

San Francisco Bay Conservation and Development Commission

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October 21, 2019

TO: Bay Fill Policies Working Group Members

FROM: Steve Goldbeck, Deputy Director (415/352-3611; steve.goldbeck@bcdc.ca.gov)
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SUBJECT: September 19, 2019, Commission Bay Fill Policies Working Group Draft Meeting Minutes

1. **Roll Call, Introductions and Approval of Agenda.** Acting Chair Jim McGrath called the meeting to order and approved the Agenda at the Bay Area Metro Center, 375 Beale Street, Ohlone Room, First Floor, San Francisco, California at 11:06 a.m., and asked everyone to introduce themselves.

Bay Fill Policy working Group members in attendance included Commissioners Katerina Galacatos, Jim McGrath, Barry Nelson (arrived at 11:13 a.m.), Pat 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, and BRRIT analyst Anniken Lydon.

Also in attendance were John Coleman, Bay Planning Coalition and Marilyn Latta, State Coastal Conservancy.

2. **Approval of August 15, 2019 BFPWG Meeting Minutes.** The Working Group members approved the meeting minutes for August 15, 2019 as presented.

MOTION: Commissioner Showalter moved approval of the Minutes, seconded by Commissioner Ziegler. The motion carried by a voice vote of 4-0-0 with no abstentions or objections.

3. **Brief Outline of Final Recommendation.** Ms. Hall discussed the following: We will start with an outline of today's meeting. We are going to review the timeline for what is remaining, review changes to policy language for the Final Staff Recommendation and then review an outline of the staff presentation for the October 3rd vote and if we have time talk about Next Steps for the Working Group.

In terms of the timeline for BPA 1-17 we are hoping to publish the Staff Recommendation tomorrow or Monday. As for BPA 3-19 we are hoping to publish that Staff Recommendation by next Friday. And then both of those would be brought to the Commission for a vote on October 3rd.

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Acting Chair McGrath chimed in: And inherent in that is the nature of changes our response to comments and do not require any further circulation although the chair of the full Commission would have the discretion to open the public hearing at the meeting.

Ms. Hall continued: And we are talking about the changes since the preliminary recommendations. In the major conclusions and policies in response to comment we added some language in Policy 5 to talk about the benefits of fill or the positive effects of fill to balance that language out.

In Fish, Other Aquatic Organisms and Wildlife we said that fill in wildlife refuges for public facilities for wildlife observation, interpretation and education would now be held to the minimum-amount-necessary standard as well.

Next, fill for habitat should balance near-term, adverse impacts and long-term benefits which is the policy language that combines the previous Policy 6 and 7 which had been talking about habitat-type conversion concerns and whether we should weigh in on smaller, incremental fill or larger less frequent fill. Additionally we added a bit to that stating that fill timing, volume and frequency should be decided on a case-by-case basis rather than determined ahead of time.

In Tidal Marshes and Tidal Flats and Sub-Tidal Areas, we had a lot of similar policy additions to both of those sections. We added some language in response to the public comment noting that while projects should strive to be self-sustaining there are cases where management or intervention maybe necessary to maintain valuable restored or existing habitat.

We added a piece on how adaptive management can also be an effective tool for communicating and sharing best available science.

We (the Working Group) talked previously about separating Policy 6 into two separate policies. Policy 6 is that very long policy that has a list of criteria that applicants have to evaluate and this Working Group identified that one of the issues you had with that policy is that the first piece talks more about the design and initial analysis of the project whereas the last couple of sentences talked about the ongoing management of the project and how to handle it if you haven't reached the success criteria. And so in response to that discussion we proposed separating that second piece out into its own policy.

We clarified the language around funding strategy which we had also talked about with you all before.

We added a piece to the monitoring policies saying that monitoring should coordinate with regional efforts where feasible and should strive to improve value and usefulness of data.

Right now the way the pilot project policy was written was very broad but we want to clarify that pilot projects that are addressing these urgent questions about habitat restoration and sea level rise adaptation are the ones that we are specifically encouraging here.

Commissioner Ziegler commented: The thing with pilot projects is the extent to which we want to accelerate the work. I wonder in the language that you use whether it wants pilot projects that would help accelerate the work.

