

# San Francisco Bay Conservation and Development Commission

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September 13, 2019

**TO: Bay Fill Policies Working Group Members**

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**SUBJECT: August 15, 2019, Commission Bay Fill Policies Working Group Draft Meeting Summary**

1. **Roll Call, Introductions and Approval of Agenda.** Acting Chair Jim McGrath called the meeting to order at the Bay Area Metro Center, 375 Beale Street, Ohlone Room, First Floor, San Francisco, California at 10:31 a.m. and asked everyone to introduce themselves.

Bay Fill Policy working Group members in attendance included Commissioners Katerina Galacatos, Jim McGrath, Patricia Showalter and Sam Ziegler.

BCDC staff in attendance included Chief Deputy Director Steve Goldbeck, Chief of Federal Consistency and Permits Erik Buehmann, Planning Director Jessica Fain, Planning Manager Shannon Fiala, Sediment Program Manager Brenda Goeden, Coastal Scientist Megan Hall, Sediment Project Analyst Anniken Lydon.

Also in attendance were Ashley LaBass, Bay Planning Coalition; Kelly Malinowski, State Coastal Conservancy; Jon McCull, Port of San Francisco; Nicholas Niiro, SFO; Martha Whetstone, SFO.

Acting Chair McGrath stated: We have been gradually working through the comments that we received on the draft and working with the staff to try to identify things that we think should be changed and things that shouldn't be changed. We are roughly half way through.

Are there any changes to the Agenda that we have today? (No responses were voiced) I will approve it by consensus. We do need to approve the Meeting Minutes.

2. **Approval of July 18, 2019 BFPWG Meeting Minutes.** The Working Group members approved the meeting summary for July 18, 2019 as presented.

**MOTION:** Commissioner Showalter moved approval of the Minutes, seconded by Commissioner Galacatos. The motion carried by voice vote with no abstentions or objections.



3. **Discussion of Further Refinements to Draft Language.** Ms. Hall presented the following: What we have been doing with the Working Group is focusing on the tougher policy issues and that is still the plan today. So rather than covering different material we are going to go over some of the same material; the material where we have had a lot of feedback and where there have been some sticking points. The plan for today is to re-cover some of that. I actually expect that we will finish today. We have seven items to cover.

Acting Chair McGrath continued: Now we will discuss further refinements to draft language. Megan I am turning it over to you.

Ms. Hall addressed the Working Group: We are going to go over policies where there have been sticking points, so it isn't comprehensive, but these are ones where we really think it is important to continue to hear feedback from the Working Group. I will note that since our last meeting we have been meeting in order to work on these issues. I think we have had four meetings in the past two weeks of regulatory staff to try to work through some of these things.

We've also been meeting with stakeholders--particularly stakeholders that really did feel strongly about certain policies or issues. These included the U.S. EPA, the San Francisco Bay Joint Venture Management Board so we had a two-hour conversation with them. We met with SFO and the U.S. Army Corps of Engineers and the Port of Oakland. For each of those we have usually been dealing with one or two target issues except for the Management Board where we walked through a lot of different issues.

I will also note that today we are going to be showing you where we currently are with draft language changes. We are not saying this is going to necessarily be the final language. And if possible we would like to avoid getting into small, wordsmithing issues and more hear if you think conceptually we are heading in the right direction.

And so, this incremental fill placement policy had a lot of concern over the fact that we were calling for incremental placement first and then only accepting larger, single placements in certain circumstances if it wasn't feasible to do smaller, incremental placements. Based on the discussion last time you all had concluded perhaps it was best for BCDC to not put our thumb on the scale in this matter and rather leave it up to a case-by-case basis decision.

And after revisiting the literature and thinking through this issue a bit more I have sort of come to agreement on that as well that perhaps it is better to not necessarily prescriptively say which approach you should take but rather add in additional language that says we want to carefully consider the volume, frequency, timing of placement--which is what we tried to combine into the next policy--Fish, Other Aquatic Organisms and Wildlife Policy 7--which was originally targeted for a type-conversion but the way we proposed it now kind of wraps the two together. The idea would be that we wouldn't have this policy as it is written at all -- it would just be combined with the next one. Whereas the finding then could present the idea that you do have this range of options when you are considering how to place fill.

Acting Chair McGrath chimed in: So, let's get reactions from the Working Group and then public comments.

Commissioner Ziegler commented: I am not thrilled with this just because of the “should”. I haven’t seen projects that have been planning over the long-term for fill as they are applying for a permit or proposing a project. I wonder about the planning horizon and how this works in the regulatory framework.

On the restoration projects that we have been funding I know the whole concept is out there and it is certainly a good approach and it is going to be needed. But does this mean that if a project comes forward in the permitting framework that if it doesn’t plan for this in the long-term that they’ll need to?

Ms. Hall replied: We are suggesting right now removing this policy.

