be amended to delete the word “Initial” prior to the words “Environmental Assessment” because the regulations otherwise consistently refer only to an “environmental assessment” and not to an “initial environmental assessment.” In addition, subsection 11510(b) would be amended to clarify that the proponent shall provide such information “as requested by the Executive Director.”

Subsection 11510(b) would also be amended to delete the words “for the plan amendment,” after the words “staff planning report,” for clarity and to avoid potential confusion because a staff planning report may be prepared for a new plan document or a planning study, as well as for a plan amendment.

### **Section 11511 -- Determination of Significant Adverse Environmental Impacts and Preparation of an Environmental Assessment**

When the Commission is the lead agency and the Executive Director has determined that a proposed activity is not statutorily or categorically exempt, section 11511 requires the Executive Director to determine if the proposed activity may have any individually or cumulatively substantial adverse impact on the physical environment. The first sentence of subsection 11511(b) would be revised for clarity to: (1) refer to “a proposed activity that is not statutorily or categorically exempt but” will not have a significant adverse environmental impact; and (2) delete the words “on the amendment,” after the words “staff planning report,” for clarity and to avoid potential confusion because a staff planning report may be prepared for a new plan document or a planning study, as well as for a plan amendment.

The Authority and Reference note for this section would be amended to add an authority citation to Public Resources Code section 21082, which provides that all public agencies shall adopt objectives, criteria, and procedures for the evaluation of proposed projects and the preparation of environmental documents pursuant to CEQA.

### **Section 11520 -- Use of a Federal Environmental Assessment or Environmental Impact Statement as an Environmental Assessment**

Section 11520 addresses the Commission's use of a federal environmental assessment or environmental impact statement as an environmental assessment. The Authority and Reference note would be amended to add an authority citation to Public Resources Code section 21082.

### **Section 11521 -- Contents of an Environmental Assessment**

Section 11521 specifies the required contents of an environmental assessment. The Authority and Reference note would be amended to add an authority citation to Public Resources Code section 21082.

### **Section 11522 -- Consultation**

Section 11522 would be added to address consultation with responsible agencies as required by CEQA. Subsection 11522(a) would state the general requirement that, upon completion of an environmental assessment, the Commission shall consult with other public agencies having jurisdiction by law with respect to the proposed activity or which exercise authority over resources that may be affected by the proposed activity.

Subsection 11522(b) would provide that upon completion of an environmental assessment prepared in connection with a permit application, the Commission shall consult with such public agencies by distributing a copy of the environmental assessment with the application summary, distributed in accordance with subsection 10381(b) of the regulations, to all agencies listed in section 10360, all affected cities or counties, and any other responsible agencies identified by the Executive Director. Subsection 10381(b) currently provides that if the Commission has prepared an environmental assessment, the Executive Director shall distribute the application summary no less than 30 days prior to the scheduled public hearing to all responsible agencies and to all persons and entities listed in subsection 10381(a). Subsection 10381(a) in turn refers to all agencies listed in section 10360 and to all affected cities and counties. The agencies listed in section 10360 are: the U.S. Army Corps of Engineers; the California Department of Fish and Wildlife; the San Francisco Bay Regional Water Quality Control Board; the State Lands Commission; the U.S. Fish and Wildlife Service; and the National Marine Fisheries Service.

Subsection 11522 (c) would provide that, upon completion of an environmental assessment prepared in connection with a plan, plan amendment, or planning study, the Commission shall consult with such public agencies by distributing a staff planning report, including the environmental assessment, in accordance with subsection 11003(a) of these regulations. Subsection 11003(a) provides that not less than 30 days prior to the initial public hearing on a plan document, the Executive Director shall distribute the staff planning report to all persons, agencies, and organizations who previously received a descriptive notice concerning the plan document, including all agencies that have jurisdiction by law with respect to any proposed activity that is listed in the notice.