Ms. Hall replied: We don't specifically talk about that with the idea being that if we are encouraging pilot projects then we can accelerate other projects in response to results we are getting. We can take that back and consider it.

Mr. Goldbeck commented: We might want to think about pilot projects that don't necessarily accelerate restoration projects but improve them.

Acting Chair McGrath acknowledged Commissioner Nelson's arrival at 11:13 a.m.: Let me bring Barry up to speed. We've been going over policy discussions that were discussed in granular detail in the last two meetings that you missed. This is kind of the conclusions with the staff ready to release tomorrow or Monday.

I think we reached general consensus as a sub-committee on all the points. We didn't reach language decisions but I think we gave clear policy direction. Is that a fair statement? (Staff and Working Group Members nodded in agreement).

Ms. Latta chimed in: I just wonder if projects in general you want to encourage in this manner?

Ms. Hall responded: There is other language that is already is encouraging this kind of work throughout especially fill for that kind of work. And we've even added language to the previous, minor fill policies to say, fill for these purposes including sea level rise.

Commissioner Ziegler weighed in: On the thing we were talking about "accelerate". Maybe we could talk about that after we look at this and just sort of the concept and to what we actually think about that in terms of achieving 100,000 acres of tidal marsh by 2030 and what if any role the policy change has in doing that.

Chair Nelson continued the discussion: Are there a lot of spots where we are talking about pilot projects that do this?

Ms. Hall replied: That is the one policy that was added specifically just saying the Commission should encourage pilot projects.

Commissioner McGrath added: But I wanted to highlight for Barry this first bullet that the replacement with the minimum amount necessary. The standards of the Clean Water Act and the statutory standards of the McAteer-Petris Act don't go away. They are good policy standards but we no longer have the added "only minor amounts of fill".

Ms. Goeden commented: Barry to your previous question; on the next slide it is in tidal marshes and sub-tidal areas. So there are two sets of policies that have virtually very similar policy changes applicable to each of those ecological systems.

Commissioner Showalter had a question: I have a question on where we are in this meeting. On these slides are you going over the things we are going to discuss in more detail later?

Ms. Hall explained: No, I am just showing you a brief overview walking through the things we have already decided that will be coming out as changes in the Staff Recommendation that we will publish.

Commissioner McGrath chimed in: Remember we discussed these but didn't finalize language and we left it to the staff to finalize language which they can't show us yet because it is not a public document.

Ms. Hall added: And we just didn't want to dwell too long on that specific issue.

Commissioner McGrath added levity: We wordsmithed. (Laughter)

Commissioner Showalter continued: I just want to add for clarification a little bit of conceptual wordsmithing related to this. I really like adaptive management as an effective tool for communicating and sharing best available science. Thank you for including that – that is great. I also hope that there is included a description of what we talked about which is how to differentiate the monitoring that we expect to be done by any project and then the monitoring that we would really like to see included in regional efforts. That monitoring might be more research oriented. So the way I see it from BCDC's point of view we will always require that a project monitors to say did they complete the project? That we will always require but from the monitoring that is designed to study of the effectiveness of the project or could be seen as research – that is the monitoring we will encourage to be included in regional efforts. I just want to make sure that there is some language in there that clarifies that. And if there isn't you might want to go back and think about it.

Mr. Buehmann added: There are several places where that is discussed.

Commissioner McGrath mentioned previous discussions: And to summarize that discussion; we distinguished between those things which are required as mitigation where there has to be success and those things where we are encouraging but not necessarily mandating a level of monitoring that would discourage projects.

Commissioner Showalter responded: Right, and this came up in a discussion I was having with a stakeholder and they were saying that one of the reasons we want to really have this really robust wetlands regional monitoring program is because there may be some small projects that actually do need to be monitored for effectiveness, but it would sort of sink the project ever being done if that project had to pay for it. If it is part of a regional monitoring that doesn't mean that the monitoring wouldn't be done unless the project itself paid for it. We are not saying that. That doesn't make sense to you?

Ms. Hall replied: It does make sense but we are not saying that the project has to do this.

Mr. Goldbeck added: It has to be done one way or the other.