Ms. Fiala added: I think it would be helpful to go to the next one. (Laughter)

Ms. Hall explained: Let’s look at the next one so we see how it would be wrapped in. So, this one tries to roll together the concerns about type-conversion and the idea of incremental fill placement both of which are about temporal loss which we had discussed last time. So, both of these were trying to get at the idea that projects should avoid placing more fill than they really need to at any given time to adapt to a far-distant future sea-level-rise horizon or something like that. We wanted to make sure that the placement approach makes sense and is not unnecessarily harming habitats or wildlife too early. The way we tried to get at this is this combination of language – Allowable fill for habitat projects in the Bay should minimize near-term impacts and loss of existing; well I won’t read it to you because can read it. The idea is generally we want to reduce the impacts in the near term. We want to maximize the benefits in the long-term and we want to make sure that these projects are scaled appropriately for sea-level-rise, adaptation measures. And the part that looks back to what Policy 6 used to be is the timing, frequency and volume of fill should be determined in accordance with these criteria. You should consider all of those aspects and also consider our climate-change policies on the horizons where you need to be resilient or adaptable and based on those considerations determine what is the appropriate amount.

Acting Chair McGrath asked for input from Commissioner Galacatos: Okay I am going to put Katerina on the spot, and you can pass.

Commissioner Galacatos commented: I like this language better than what we had before. I am going to bring up Sam’s question about the timing and frequency of volume in the sense that for most permitting actions that we have there are very few that are sort of in a phased approach. It is usually you are having a project going to a fact that they are going to be doing something within the next X number of years so that is the part that may create some confusion or some ambiguity.

Ms. Hall replied: I think it is intentionally left to be flexible because we are not sure what might be necessary and potentially we will need to have more projects that use a phased approach because of these uncertain time horizons.

Commissioner Galacatos continued: Usually even if you are having a phased approach to a project you are going to be approving a permitting of each phase as it comes on and not in the beginning and saying, okay – you’re going to do this in phases. Usually for a lot of these larger-scale projects you are doing each phase as it comes along.

Ms. Goeden chimed in: So the regulatory staff has worked on this a bit and one of the questions was that we did discuss as an agency is the ability to issue a single permit that would allow for additional placement over time through a plan review action which is something we normally do with any project that doesn’t have 100 percent design when it is permitted. And so, we could foresee in a project that needed potentially more fill over time the ability to say what the max is under the request and then have conditions that allow them to add more as time goes on as needed with the simple plan review action. And so that was one way we were thinking from the regulatory framework of dealing with the ambiguity and issue of not knowing exactly how much but knowing that we need more as sea level rise changes and the elevations need to be changed. We did as a staff have that conversation and talked through from the regulatory perspective how we might be able to do that.

Commissioner Showalter asked: And you felt that this last sentence – “The timing frequency and volume of fill should be determined in accordance with these criteria.” allowed you to do that whereas without that you are not allowed to do it?

Mr. Goldbeck responded: No because this is guidance on how we should go about looking at it.

Commissioner Showalter continued: I was the one that took umbrage at this. I appreciate everyone rethinking this. I think this is much better. I would suggest that we get rid of the last sentence – “The timing, frequency and volume of fill should be determined in accordance with these criteria.” As permit grantors you get to consider whatever is appropriate for doing the project with the best, available science. Then the other thing I would suggest is that instead of saying, “minimize near-term impacts” we should say, “minimize near-term, negative impacts” because we are doing these projects to create major impacts.

Like in the South Bay Salt Ponds which is the one I am most familiar with the whole idea is that by breaching these we want to create a huge impact. So, my two suggestions are to just add “negative impacts” and then make this a little shorter yet by getting rid of that last sentence.

Acting Chair McGrath commented: I appreciate the movement towards a more general – I think BCDC is a solid commission with a solid staff and having a little more discretion as long as there is a clear policy direction is a good move because science changes and we don’t want to have to change the Bay Plan every time it changes. Having worked in this arena for many, many years the Bay and its inter-tidal systems are very dynamic. And they are dynamic on different time scales. Every day there is a lot of sediment in suspension on the Bay and it is not

cohesive enough sediment to stay on the bottom when the tide currents increase due through the tidal cycle. So that is normal. It was higher because of the Gold Rush. It has come back down but there is a normal turbidity cycle and the good thing about that is that it places sediment where the natural system wants to put it when it eventually settles.

The second time scale is that which formed these things in the first place which is an annual cycle or decadal cycle where big floods came down and left a delta that was then redistributed generally only at high tide with enough action but those provide the gentle contours that make wetland systems their most diverse and resilient.

I don't think you have to go to one extreme or the other. You have only put fill in once or you have to put in fill a couple of times. You should be thinking about what the natural system is that is going to push these sediments around after they are done. This provides the mechanism to do that. I don't know that you need the last sentence, but I don't know that I want to fight about it either.

Commissioner Ziegler stated: I like Pat's suggestion.

Ms. Goeden had an alternate suggestion: I'd like to offer a counter to that suggestion. I am not arguing one way or the other. One of the things that we do hear from the restoration community is they would like some certainty. By adding the timing, frequency and volume it gives them an idea of what we are looking at.

Commissioner Showalter asked: So, you think it makes permitting easier?

Acting Chair McGrath interjected: It makes planning easier.

Ms. Goeden replied: I don't know that anything makes permitting easier. (Laughter) It gives the applicant an idea of what we are looking at other than just the best, available science which is a very large category. So, this says we are going to look at the timing of the project and the placement. We are going to look at how frequently you need to do it and you can tell us there is a reason for it to be more frequent or less frequent. It doesn't mean it has to be frequent.