The Authority and Reference note for this new section would include the following authority citations: (1) Government Code section 66632(f), which authorizes the Commission to adopt regulations to enable it to carry out its functions under the MPA; (2) Public Resources Code section 21082, which provides that all public agencies shall adopt objectives, criteria, and procedures for the evaluation of proposed projects and the preparation of environmental documents pursuant to CEQA; and (3) Public Resources Code section 29201(e), which authorizes the Commission to adopt regulations consistent with the SMPA. The references would be to Public Resources Code Sections 21080.5 and 21104. Section 21080.5 authorizes the Secretary to certify a regulatory program of a state agency under CEQA. Section 21104 requires a state lead agency to consult with and obtain comments from responsible agencies with respect to a project that is the subject of an environmental document prepared by the lead agency.

### **Section 11523 -- Notice of Availability of Environmental Assessment; Public Comments; Response to Comments**

Section 11523 would be added to require that an environmental assessment be made available for public review, provide for public comment, and require the preparation of written responses to comments, as required by CEQA.

Subsection 11523(a)(1) would provide that upon completion of an environmental assessment prepared in connection with a permit application, the Executive Director shall post on the Commission's website a notice of availability of the environmental assessment and shall provide a copy of such notice by first class mail or email to any persons who have previously requested such notices in writing. This subsection would require the notice of availability to disclose: (i) a brief description of the proposed activity and its location; (ii) the starting and ending dates of the review period, which shall be for a period of not less than 30 days, during which the Commission will receive comments on the environmental assessment; and (iii) the date, time, and location of any public hearing to be held by the Commission or Executive Director on the environmental assessment and on the permit application, if scheduled at the time of the notice. This subsection would also provide that any public hearing on the environmental assessment shall be held on or before the last day of the review period.

Subsection 11523(a)(2) would provide that the Executive Director shall prepare written responses to the significant environmental issues raised in the comments received during the review period, including written comments and oral comments received at any public hearing. This subsection would require the Executive Director to make copies of the written responses to comments available for review on the Commission's website at least 10 days prior to the Commission's consideration of the permit application that is the subject of the environmental assessment. This subsection would also require the Executive Director to make the written responses to comments available at the Commission meeting at which the Commission will consider the permit application that is the subject of the environmental assessment in accordance with subsection 10500(c) of the regulations. Subsection 10500(c) provides that the Executive Director shall prepare and present at the meeting at which the Commission will vote on a permit application a summary of all significant environmental points raised during the process of reviewing the application and the staff's response to each of those points.

Subsection 11523(b)(1) would provide that upon completion of an environmental assessment prepared in connection with a plan, plan amendment, or planning study, the Executive Director shall make the environmental assessment available for review by distributing a staff planning report including the environmental assessment in accordance with subsection 11003(a) of these regulations. Subsection 11523(b)(1) would also provide that the Commission shall hold a public hearing on the proposed plan, plan amendment, or planning study not less than 30 days after distribution of the staff planning report in accordance with subsections 11003(a) and 11004(a) of the regulation. As noted above, subsection 11003(a) provides that not less than 30 days prior to the initial public hearing on a plan document, the Executive Director shall distribute the staff planning report to all persons, agencies, and organizations who previously received a descriptive notice concerning the plan document, including all agencies that have jurisdiction by law with respect to any proposed activity that is listed in the notice. Subsection 11004(a) provides that the Commission shall hold a public hearing not less than 30 days following distribution of the descriptive notice.

Subsection 11523(b)(2) would provide that the Executive Director shall prepare and include in the staff planning recommendation written responses to all comments received on the proposed plan, plan amendment, or planning study, including comments on the environmental assessment, in accordance with subsection 11005(b)(1) of these regulations. Subsection 11005(b)(1) requires the staff planning recommendation to contain, among other information, a summary of comments and responses to all comments received either in writing prior to the close of the public comment period or at the public hearing. Subsection 11523(b)(1) would also provide that the Executive Director shall distribute the staff planning recommendation, including the responses to comments on the environmental assessment, to all agencies, organizations, and persons who received the staff planning report and to anyone else who requested in writing to receive a copy of the staff planning recommendation in accordance with subsection 11005(c) of these regulations. Subsection 11005(c) requires the Executive Director to mail by first class mail or email (and to make available on the Commission's website) a copy of the staff planning recommendation to all agencies, organizations, and individuals who received the staff planning report and to anyone else who requests in writing to receive a copy of the recommendation.