Commissioner Showalter continued: The flip of it is we are also not saying that because a project is small and can't afford to pay for effectiveness or research monitoring that this

doesn't mean that it might not be appropriate there. We would let that decision be made by the regional monitoring and we might encourage that.

Chair Nelson chimed in: The other way of saying that would be to say that a robust and effective regional monitoring program could reduce the burden on individual projects and make them more viable.

Ms. Hall stated: Which we do say in the findings.

Commissioner Showalter continued: I think that is real important.

Commissioner McGrath referred back to previous discussions: The other point that we made in the discussion was that there are going to be projects that will have benefits that may not be fully beneficial as we had hoped but to learn from that is appropriate but to saddle the project which will be a net benefit with that might not be a good idea. I mean that is the context for monitoring. And the discussion that we had is there was discretion. And we encouraged writing with discretion that would say – if you are replacing values you are going to be required to have a successful project. If you are benefitting the Bay then we are more in a discretionary area where it depends on whether it is settled science or we are going to learn something from it and the like. It is a burden/benefit test that we want to articulate.

Ms. Hall continued: Finally shoreline protection has not really changed that much except for the airport language which we have also been discussing in detail in the last couple of meetings. And before we had said that airports may be exempt from certain natural and nature-based features but we decided on this more specific language that would be narrower in their exemption.

Finally, we are going to talk through Dredging Policy 11b and the two options that are still lingering there for our final choice on this policy. And we will also talk a bit about the Plan Map Policy and we can thing about those things all together.

First we will just frame the Dredging Policy 11b discussion. Our Preliminary Staff Recommendation was to remove Dredging Policy 11b because as that policy is currently written it restricts the amount of dredged sediment that can be used in the Bay for habitat projects until the Middle Harbor Enhancement Area is completed.

And so because it is restricting fill for habitat work that is unrelated to this one project and making other projects dependent on this one specific project we proposed it for removal.

And that opinion was generally supported. Many stakeholders at the workshop were in favor of that but we also did get some opposition to it. We also heard some concerns and staff had a few concerns about that.

So the first concern that was raised by Save the Bay and Audubon of California and was supported at the Commission meeting as well by Chair Wasserman and Commissioner Gioia was this idea that if we move Dredging Policy 11b to the Plan Maps does it retain its full force?

So folks were concerned that this would maybe reduce BCDC's position with the Corps in negotiating completion of this project although there is no way to actually know that at this point.

The other concern was that if we remove this policy how does that open up placement of sediment in areas where we actually might not want sediment to be placed yet? We may not know enough about them--specifically deep, sub-tidal areas.

Staff and Save the Bay were concerned a little bit about that issue. Should we be removing this current limitation that we have on those areas where we don't really know much about them and where there is a lot of potential for operations that are placing dredged sediment that is for habitat benefits but maybe that isn't the primary purpose and it is more for cheaper dredged sediment disposal.

And so in response to that staff had proposed in the preliminary recommendation the addition of a policy that prioritized the placement of sediment in the margins of the Bay. That is where we need it the most but also restricts to a minor amount the amount of sediment that can be placed in deep, sub-tidal areas for habitat work.

That draft policy is currently still in our recommendation and would alleviate that concern.

Chair Nelson chimed in: All that suggests largely that we should leave it in and modify it.

Ms. Hall responded: I guess that was all saying we can take it out because – I didn't fully qualify why from the concern of our Commission and Save the Bay perspective, but our legal team has assured us that moving it to the Plan Map Policy or really just having a policy on it in general doesn't have any actual enforcement power. And recognizing that the question is even if the Bay Plan Map policies are not used as enforcement tools; is there an additional symbolic gesture there in moving it? Does it weaken it somehow to have in a Plan Map policy?

Our legal team says from an enforcement standpoint it does not and, in fact, that neither of those policies really strengthen our enforcement case. And so it gets into a different kind of discussion – more of a symbolic type of discussion.

So then in terms of the option of retaining it I just told you the two reasons why it might be a good idea to retain it. Save the Bay and a couple of our Commissioners did argue it in favor of retaining an amended version at the public hearing.

There is also the perspective that from a precautionary standpoint we don't really know what the effect might be. There is no way to fully know what effect this policy is or is not having on the Corps at this point. From a precautionary standpoint we could argue having something in the Bay Plan still saying more or less the same thing but releasing almost any habitat project that is currently conceivable from this restriction would allow us to maintain this language.