Ms. Goldbeck stated: Or it might be just once.

Ms. Goeden continued: It might be just once – that is what I'm trying to say, thank you. And the volume is something that we will consider. So, it does actually give a little bit of here's kind of the brackets that we are looking at to the restoration and other folks who are trying to do habitat projects. Without it they are just left with – we're going to try to minimize impacts and provide benefits. And so that is the counter and something to think about. I'm not throwing down the sword one way or the other. We do hear that they would like to know a little bit more about how we are making determinations.

Ms. Hall continued: I do think it helps to add context to remind that this policy was originally – the whole concern is how are we going to be determining what is the right volume here and frequency and timing it just draws you back to that concern. It just adds a context

that would potentially be lost a little bit without it for analysts and the community. I don't think it is prescriptive because it isn't saying any specific time or frequency. Analysts already look at those things and this is just adding some more context.

Acting Chair McGrath interjected: I want to make sure we cover everything and give the public a chance to comment. What I would suggest to the staff is they go back and look at might this not better be handled with findings rather than policy.

Commissioner Showalter emphasized: And we want to minimize negative impacts.

Acting Chair McGrath added: I would use the term "adverse". Anybody wish to comment on this? Throw up your hand or we will move on to the next one.

Ms. Malinowski commented: I am generally supportive of this. We were supportive of the changes that you guys made to Policy 6. We felt that you should define incremental fill as the placement it should be depending on the project, so we are supportive of you taking that out and combining it with Policy 7. We didn't comment on Policy 7 originally but now only with what has been changed our one comment would be I would be a little bit worried about the minimize near-term impacts and losses to the Bay habitat just because a lot of the more innovative wetland restoration techniques like fine-layer sediment like the addition they did to Seal Beach – that had a huge impact on the marsh but because over time we can save things.

I feel like in this era of climate change impacts we are sort of still making tradeoffs between what we have today and what we could reuse versus actually thinking about potentially moving everything and what could be saved. I just don't want to focus too much on minimizing near-term impacts because of the false trade-off we could lose everything if we don't try this.

Acting Chair McGrath replied: We hear you on that. I guess the other context that I am concerned about with the shortage of sediment in the Bay I would like to have a mechanism of where the material that is cleared out of flood-control channels – in other words material that was on its way to the Bay – can be placed in the system. But I don't want to necessarily prescribe that it cannot or should be placed on an area that now has habitat value. I can find a circumstance where either is right where I know that the tides will reach it and gradually disperse it around the system. On the other hand, I'm not going to be in favor of covering Salt Marsh Harvest Mouse for future benefits. I think we want a policy here that steers us to have some discretion in the middle.

Mr. Goldbeck chimed in: How we usually use "minimize" isn't that you can't do it. It is more that you need to look at minimizing in the context of the project. I think it does give us discretion.

Commissioner Ziegler commented: I appreciate all of this and I'm wondering with the issue raised about A gives me some pause now and I am wondering how that might impact requirements for mitigation and if that might provide additional call to try to have no losses. And there is going to be a loss. I mean we are looking for a net benefit. But there are going to be these trade-offs that are going to be very hard to make.

Ms. Hall acknowledged: And we recognize that. The point is saying that we would ideally like to be doing projects in the least-impactful way possible but within the context and goals of that project. If the goal is sea-level-rise adaptation we want to make sure you are still considering that it is existing habitat that has values and the way that we are impacting it is hopefully in the least harmful way it can be.

Ms. Goeden chimed in: I would also just add that BCDC's record on permitting these kinds of projects speaks for itself. We always do this. This is not new. We try to minimize impacts where we can, and we allow restoration projects to move forward primarily as planned with some minor tweaks to it here and there that are usually in accord with all of the agencies. So, I think we have a pretty solid record to be able to be trusted on this.

Commissioner Ziegler noted: We are moving into a different realm. I really appreciate what you are saying and fully agree but it is a paradigm shift.

Acting Chair McGrath stated: Well Sam's comment is appropriate because we almost stalled out on Sonoma Baylands over the question of can you alter seasonal wetlands to make them tidal wetlands without mitigation? Barry helped as the Executive Director of Save the Bay helped roll the U.S. Fish and Wildlife Service who was going to hang out there and maybe forever. So, I think "minimize" which is pretty close to a statutory term doesn't add any real, new hurdle. I think that hurdle is already there.

Ms. Hall continued: So, moving on to the next policy (Tidal Marshes and Tidal Flats Policy 6), this is a policy that has been in the Bay Plan already, but we have suggested some additions to it.

On this slide red text indicates changes that have been made since the Preliminary Staff Recommendation. The Preliminary Staff Recommendation is the document we published in May. So, things that are crossed out here in red means right now we are saying we think these are suggested further changes. The underlined are additions from the May report. There were concerns about this policy overall, but the crossed-out pieces are in response to EPA's concerns. The way this was written was a little bit confusing.