The Authority and Reference note for this new section would include the following authority citations: (1) Government Code section 66632(f); (2) Public Resources Code section 21082; and (3) Public Resources Code section 29201(e). The references would be to Public Resources Code Sections 21080.5, 21091, 21092, and 21092.2. Section 21080.5 authorizes the Secretary to certify a regulatory program of a state agency under CEQA. Section 21091 provides that the public review period on certain environmental documents shall be not less than 30 days and requires the lead agency to consider comments received within the review period and prepare written responses to those comments. Section 21092 requires a lead agency to provide notice specifying the period during which comments will be received on certain environmental documents and that such notice shall include the date, time, and location of any public hearing on the proposed activity. Section 21092.2 requires that such notice be provided to every person who has filed a written request for notices with the lead agency.

## **Section 11524 -- Consideration of Environmental Assessment; Final Environmental Assessment; Commission Findings**

Section 11524 would be added to: (1) address Commission consideration and approval of an environmental assessment; (2) identify the documents that comprise the final environmental assessment; (3) address the findings to be made by the Commission if an environmental assessment identifies one or more significant environmental effects of a proposed activity; and (4) provide for the adoption of a program for monitoring or reporting on revisions the Commission has required in a project or the measures it has imposed as conditions of approval to mitigate or avoid significant environmental effects.

Subsection 11524(a) would provide that when the Commission is the lead agency, prior to acting on a permit application, plan, plan amendment, or planning study, the Commission shall consider the materials generated pursuant to section 11520, if applicable, section 11521, and subsections 11523(a)(2) or 11523(b)(2), as applicable. This subsection would also provide that the Commission shall approve the environmental assessment prior to or at the same time as it acts on the permit application, plan, plan amendment, or planning study. This subsection would further provide that upon adoption of the resolution approving the permit application, plan, plan amendment, or planning study, the environmental assessment shall become final.

Subsection 11524(b) would specify that the final environmental assessment shall include: (1) the materials described in section 11520, if applicable, and section 11521; (2) comments on the environmental assessment and the written responses to comments prepared pursuant to subsections 11523(a)(2) or 11523(b)(2), as applicable; (3) the Commission resolution approving the permit application, plan, plan amendment, or planning study; and (4) any other documentation as the Commission may prescribe.

Subsection 11524(c) would provide that if the environmental assessment prepared by the Commission identifies one or more significant environmental effects of the proposed activity, the Commission shall make any findings required by 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). Public Resources Code section 21081 and sections 15091(a) and 15093(b) of the CEQA Guidelines require a public agency to make certain findings with respect to each significant environmental effect as to: (1) changes or alterations required in, or incorporated into, a project to mitigate or avoid significant effects; (2) those changes or alterations that are within the responsibility and jurisdiction of another public agency and that have been, or can or should be, adopted by that other agency; and (3) specific economic, legal, social, technological or other considerations that make infeasible the mitigation measures or alternatives identified in the environmental document.

Subsection 11524(d) would provide that if the Commission makes any finding as described in Public Resources Code section 21081(a)(1) and section 15091(a)(1) of the CEQA Guidelines, 14 C.C.R. § 15091(a)(1), it shall adopt a program for monitoring or reporting on the revisions it has required in the project or the measures it has imposed as conditions of approval to mitigate or avoid significant environmental effects. Public Resources Code section 21081.6 and section 15091(d) of the CEQA

Guidelines, 14 C.C.R. § 15091(d), provide that when a public agency makes findings that changes or alterations have been required in, or incorporated into, a project to mitigate or avoid significant effects, the agency shall adopt a monitoring or reporting program for the revisions it has required in the project or the measures it has imposed as conditions of approval to mitigate or avoid significant environmental effects.