Maybe it is having some impact on the Corps in terms of encouraging completion and also allowing any of the habitat work that we could currently conceive of to proceed.

And so this draft language would do that because a project would have to be similar in scale, bathymetric modification and type of habitat creation to the Oakland Middle Harbor Project. We as staff haven't been able to think of any project that could fit that definition. We think that pretty much any habitat project would be able to use dredged sediment.

Ms. Goeden chimed in: There is one project that could and that would be the filling of Bay Farm Island which we don't want to say because we would rather use the sediment in an appropriate place.

Chair Nelson added: I originally thought we should just get rid of that. It was clearly a hurdle. At the moment it seems to me there are three reasons and a question of why it makes sense for us to go with option two here.

The first reason is because we amended the Bay Plan so the Middle Harbor Project should move forward. That is something that we don't do lightly. And the fact that this project, for lots of reasons, is struggling to reach conclusion and deliver on all the values that were promised by that project – the fact that this project is so slow to be completed is a big deal.

So I think retaining that – I'm afraid the signal it would send if we deleted that and just moved it to the Map Notes is that it looks as though it is kind of dropping off our radar screens.

So in terms of encouraging the Corps to complete the project I tend to think we should leave it in.

And the second reason gets to the borrow pit question. And that is that the Middle Harbor Project was a giant pilot project. We don't do giant pilot projects very often and we made the right call by doing it. I think we did the right thing. But when you step out on a limb and approve a giant pilot project and that pilot project is struggling; that's really important. The whole point of a pilot project is we are going to do this first and then we are going to build on that by building the next project – well it's really important that we have flashing no light because what is happening here is we approved a giant pilot project.

I have no idea how likely the borrow pit is as a project. But I think this is a giant flashing, red light that until that pilot project is completed we are very skeptical of the next project to build on that pilot project.

The third reason I tend to think we should leave it in is the Corps has not been a great partner with BCDC on dredging issues. So that doesn't encourage me to want to delete this.

The question is whether in any way this language could unintentionally discourage other projects. And Marilyn I am looking at you in particular about that. Are there some unintended consequences here that we are not thinking about?

Ms. Latta commented: The Conservancy did submit a letter recommending removal of Policy 11b for the purposes of just general concern. And it has existed since we published the Sub-Tidal Goals in 2010 and before. There has been a general concern that is an unfair requirement. Everybody wants to see the project completed and see the responsible agencies held to that completion. So I should state that up front. That was clearly part of our comments as well.

But there has been concern that it would prevent other types of sub-tidal projects. I think the way that you are clarifying now – I think we would still prefer to see removal if there is still somewhat of that concern but really being more specific about the scale type and modification types of projects that are really similar to Middle Harbor; I agree.

You know our comment letter on Middle Harbor pointed out such potentials like Cullinan or Skaggs – I think it was Skaggs because accidentally breaching, filling too fast and needing to take an emergency action or something but it doesn't fit well with when the dredged material is available and what you would have to do to plan for that scale of dredged material in one application.

So I tend to agree – it is wonderful to hear it if it is truly correct that most other projects would be able to move forward with this language included. So I think it satisfies the complaint.

Mr. Goldbeck added: And from staff's standpoint we don't really think that this would preclude something at Skaggs or Cullinan because they are not essentially similar to this project.

Ms. Goeden chimed in: And also just remember Middle Harbor was 42 feet deep.

Ms. Latta continued: These aren't habitats where we are actively working to establish eel grass, for example.

Chair Nelson acknowledged the statement: That is really helpful and we want to make sure that we are distinguishing that. This pilot project where we are going to build eel grass in the Central Bay by deepening an area is a very different project than a project at Cullinan or Skaggs where you are trying to achieve a different kind of habitat on a different scale and so forth.

Ms. Latta asked for a definition: My one question was to clarify the definition of "deep". Are you referring to 10 foot or three meters which are most commonly used for shallow versus deeper?

Ms. Hall answered: We decided to not add a specific definition to the Bay Plan and allow it to be decided on a project-by-project basis.

Ms. Latta replied: I hope it would be more in the 30 to 40 like Brenda is saying. The extremely deep would be far off the realm of where we try to target this.