We wrote, "An adaptive-management plan to assess benefits, impacts and the likelihood of success and sustainability" because that is not really what the adaptive-management plan does. So, the way that this bit had been added made it more confusing, but we decided that saying to "assess benefits, impacts, the likelihood of success, the sustainability of the project" could be moved to the finding as our plan is to add that language to a finding. I think it might already be covered there to some extent but make sure that is clarified in the finding.

Otherwise there is concern about the list of analysis requirements in this policy and all the work that would potentially go into doing this analysis. But after many discussions with the regulatory staff about this, they really maintain the idea that the extent to which any given project has to actually do an analysis of any of these topics is completely dependent on the

project. So, for example for a small, Bay project that isn't really expected to have that much impact et cetera, your analysis could be something as easy as saying, the impact of the project on the Bay's sediment budget is going to be minimal and that would be sufficient.

And so the regulatory team feels that having this list would still provide some guidance of what we are looking for and the criteria that would be important to assess in determining the project's sustainability, likelihood of success et cetera. And remember we also have the policy right after this that says that the level of design should scale with the project's purpose, size, goals et cetera.

Acting Chair McGrath chimed in: So to tee this up Megan the language here in red would be stricken but similar language would be added to the findings.

Ms. Hall answered: Yes.

Acting Chair McGrath continued: And that resolves EPA's concerns and shortens a little bit – you've not suggested any changes for k and l and we have heard some concerns in our comments that this could complicate the planning. So that is the item and the regulatory staff feels that these changes are important.

Commissioner Ziegler commented: This works for me and it was a matter that the design and evaluation of a project and what is laid out there is really critical; just the construction of it in part with setting the goals and then a monitoring program and appropriate adaptive-management plan before we talked about the basis of design and evaluation – and then just another little thing that is making sure that the part of working within the context of the regional goals is well placed. I am hopeful that we will increasingly rely on looking overall and having goals that can really help guide what we are doing where.

Ms. Hall stated: We do have another policy that is supposed to be an even stronger implementation arm of the regional goals saying that projects should be sustainable, should increase connectivity and fit within a regional framework.

Commissioner Galacatos was recognized: My only question would be it all feels like what you are going to be evaluating but then you have the last sentence like if you are not meeting your criteria then you should have to do these things. Is that really a place for those types of things?

Acting Chair McGrath asked: Isn't that the purpose of and adaptive-management plan?

Commissioner Galacatos continued: Yes but you are basically already dictating what an adaptive-management plan should be. Those are components of the adaptive-management plan. But my question is – is that really a policy?

Acting Chair McGrath noted: In the last sentence I saw the same problem.

Commissioner Galacatos reiterated: Both the last two sentences are ones that maybe we should just look at and reconsider in terms of is this – not that I disagree with the sentences but I am actually questioning whether this would be the appropriate place to put them. So if the criteria are not being met you have to analyze why and that to me is a permit condition.

Mr. Goldbeck chimed in: Right but usually permit conditions need to be based upon policies. So that sets up putting in those conditions.

Acting Chair McGrath added: But you set that up Steve with – at the beginning is says, as appropriate, an adaptive-management plan. So I see you guys making the decision this one is straight-forward enough and doesn't need an adaptive-management plan – it's a grading project. Or this one needs a pretty complex adaptive-management plan and then as Katerina said I saw the same problem; then it specifies in the permit conditions under what circumstances elements of the adaptive-management plan would lead to changes. I don't think you put it in the Bay Plan. I think you put it in the permit conditions.

Commissioner Galacatos observed: In the last sentence is another one where when I am reading that it is if you had substantial adverse impacts to the Bay on a project everybody should be sitting there going – whoops, now what?

Mr. Goldbeck replied: They should.

Ms. Goeden added: They should but they don't always.

Commissioner Ziegler asked: What type of timeframe horizon are you thinking about with those last, two sentences? Are you talking about the success criteria for the completion of the project? Are you talking about development of plans and more sedimentation and functions happening?

Mr. Goldbeck answered: It could be project specific and it could have that. It could have something halfway down that something will occur and then something later. It really depends on how the project is proposed and what the success criteria are.

Commissioner Showalter was recognized: When I read this it seems like the top two-thirds of it is very well written and it is related to planning a project and how we would consider it. And the bottom two sentences are very well written too but they relate to enforcement if it doesn't work. It just seems like that is an awful lot in one paragraph. Is there a way we could make it two paragraphs?

Ms. Goeden suggested: You could break it apart and say if success criteria are not met A, B.

Mr. Buehmann commented: I will point out that this language is success criteria not met is already in the Bay Plan.

Commissioner Showalter chimed in: Is it?

Mr. Buehmann answered: Yes and that's why it is not underlined.

Commissioner Showalter continued: And do you find it confusing?

Mr. Goldbeck observed: Oh yes you are right this is existing language.

Mr. Buehmann stated: It does support our ability to require adaptive management. So the addition of the management plan is for explicit acknowledgement that in your application process you should, as appropriate, be creating an adaptation plan.

Commissioner Showalter noted: That said we are getting dinged for not doing enough enforcement and I am wondering if we need to call out where this would be an enforcement thing so that the staff knows that if this isn't working this would be an enforcement thing and it wouldn't be buried in here.