The Authority and Reference note for this new section would include the following authority citations: (1) Government Code section 66632(f); (2) Public Resources Code section 21082; and (3) Public Resources Code section 29201(e). The references would be to Public Resources Code sections 21080.5, 21081, and 21081.6. Section 21080.5 authorizes the Secretary to certify a regulatory program of a state agency under CEQA. As noted above, section 21081 requires a public agency to make certain findings with respect to each significant environmental effect. Section 21081.6 provides that when a public agency makes the findings required by section 21081(a)(1), the public agency shall adopt a monitoring or reporting program for the revisions it has required in the project or the measures it has imposed as conditions of approval to mitigate or avoid significant environmental effects.

### **Section 11525 -- Notice of Decision**

A certified regulatory program is required to include regulations that provide for the administering agency, when acting as the CEQA lead agency, to file a notice of decision on the proposed activity with the Secretary. Pub. Res. Code section 21080.5(d)(2)(E). The Commission's regulations currently comply with this requirement. 14 C.C.R. §§ 10524 (notice of issuance of a permit for which the Commission has prepared an environmental assessment and is acting as lead agency) and 11007(a) (notice of the adoption of a plan amendment or other plan document). Section 11525 would be added to restate these filing requirements and cross-reference sections 10524 and 11007(a), in subsections 11525(a) and (b), respectively, so that these requirements are set forth in Chapter 15, subchapter 1 of the regulations, which contains the regulations governing when the Commission is acting as the CEQA lead agency.

The Authority and Reference note for this new section would include the following authority citations: (1) Government Code section 66632(f); and (2) Public Resources Code section 29201(e). The references would include: (1) Government Code section 66632(f) and 66652; and (2) Public Resources Code sections 21080.5, 29202, and 29520(a). Government Code sections 66632(f) and 66652 authorize the Commission to issue permits under the MPA and to amend the San Francisco Bay Plan (or adopt new plan documents), respectively. Public Resources Code section 21080.5 authorizes the Secretary to certify a regulatory program of a state agency under CEQA. Section 29202 authorize the Commission to amend the Suisun Marsh Protection Plan. Finally, section 29520(a) states that, except as expressly provided otherwise, the Commission shall use the procedures set forth in Title 7.2 of the Government Code (*i.e.*, the MPA) in processing and issuing marsh development permits under the SMPA.

### **Section 11531 -- Selection and Retention of a Consultant**

Section 11531 currently is entitled "Selection of a Consultant," but this section addresses both the selection and retention of a consultant to prepare an environmental assessment. Therefore, the title of this section would be amended to read: "Selection and Retention of a Consultant." In addition, this section would be amended in a number of respects.

First, a new subsection 11531(a) would be created at the beginning of the section and existing subsections (a), (b), and (c) would be redesignated as new subsection 11531(a)(1), (a)(2), and (3), to address the three steps described by the regulation to select a consultant. Second, subsections 11531(a)(1) and (a)(3) would be amended for consistency to each refer to consultant estimates of “maximum fees and costs.” Third, given the potential for cost overruns due to factors outside the control of the consultant, such as the range of issues raised during agency consultation or in public comments, subsection 11531(a)(2) would be amended to delete the existing requirement that a consultant establish a fixed cost to be incurred to prepare an environmental assessment.

Fourth, existing subsection 11531(e) vaguely states that the Executive Director shall “enter into an agreement” for the preparation of an environmental assessment, but it is not clear whether the Executive Director is to enter into such an agreement with the applicant for a permit or plan amendment or with the consultant. Moreover, CEQA does not require a lead agency to contract directly with an environmental consultant, and the CEQA Guidelines allow a number of different arrangements for a lead agency to prepare an environmental review document using the services of a consultant. See 14 C.C.R. § 15084(d). Therefore, it is proposed to delete existing subsection (e) and insert a new subsection (b) that will allow, consistent with the CEQA Guidelines, for three possible arrangements for retaining the consultant selected by the Executive Director to prepare an environmental assessment: the Executive Director may either (1) enter into an agreement with the consultant; (2) execute a memorandum of understanding with the applicant to govern retention and payment of the consultant; or (3) consent to the applicant retaining the consultant.