Commissioner Ziegler commented: I think that was Brenda's point in saying to be similar you have to be –

Ms. Goeden stated: So the word “deep” is not in this policy. So it really is about a bathymetric modification, scale, and type of habitat creation.

Chair Nelson chimed in: You could have a bathymetric modification and it definitely makes sense.

Mr. John Coleman commented: Personally I like to have Policy 11b removed. So why can't a statement be made in the Bay Plan Amendment addressing Middle Harbor seeking it to have the conclusion of what and when it was approved and that would have as much legal standing; would it not? I mean to have it be a statement in the document.

Ms. Hall explained: That is what the Plan Map Policy addition is about.

Mr. Coleman continued: Maybe there will be nothing that will be impacted by leaving 11b as you are saying. However, if something does come along and Middle Harbor is not completed for whatever reasons – are you going to do a “wink/nod” okay we are going to let this project move forward and let it go on? I just don't want to limit potential projects.

Chair Nelson chimed in: That is a really good point. If some project surfaces that none of us are thinking about right now and this gets in its way and it looks like a really promising project and if this was in the Bay Plan; one of two things would have to happen – either you would have to look at that project and say it is actually distinguishable from this one and it is different enough that it can move forward like Cullinan or Skaggs, or if it really is very similar to this project I mean that is a really important call for the Commission to make because what we would be saying is we know the last project like this didn't pan out and it's been some time. We are thinking of approving the next project like that despite that fact and if we do that I think we should force ourselves to go back and amend the Bay Plan and do it.

Mr. Coleman continued: The thing is then you are going to go through a whole new process that you are doing now and if you are looking at something down the road where many of the Commissioners may not be sitting there over the decision that would be similar to Middle Harbor they are going to look at the record and say – well it wasn't done and this is the policy therefore we are not going to approve this project. The historical record will be embedded in the Bay Plan Amendment. And you may have new Commissioners or staff who is saying; they did it for a reason, we're not going to second guess it now.

Chair Nelson asked: Are there other projects like that that you can see on the horizon?

Mr. Coleman replied: I am not aware of any.

Chair Nelson responded: Yes I am not either.

Mr. Coleman continued: I just don't want to see BCDC tie its hands up on potentially a good project.

Ms. Goeden stated: I don't think we are. As a staff analyst who found a really good project that had some similarities – is it inside an active port, is it very deep modifying to shallow, sub-tidal for eel grass, is it the same type of habitat creation, what is the scale? I think the staff is smart enough that if they found a really good project they could work with this language.

I can't imagine that the Port of Redwood City, the Port of Richmond – the Port of Oakland might try it again but I don't think so. I mean there is not really another location that they have available. The Port of Benicia, the Port of San Francisco; are they going to give up a cruise ship terminal for a habitat project? I don't think it is going to happen. So I think we are worried about something that might happen where the reality is fairly slim. And I think we are trying hard to walk the line of making sure that staff has tools and the perception for the Corps is such that we want this to continue to move forward but allowing for projects that we know about and think about and are reasonable to move forward. And there are other policies that we would balance this against. So there are tidal marsh policies and there are subtidal policies that talk about pilot projects and when we should authorize them and how we are furthering science. And I think that staff works very hard to balance the policies and move the projects forward. And I think this language, to the extent that we choose to keep it, allows us to characterize this project very specifically versus projects that are very different.

Mr. Coleman responded: I understand what you are saying Brenda. I will put on my hat as an East Bay MUD director where we have policies that come before us that can be 10 or 15 years old and board members weren't around or it is different staff; they look at that and they go – well they put it there for a purpose and there is a lot of angst and anxiety whether or not to change a policy as a result.

Ms. Goeden replied: Yes that happens. You can't deny it.

Commissioner Showalter was recognized: What you are saying is one of the things I'm thinking. Not just that when a project was put together and came to BCDC it would be rejected, but somebody might not ever put the project together in the first place because this language would deter them from doing that and they would just think – oh well this isn't allowed. I think that is sort of a possibility. But again it is kind of very minor when you think about the areas where the water is that deep where it might happen; there are quite sophisticated actors so I don't think that is too likely.