Mr. Goldbeck opined: I think the slight difference there is that you might not get to enforcement if you have a permit that is laid out that says, here is what we are going to do and here is what we expect to happen and then here is our adaptation plan if things aren't going the way we want and they do that – that really isn't an enforcement matter because that isn't how we handle it. It is built into the permit and we are all working on this and these things are uncertain and we are all trying to recognize as we discussed the uncertainty in all of this. So I think that wouldn't really go to enforcement unless clearly they needed to adapt and clearly they said – no, we don't care we ain't doing that; then we might have to think about whether we want to go to enforcement. I wouldn't call this enforcement. It is more of how you modulate a permit to achieve success.

Acting Chair McGrath stated: But I think you do that in a permit. I don't really care if it was already in there; it is in-artful. It is the difference between the policy setting to consider a project and the criteria. When we first started doing restoration projects and mitigation projects our goals weren't very good and it was hard to tell whether or not they had been achieved. So the first part of this does – and some of which existed from the last round – really clarifies how we have gotten better at articulating goals and when they are not met.

But part of that is a discretionary item that has to do with the permitting function. So let's say that one of the goals of a restoration project is not met but you get a rare plant there. You are not going to ask for the adaptive management to wipe out the rare plant. And this is a true story. This happened at Carpinteria. And so certain goals weren't met but the biologist found the particular palette of wetland plants to be of high enough value to leave it alone.

Mr. Goldbeck chimed in: Sure and at Sonoma Baylands when the sand piled up near the outlet pipes and that wasn't supposed to happen. So the biologist said we like that and that is going to create habitat so let's leave it.

Ms. Goeden commented: So you are making the exact point that the policy is trying to make. It is the first of the two sentences that we are discussing. So if the success criteria are not met benefits of impacts should be analyzed. And what that is doing is telling staff that you should look at what is there when the success criteria are not met. You should consider the benefits and maybe that a rare plant arrived or that we have seasonal habitat sort of situation and you should reconsider potentially based on the benefits and the impacts and make another decision because the success criteria may not be met but it may still have a benefit that you want to leave.

Acting Chair McGrath noted: Well it doesn't say that. It says it should be modified.

Ms. Goeden replied: No it says, should be analyzed and appropriate adaptation should be taken. So an adaptation measure could be – leave it. And an adaptation measure could be – let's build some more of that because this rare plant is now here and we want to support it. So I

don't believe it is saying a positive or a negative – it is saying, look at it, analyze it and then make an appropriate measure. And maybe the measure is changing the success criteria. And I think that is what it is trying to do. That is the way we read it.

Commissioner Ziegler was recognized: I think we are in a lot of agreement about the substance of it. Admittedly we have to recognize that you are utilizing a past policy and there is a lot in here. There are two big things and ideally it would be perhaps two policies – and one is about design and evaluation and the other one is then around monitoring success criteria and adaptive management.

Mr. Buehmann chimed in: I want to push back on that because we have done that in another policy and it looked like it was a new policy and everyone freaked out. (Laughter)

Commissioner Ziegler responded: But that is okay to say because one thing is to recognize why we are having some trouble with this and you are going to have to explain your way out of it. And it isn't just because we are not agreeing – it is because it is a funky construction. You are limiting yourself for a reason.

Acting Chair McGrath reiterated: It remains in-artful. You have made the point that you want to provide in here guidance as to the nature of what an adaptive-management plan should be. You haven't done it. What you have done is say, I mean the last sentence is in-artful. If you want to take that concept and say, where impacts or where risk is higher or however you want to condition it – an adaptive-management plan should include measures for modification. But this doesn't do that. I mean I think you have made a good point but you don't have the right language to actually implement this.

Ms. Goeden chimed in: I agree. I see the problem that you are pointing out. I totally agree and I think that there is definitely a way out of it.

Acting Chair McGrath suggested: So modify the last sentence maybe as part of when an adaptive-management plan is needed but remember we got push-back on having adaptive-management plans for everything. There are some things that are small enough scale. So take another crack at this.

Ms. Fiala noted: I'd like to point out that we do have findings and policies with regard to adaptive-management plans in the climate change section. And so there is a finding that explains what an adaptive-management plan is but the climate change policy doesn't really get into what an adaptive-management plan would be. And so perhaps we could flesh out exactly what would be included in that or the general concepts that would be included in an adaptive-management plan.

Ms. Hall chimed in: And just to clarify – we just want to clarify with this policy what exactly the last two sentences are getting at or break it apart and make sure that the adaptive-management piece is more clearly linked to that.

Moving on, the next policy talks about scaling the level of design, monitoring and adaptive management with the project's purpose, size, impact and level of uncertainty et cetera. We also added the piece originally about requiring a funding plan for monitoring adaptive management. And because there was a lot of confusion over what exactly that meant we suggest a little clarifying bit at the end to specify that we are not expecting for applicants to come with money already in hand for this or with even plans already submitted or applications for grants already submitted but more so that we want the applicant to demonstrate they considered the costs, identified potential funding sources for monitoring adaptive management that may be necessary. I think by clarifying that it should hopefully make it a little less intimidating.

Commissioner Showalter stated: I think it looks good.