Fifth, a new subsection 11531(c) would be added to state that, notwithstanding the estimated maximum fees and costs provided by the selected consultant, the applicant shall be responsible for all consultant fees or costs to prepare or help to prepare the environmental assessment.

Sixth, as currently written, subsection 11531(d) provides for the Executive Director to deposit the fees submitted by the applicant to pay the consultant into an account maintained by the Commission for this purpose, and subsection 11531(f) provides for the Executive Director to pay the consultant according to a mutually agreed upon schedule of payments. It is proposed to:

- (1) combine these two subsections into a revised subsection 11531(d);
- (2) clarify that the applicant shall be required to deposit the amount of the maximum fees or costs estimated by the consultant only if the Executive Director enters into an agreement with the consultant;
- (3) delete the reference to a mutually agreed on schedule of payments usually being in installments of 25% of the total fee, with 25% withheld until the Commission has taken final action on the assessment, to allow the Executive Director and the consultant to mutually agree on a different payment schedule, such as monthly billing, as set forth in the agreement;
- (4) add a provision stating that after completion of the environmental assessment, the Executive Director shall refund to the applicant any part of the consultant fees or costs not actually charged by the consultant; and

- (5) add a provision stating that if the estimated fees and costs are exceeded prior to completion of the environmental assessment, the consultant shall submit monthly billing statements to the Executive Director and the applicant for the additional fees and costs as incurred, and the applicant shall pay each bill within 30 days of receipt.

### **Section 11532 -- Fees in Excess of Estimates**

Section 11532 currently provides that the Commission will not be responsible for fees to prepare an environmental assessment that exceed the previously determined cost ceiling (as estimated by the consultant). To clarify that this section refers to consultant fees or costs, as determined under subsection 11531(a), and to distinguish these consultant fees or costs from Commission fees associated with preparation of an environmental assessment, which are addressed in section 11540 (as discussed below), the title and first sentence of this section would be amended to: (1) add the word “consultant” before the word “fees”; and (2) add the words “or costs” after the word “fees.”

In addition, for consistency with the proposed subsection 11531(c), discussed above, which provides that the applicant shall be responsible for all consultant fees or costs to prepare or help to prepare the environmental assessment, notwithstanding the estimated maximum fees and costs provided by the selected consultant, the first sentence of this subsection would be amended to delete the words “previously determined ceiling” and insert instead the words “the maximum fees and costs estimated by the selected consultant.”

Finally, the second sentence of section 11532 cautions the consultant to consider, and requires every contract for consultant assistance to provide, that the Commission will not be responsible for any fees that exceed the consultant’s estimate. For consistency with the proposed amendments to subsection 11531(a)(2), discussed above, which would delete the existing requirement that a consultant establish a fixed cost to be incurred to prepare an environmental assessment, and in light of subsection 11531(c), which provides that the applicant shall be responsible for all consultant fees or costs, the second sentence of section 11532 would be deleted as unnecessary.

### **Section 11533 -- Relationship of Commission and Consultant**

Section 11533 addresses the relationship between the Commission and a consultant retained to prepare an environmental assessment and provides that the Commission, through the Executive Director, shall have final responsibility for the contents of any environmental assessment. This section would be amended to add a sentence stating that before using an environmental assessment prepared by a consultant, the Commission shall subject the environmental assessment to the agency’s own independent review and analysis. Such independent review and analysis by the lead agency is required by CEQA and the CEQA Guidelines. Pub. Res. Code § 21082.1(c)(1); 14 C.C.R. § 15084(e).

### **Section 11540 -- Basic Fee; and Section 11541 -- Preparation Fee**

Section 11540 currently provides that, in addition to any other fees, an applicant for a permit shall pay a “basic fee” of \$300 when the Commission prepares an environmental assessment to cover the costs of analyzing, processing, and mailing the assessment for a permit application. Section 11541 currently provides that, in addition to any other fees, a permit applicant shall pay an additional “preparation fee” of \$500 to cover the costs to the Commission of preparing an environmental assessment for which the Commission needs no consultant assistance.

CEQA and the CEQA Guidelines state that a lead agency may charge and collect a reasonable fee from a project proponent to recover the estimated costs incurred by the lead agency in preparing an environmental review document and for procedures necessary to comply with CEQA on the project. Pub. Res. Code § 21089(a); 14 C.C.R. § 15045(a). While certainly reasonable, both the basic fee of \$300 authorized by section 11540 and the preparation fee of \$500 authorized by section 11541 are arbitrary and bear no reasonable relationship to the costs actually incurred by the Commission to prepare and process an environmental assessment, whether or not the Commission needs the assistance of a consultant. Moreover, both sections expressly authorize such fees only when the Commission prepares an environmental assessment in connection a permit application. These sections do not authorize such fees when the Commission prepares an environmental assessment in connection with preparation of a plan or plan amendment (although the Commission is authorized to recover its full costs of processing a plan amendment or other plan document, implicitly including the costs to prepare an environmental assessment, by subsection 11008(a) of the regulations). For these reasons: (1) the existing text of section 11540 would be deleted; (2) section 11540 would be revised to authorize the Commission to assess fees sufficient to recover its full costs to prepare an environmental assessment in connection with an application for a permit, plan, or plan amendment; and (3) section 11541 would be repealed.

As revised, subsection 11540(a) would provide that when the Commission is the lead agency and the Executive Director determines that an environmental assessment must be prepared, an applicant for a permit, plan, or plan amendment shall pay, in addition to any consultant fees and costs, the Commission's full costs of preparing, processing, and distributing the environmental assessment. The recovery of the Commission's reasonable costs associated with preparation and processing an environmental assessment is authorized Public Resources Code section 21089(a) and section 15045(a) of the CEQA Guidelines, 14 C.C.R. § 15045(a).

New subsection 11540(b) would provide that after the Executive Director determines that an environmental assessment must be prepared, the Commission will submit monthly bills to the applicant for the costs incurred by the Commission and staff during the preceding month for preparation of the environmental assessment.

New subsection 11540(c) would require the applicant to pay the monthly bill for the Commission's costs within 30 days of receipt, and would provide that an applicant's failure to do so would allow the Commission and staff to discontinue work on the environmental assessment until complete payment has been made.

Finally, new subsection 11540(d)(1) would provide that the Commission shall bill the applicant for all unpaid costs actually incurred in preparing, processing, or distributing the environmental assessment within 30 days after either: (1) the Commission and staff complete all work on the application; (2) the applicant withdraws its application; or (3) the applicant abandons the application.

### **Section 11542 -- Consultant Fees**

Section 11542 currently provides that the Commission shall charge an applicant consultant fees equal to the ceiling fee for the consultant based on the consultant's estimate to prepare an environmental assessment and shall refund any part of the consultant fee not actually charged by the consultant. Section 11542 would be repealed as unnecessary because: (1) the proposed amendment to subsection 11531(c), discussed above, provides that the applicant shall be

responsible for all consultant fees or costs to prepare an environmental assessment; and (2) the proposed amendment to subsection 11531(d), also discussed above, provides that the applicant shall be required to deposit the maximum fees or costs estimated by a consultant when the Executive Director enters into an agreement with the consultant to prepare an environmental assessment and further provides that the Executive Director shall refund any part of the consultant fees or costs not actually charged by the consultant.