Ms. Hall continued: Next, this is shoreline protection policy 4. As we explained last week we wanted to keep the language saying that all projects should evaluate the use of natural and nature-based features but have a form or an easy application similar to what the state of Maryland does to easily get an out for a small homeowner or maintenance projects where it isn't fully necessary to go through the entire evaluation of how they can incorporate nature-based features. But in general we want everyone to be working toward that goal.

We have been having discussions with SFO and gone back and forth on some proposed language. And we have made some changes to what we had initially suggested which are shown here saying, now airports may be exempt from incorporating natural and nature-based features that could endanger public safety by attracting birds. And so before it said, by attracting potentially hazardous wildlife but when we were thinking about it we couldn't think of any potentially hazardous wildlife besides birds. But if you have thoughts on that please share. And so there was some concern about what exactly potentially hazardous wildlife means and would it be better to just say exactly what we mean.

Mr. Niiro of SFO commented: I think the concern was that it could attract wildlife that would then attract non-bird wildlife that could then attract birds so that's why they wanted it to be broader.

Mr. Buehmann asked: Wouldn't that be attracting birds? (Laughter)

Mr. Niiro answered: Ultimately yes.

Mr. Whetstone of SFO added: That's the most dangerous one.

Mr. Goldbeck stated: I think we captured that at the end.

Ms. Hall added: It would ultimately be endangered public safety by attracting birds in the end unless there is something we are not thinking of.

Ms. Whetstone chimed in: I mean I don't know about deer and foxes; we are trying to keep all wildlife off the runways and all of that kind of thing. It is not necessarily limited to birds that we are concerned with. I mean if there are deer going up and down the runways I don't want that either.

Ms. Goeden asked: Do you have the runways fenced off?

Ms. Whetstone answered: No. We have security fencing down the roadways and stuff like that but on the side of the water we do not. And we have some already some levees and things like that. But we are not 100 percent on levees on the water side. Originally we had “shall” in there and we prefer “may be” instead of “may” and I think we could live with “should” if we couldn’t get “shall” but one of the things we are thinking in doing this was that we wanted to have something to point to when all of our permitting is there so that there is no big, giant debate. We will always have to prove a public safety exception.

So that in any version that we put forth we’ve acknowledged that we would say this measure would attract – we can’t use natural habitat here because it will attract birds which is bad. But you all have a lot of stuff that indicates preference already in the Bay Plan for natural-based solutions. So your staff is very oriented towards that. And one of the things that we thought – you know we never wanted to feel like we were always fighting upstream because I think everybody acknowledges, oh yes, you know, you guys we know you don’t want birds and stuff like that and you can’t have birds to operate an airport. But we are appreciating BCDC’s ability to help us get that acknowledged in the Bay Plan so that we can actually point to something.

Acting Chair McGrath asked: So does this help? Can you live with this?

Ms. Whetstone replied: It definitely helps. I’d prefer that if we could have some wiggle room on the “may” because we are still under any of the language we have to show a public-safety exception. So if the “may” could be like “should” we should be given a permit if it shows natural habitat would be a public-safety exception we really would love that language instead of “may”.

Acting Chair McGrath replied: I am going to put my thumb on the scale. In a previous life I was involved with another airport. And they said we generally ought to be able to fill all the wetlands at the airport. And we said, you don’t have enough money to put together a mitigation package for that. And they couldn’t and they couldn’t do the permitting. But the consequence is you’ve got wildlife people out there hazing the birds. You don’t have quality habitat. You won’t have quality habitat. You won’t get money from the FAA to do things if you increase it. And you’re going to be out there hazing it. So whatever habitat you have is going to have a marginal quality and we can’t change that. And these things exist but I think “may” is probably enough of a permissive language to keep you guys open. That and the FAA can be a pretty good handle as long as you can make the case.

Ms. Whetstone responded: It is just that we wanted to point to you all have so many preferences all through the Bay Plan. But if we can let your staff know that we should be given an exemption if we prove that there is a hazardous situation to us which would dictate us not using natural solutions.

Acting Chair McGrath opined: Well I think this does that.

Mr. Buehmann noted: There is actually a clause in the Bay Plan that says, “should” means “shall”. So changing it to “should” wouldn’t serve as middle ground for what you are proposing. We would definitely interpret this as sort of a kind of requirement that you are proposing that you would just provide information by the FAA and studies and that would probably be satisfactory for this policy.

Ms. Whetstone replied: Okay we were just trying to make it where your staff was clear that how far we have to go to put that – I think what we were thinking about when we were talking about doing this initially; I think this is going to only apply to maybe us and Oakland Airport. I don’t think it is a pervasive situation for a lot of people.

Acting Chair McGrath stated: This is a pretty good carve-out.

Ms. Whetstone responded: Yes.

Commissioner Showalter chimed in: Thank you SFO for coming. It is really good that you have taken part in the last two meetings. That helps a lot that we can talk directly to you instead of just receiving a letter or something. Part of the discussion that we had the last time was that we don’t really know what nature-based solutions may come forward in the future. And we don’t want to put complete scripture on it because there might be something in the future that will work fine for you and might even be good for you in terms of reducing the amount of or size of your flood wall.