### **Section 11543 -- Exception**

Section 11543 currently provides that the Executive Director may reduce or increase the basic fee or the preparation fee, as authorized by existing sections 11540 and 11541, respectively, by an amount not exceeding 50% of the normally required amount if the Executive Director believes that these fees do not reflect the actual cost to the Commission of preparing or analyzing required environmental documents. As discussed above, both the basic fee of \$300 currently authorized by section 11540 and the preparation fee of \$500 currently authorized by section 11541 are arbitrary and bear no reasonable relationship to the costs actually incurred by the Commission to prepare and process an environmental assessment. Similarly, allowing the Executive Director to reduce or increase these fees by an amount not to exceed 50% of each fee, as currently authorized by section 11543, is also arbitrary and will not ensure that the Commission recovers the costs actually incurred by the Commission and staff to prepare and process an environmental assessment. Therefore, section 11543 would be deleted as unnecessary because, as discussed above, the proposed amendment to subsection 11540(a) provides that an applicant shall be responsible for paying the Commission's full costs of preparing, processing, and distributing an environmental assessment.

### **Section 11544 -- When Environmental Fees Must Be Paid**

Section 11544 currently provides that an applicant must pay all applicable environmental fees prior to the Commission commencing work on an environmental assessment. Section 11544 would be repealed as unnecessary because: (1) the proposed amendment to sections 11531(d), discussed above, provides that when the Executive Director enters into an agreement with a consultant for preparation of an environmental assessment, the applicant shall deposit the maximum fees or costs estimated by the consultant into an account maintained by the Commission and further provides that the Executive Director shall pay the consultant from this account according to a mutually agreed upon schedule of payments; and (2) the proposed amendments to subsections 11540(b)-(d), discussed above, specify the process for the Commission to bill an applicant for the Commission's full costs of preparing, processing and distributing an environmental assessment.

### **Section 11560 -- Review and Comment on Environmental Documents**

Section 11560 addresses the Commission's role as a CEQA responsible agency, rather than the lead agency. The title of section 11560 would be amended to add the words "and consideration of," so that it reads, "Review and Comment on and Consideration of Environmental Documents," to describe the scope of the Commission's responsibilities more accurately as a responsible agency, as set forth in the regulation. In addition, section 11560 would be amended in a number of respects.

First, the introductory clause of subsection 11560(a) would be amended to insert the word "proposed" before the word "activity" to reflect that CEQA environmental review is conducted for proposed activities or proposed projects.

A new subsection 11560(a)(1) would be added to acknowledge the duty of the Commission as a responsible agency to respond to any request for consultation by the lead agency to ensure that the lead agency prepares an environmental document that meets the informational needs of the Commission. Pub. Res. Code § 21080.4; 14 C.C.R. § 15096(b).

Third, existing subsection 11560(a)(1) would be renumbered as subsection 11560(a)(2). This subsection describes the duty of the Commission as a responsible agency under CEQA and the CEQA Guidelines to review and submit comments to the lead agency on any environmental document that the lead agency has sent to the Commission for consultation. Subsection 11560(a)(2) would also be amended to: (1) add an initial study, environmental assessment, and negative declaration as types of environmental documents; (2) delete the reference to “environmental working papers” due to the lack of specificity of that term and the fact that in practice, lead agencies send CEQA environmental documents to the Commission for review and comment but do not send “environmental working papers;” and (3) delete the existing reference to forwarding comments “to the appropriate state agency coordinating state comments” given the absence of any legal basis in CEQA for such a requirement and that fact that in practice there is not a single state agency that coordinates state comments on environmental documents.

Fourth, existing subsection 11560(a)(2) would be deleted. This subsection requires an applicant for a Commission permit to prepare a “written summary of any environmental documentation ... prepared by the lead agency” including “the disposition” of any “significant environmental issues” as well as a description of “any revision to the proposed project to mitigate its impacts or any objections.” As a responsible agency, the Commission typically receives, and Commission staff reviews and comments on, a public review draft of the environmental document prepared by the lead agency. Commission staff also typically receives a copy of any permit or other authorization issued by the lead agency, which includes conditions of approval and mitigation measures. Moreover, the Executive Director can request any of the information described in existing section 11560(a)(2) from the lead agency and has the authority to request that an applicant provide such information for Commission staff to fully evaluate an application. Therefore, it is unnecessary to burden an applicant with a requirement to prepare a summary of the environmental document prepared by the lead agency and to burden the Commission staff with the additional tasks of reviewing and evaluating the applicant’s summary.