So that’s why we wanted to put this little bit of discretion in there. And I just wanted to make sure that you have gotten that because we don’t – I mean people are working very, very hard on new methodologies and there may be something that comes up next week.

Ms. Whetstone replied: And we acknowledge that. We discussed that at SFO ourselves. We are not against it in theory. But we also believe that the wording that said we still have to prove the public-safety exception. If there is a nature-based solution that does not create the hazard the language would encompass that because we still have to show the public safety. So if there is that situation that you say about a nature-based solution that doesn’t attract wildlife the language would account for that because then you wouldn’t need a public-safety exception. It wouldn’t be a hazard.

Ms. Goeden chimed in: And I think the current language does account for that situation.

Ms. Whetstone agreed: Yes that is why we put in there that if the – you still have to say, SFO would still have to say this would be a public-safety problem.

Acting Chair McGrath chimed in: As I look at this I am not strongly persuaded to change “may” because I think agencies fight to keep their discretion. And I also know that you are in the middle of the Bay. There is not going to be a completely risk-free mechanism. There are lots of birds that are out there. I’ve raced right up to your pole on windsurfers and so I know the bird life out there.

But again it is a little bit in-artful. If I was to word this as the staff I'd say, airports may be exempt from incorporating natural and nature-based features if they would increase public risk. And that broadens it not to just birds and it puts a criterion. If it is going to make the risk higher it shouldn't be done. So I want to suggest – I think that is a little clearer standard. Having done this for a long time I like metrics where an increase in risk triggers this.

Ms. Malinowski was recognized: I thank SFO for being here. Our agency definitely understands the concern for birds. This language is helpful because, for example, restoring the creeks near you we found out that you were getting flooded more from the creeks than the shoreline over time and so this would help leave flexibility for creek restoration and flood-plain restoration which might have birds that you are not concerned about which might be able to help with the creek flooding.

We really support this policy and thank you for referencing the state of Maryland. The state of Maryland has a living, shoreline protection and basically their law says try green before gray and this one just says try green. So I don't know if you need to say, before you try gray. Perhaps there should be language that says, all shoreline-protection projects should evaluate the natural and nature-based features before considering man-made features.

Ms. Hall opined: I think it is implied.

Mr. Buehmann noted: Yes it is because the whole point of this is rectifying a bias towards gray.

Acting Chair McGrath asked: So staff do you want to push back on anything? Do you want to leave this the way it is?

Ms. Hall asked: You mean on your suggestion?

Acting Chair McGrath answered: On my suggestion, the SFO suggestion.

Ms. Hall replied: I am less inclined to say, increase public risk in general because I think that opens it up a lot more. Part of how we got to this is that we discussed and decided we do want to try to be as explicit as possible as to why this exemption is in here. This is primarily because of the bird concerns or solely because of the bird concerns. And so in previous versions we had tried to go with broader language and decided that it was opening up this exemption a lot further than we necessarily wanted to. That is my take on it.

Acting Chair McGrath added: My context was there is not a risk-free environment out there. The Port of Oakland has had to cancel taxing flights because there was a coyote on the runway. (Laughter) I think it is a well-made point that they are in the risk-reduction business. That is what they have to do. And the standard here of increasing risk – I mean I did hear them say well maybe it is not just birds. I was looking for perhaps a little leaner language. But I accept your point that – and the other thing I would suggest is we shouldn't let perfect the enemy of good. I mean if this gives a pretty clear signal that we are not hammering airports and I think it does, maybe it is good enough to go.

I see Sam and Katarina nodding so the Working Committee says, it is close enough.

Ms. Whetstone added: We would appreciate if we could broaden it up to hazardous wildlife or wildlife because it could be because we have a biologist there who deals with all of the wildlife situation and birds and the whole thing.

Acting Chair McGrath stated: Hazardous wildlife instead of birds.

Ms. Whetstone replied: Yes, hazardous wildlife and if you wanted to specify birds you could say, including birds – any hazardous wildlife.

Mr. Niiro added: Wildlife on the runways and other concerns but bird strikes are the primary concern but it is possible that other wildlife could be attracted.

Mr. Goldbeck chimed in: I am just trying to think of a situation where we would be doing something through our Bay shoreline jurisdiction that would attract deer or coyotes.

Commissioner Galacatos noted: This is not just for SFO but this would also incorporate Oakland Airport and there are other airports in the Bay Area so this is not just one airport.

Ms. Hall stated: To me it is fine to say potentially, hazardous wildlife. The reason we changed it to birds is in discussion we couldn't identify anything else besides birds.

Ms. Whetstone noted: it is so much the majority of the problem but I know that they are chasing off all sorts of stuff all the time. So I was just trying to think if it would include the birds and there was a way to include other things. But I think it is 99 percent of the time it is birds. We want to thank BCDC. They have been very good about cooperating and meeting with us and talking about this for several years. I want to commend and thank everybody for being open to the insertion – thank you.

Mr. Goldbeck reminded the group: This is still going through a couple of different review processes and it will go to senior staff. We will keep things open.

Ms. Hall continued: And finally we have Dredging Policy 11b and BPA 3-19. On August 5th we released the Preliminary Staff Recommendation for BPA 3-19 which is the proposed addition of a Bay Plan map policy regarding Middle Harbor Enhancement Area. We don't have any official update on what our absolute end recommendation for both Dredging Policy 11b and the Plan Map Policy are but we did want to update you that we have been having conversations with the Port of Oakland and the Army Corps. We have talked to them about this proposed language and met with them also after the report was released. And they do have concerns with it. By removing the piece we had in there before about them also having to provide benefits to make up for the temporal loss they were happy about that removal but they still do have concerns with the language as it is written. They did propose some alternative language although they didn't share it in an official capacity yet so I'm not sure if I can officially share it. But the other suggestion that they made was to try to work through these issues via a memorandum of understanding rather than resort to policy issues which we have hardly even discussed as staff yet. We don't have a recommendation on that yet but we wanted to update you that this is where this process stands. We are only in the first week and a half into the public comment period for the map. We will have the initial public hearing on it on September 5th and there is still a lot of opportunity for further discussion on that topic.

Ms. Malinowski stated: We support this 100 percent and we think it is smart to take out Policy 11b and only have the Map Policy which is what you propose in the Staff Recommendation. Putting it in the Map Policy still holds the Middle Harbor folks to finishing the project without precluding other similar projects from taking place.

Ms. Hall added: I will just clarify that the Staff Report for BPA 3-19 doesn't give any specific recommendation on Dredging Policy 11b.

**4. Timeline/Next Steps.** Ms. Hall continued: So Next Steps as I mentioned on September 5th we have the public hearing on the Plan Map Policy addition.

September 19th we have another Bay Fill Working Group meeting and because we have pushed the tentative vote to October 3rd we may want to have that meeting on September 19th. And then if we do have the vote on October 3rd we would publish the Staff Recommendation no later than September 27th.

Another issue that maybe it is worth raising is – are any of these changes substantial enough to require a second, public hearing? I am not sure where the line is on that.

Mr. Goldbeck stated: It is the Commission that makes the decision. The staff makes an initial determination and then the Commission decides whether a public hearing is in order or not. It would be great to have the Working Group weigh in. I am not trying to cut the Working Group out of this at all. We want to hear from you folks on this. In terms of the actual regulations that is how it works. So far we at the staff level think that any of these changes raise to that level. If you folks think it does we certainly want to hear it.

Acting Chair McGrath stated: Well I would ask my attorney.

Ms. Goeden replied: We are talking to our attorney. (Laughter)

Acting Chair McGrath continued: Under CEQA the standard test is – is there potential for, we are responding to comments and you are allowed to do that and this is a CEQA-equivalent process. So that's the vulnerability. Is there any potential for this to add a new, significant impact? Nothing there jumps out at me. The only thing that arguably has any potential for impact is a clear exemption for the airport. I would argue that it is already there under existing laws. And this doesn't absolutely let them off the hook. It presumes that there is a standard in other laws that protect passengers first.

Mr. Goldbeck added: And it also reduces the potential for a significant impact in terms of bird strikes.

Ms. Fiala chimed in: To me the question is whether or not we should attempt to have a Commission vote on these policies without having another public hearing on these policy changes. It is impossible to predict the comment letters we may receive in response to the Final Staff Recommendation.

Acting Chair McGrath stated: This was a pretty tame first hearing. There is a lot of support for this and my impression has always been that we are trying to work out the issues.

Commissioner Galacatos chimed in: The suggestion to see how it goes on the time of publication and still get the vote in is good.

Mr. Goldbeck clarified a point: Another clarification is that when we mail the Staff Recommendation and then set it up for the Commission vote people will be able to testify at that time. It is not the public hearing in the Bay Plan Amendment regulations that we had then have to respond to comments – people will be able to come and talk to it and if there is some big groundswell that we need to change something then we will go back and maybe hold a public hearing; if not then we will move forward.

Acting Chair McGrath stated: It is not a public hearing per se – it is getting to two-thirds vote.

Commissioner Showalter asked: What is the time cost in terms of having the public hearing? What is the downside of having the public hearing?

Mr. Goldbeck explained: Well if we have another public hearing under the Bay Plan Amendment then we would have to go back and respond to comments in writing and then come back and do a revised staff recommendation. So there definitely would be a time cost. If it is needed we will do it.

Commissioner Showalter chimed in: I was just thinking that a lot of times you put something out and you get comments that have no substance at all. And we got some really great comments. People really thought about it. We have changed a couple of parts of this in a very meaningful way based on those comments.

Acting Chair McGrath offered some levity: That is what we are supposed to do.  
(Laughter)

Commissioner Showalter continued: We are going to capture what happened. We just need to see what we hear based on the public comments on the Map.

Ms. Goeden stated: What works in our favor is that Megan and Shannon have done a lot of outreach and gone to meetings and talked to people, done phone interviews that have been really helpful making the interested parties and stakeholders feel more comfortable that they have been heard.

Acting Chair McGrath noted: We have seen that and we appreciate it.

5. **Adjournment.** There being no further business upon motion by Commissioner Showalter, seconded by Commissioner Galacatos, Acting Chair McGrath adjourned the meeting **at 11:47 p.m.**