Fifth, existing subsection 11560(a)(3) would be substantially revised. This subsection requires the Executive Director to include any final environmental document that is less than 10 pages in length, or a summary thereof if the document is longer than 10 pages in length, with the staff summary of the permit application. Since virtually no CEQA environmental document is less than 10 pages in length, this subsection places a considerable and unnecessary burden on staff to prepare a summary of what are typically lengthy environmental documents that may exceed hundreds of pages. In practice, staff does not prepare such summaries. Moreover, this subsection is limited in scope to providing the environmental document, or a summary thereof, when the Commission is considering a permit application and does not encompass situations when the Commission is a responsible agency on a planning matter. For these reasons, subsection 11560(a)(3) would be amended to require the Executive Director (through staff) to consider the environmental effects of the proposed activity as described in any environmental document prepared or provided by the lead agency and summarize the environmental information contained therein as relevant to the Commission’s statutory responsibilities in the application summary and/or staff recommendation

on the permit application or in the staff planning report on a planning matter. In addition, this subsection would be amended to add a negative declaration or environmental assessment as types of environmental documents that the Executive Director is required to consider. As amended, this subsection would accurately reflect the staff's practice of considering the environmental effects of proposed activities as described in the lead agency's environmental document and of summarizing the relevant environmental information in the documents prepared by staff and presented to the Commission, so that it may consider such information prior to acting on a proposed activity.

Sixth, a new subsection 11560(c) would be added to provide that if a lead agency has certified an environmental impact report for a proposed activity that identifies one or more significant environmental effects and the Commission approves an application for the proposed activity, the Commission shall make any findings required by 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). Public Resources Code section 21081 and sections 15091(a) and 15093(b) of the CEQA Guidelines require a public agency to make certain findings with respect to each significant environmental effect as to: (1) changes or alterations required in, or incorporated into, a project to mitigate or avoid significant effects; (2) those changes or alterations that are within the responsibility and jurisdiction of another public agency and that have been, or can or should be, adopted by that other agency; and (3) specific economic, legal, social, technological or other considerations that make infeasible the mitigation measures or alternatives identified in the environmental document.

Seventh, a new subsection 11560(d) would be added to provide that if the Commission makes any finding as described in Public Resources Code section 21081(a)(1) and section 15091(a)(1) of the CEQA Guidelines, 14 C.C.R. § 15091(a)(1), it shall adopt a program for monitoring or reporting on the revisions it has required in the project or the measures it has imposed as conditions of approval to mitigate or avoid significant environmental effects. Public Resources Code section 21081.6 and section 15091(d) of the CEQA Guidelines, 14 C.C.R. § 15091(d), provide that when a public agency makes findings that changes or alterations have been required in, or incorporated into, a project to mitigate or avoid significant effects, the agency shall adopt a monitoring or reporting program for the revisions it has required in the project or the measures it has imposed as conditions of approval to mitigate or avoid significant environmental effects.

Finally, the Authority and Reference note would be amended to add an authority citation to Public Resources Code section 21082 and references to Public Resources Code sections 21080.4, 21081, and 21081.6. Section 21082 provides that all public agencies shall adopt objectives, criteria, and procedures for the evaluation of proposed projects pursuant to CEQA. Section 21080.4 provides that, in response to a lead agency's request for consultation, a responsible agency shall specify the scope and content of the environmental information that is germane to the statutory responsibilities of the responsible agency which shall be included in the environmental document to ensure that the document meets the informational needs of the responsible agency. Section 21081 requires a public agency to make certain findings with respect to each significant environmental effect. Section 21081.6 provides that when a public agency makes the findings required by section 21081(a)(1), the public agency shall adopt a monitoring or reporting program for the revisions it has required in the project or the measures it has imposed as conditions of approval to mitigate or avoid significant environmental effects.

## 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 to the Commission's regulations for implementation of CEQA as described in this staff report.