I wanted to go back to the testimony that Tom Williams made at the Commission meeting. And he said a couple of things which I wish I had asked about at the time. One is apparently there are two sources of funding that add up to about six million dollars of money they have to work on this project. I'm wondering – does that mean the project is currently fully funded to completion?

Ms. Goeden explained: Nobody actually knows the answer to that question. The reason we don't know the answer is because where Middle Harbor is now is the first phase of eel grass has been planted. And so the question is now, will the eel grass succeed? There is a second phase planned to help augment it if needed. But we don't know if it will be needed. So there is

an unknown money piece there. The beach which was to be public access, the front of it – there is a big sign that says, “Not Safe Don’t Come in”. And so we are asking the Corps to remedy the situation of the forefront of the beach so people can actually use it as public access to the water.

There is an educational marsh which was committed to the environmental justice community as a way for them to be able to come to this park and see what a wetland looks like because they don’t have wetlands in West Oakland. And that is below marsh plain elevation. There is a very unlikely scenario and they looked at the science and the sedimentation for that spot – unlikely that it is going to sediment in on its own. So we are looking to have them bring it up to marsh plain elevation.

Commissioner Showalter continued: Okay so we don’t know about the money. And then the other thing that he suggested he seemed to take umbrage at adding this as a Map Policy. I didn’t really understand why but it was about this premise of federal versus –

Ms. Hall interjected: They are concerned about the language that we had proposed for the Plan Map Policy not just the general notion.

Commissioner Showalter continued: The other thing he brought up that seemed germane to this that we haven’t talked about yet is the idea of an MOU.

Ms. Hall stated: I am going to address both the Plan Map Policy and the MOU on the next slide. We will also revisit the chart from the last public hearing once we have talked through this one. We had proposed language, and this isn’t the originally proposed language for an addition to our Plan Map Policies which is where site-specific policies typically go. The Corps reacted to that saying, we can’t accept this language but we will propose alternative language or preferentially we would like to try to reach an agreement on an MOU, memorandum of understanding. And so we talked with them after the public hearing and talked about following both of those paths trying to get to either the MOU or agreement on Plan Map Policy language by next Friday, the date that we need to send the recommendation.

And so we’ve been having discussions with them regarding the MOU. They sent us a draft MOU. And from our perspective it wasn’t at all where it needed to be. They didn’t even commit to completing the project and didn’t talk about any of the temporal loss of habitat benefits which was something that we have been trying to encourage through our remediation action. And there was really just no strong statement of commitment on their part.

So we talked to them after they sent us that draft MOU last Friday and we also sent them a response with some items that we would like to see changed or included if these discussions are to go forward. And we are still waiting to hear back from them. So that is the status of the MOU discussion.

Ms. Fiala added: It is also worth noting that the Port of Oakland will not be able to be a party to the MOU on this short timeframe even if we were able to get it done by next Friday. They could not get it done by next Friday.

Ms. Hall stated: So it would just be between BCDC and the Army Corps.

Mr. Goldbeck noted: For now anyway.

Ms. Hall agreed: Yes, for now – exactly. But at the same time we as staff came up with some other potential alternatives for the Plan Map Policy language. One of those alternatives is here and the Army Corps actually said that they would be fine with this language. The main difference here is that we changed it a bit to be more in the format of how our Plan Map Policies typically read which is starting with the command verb.

So something like, protect this habitat or conserve this area for a trail, et cetera. That is how our Plan Map Policies typically read, whereas in our initial draft of this we had said, the U.S. Army Corps of Engineers and the Port of Oakland “should” and so it was a little different. They are typically directed at the Commission and what the Commission should do and how the Commission should work with other entities to do whatever we are saying in the Plan Maps.

In that spirit we proposed this addition – provide the habitat and public access benefits at the U.S. Army Corps of Engineers and Port of Oakland’s Middle Harbor Enhancement Area as described in the performance criteria of the 3M Plan, which is written out in full detail.

We think that this would still be a way to have this project referenced in the Bay Plan, a statement of BCDC’s commitment to getting this project done in the Bay Plan and to signal to the Commission to do whatever the Commission needs to do to get the Corps and the Port to finish this project. The Army Corps said, we really can’t tell you what to tell or direct your Commission to do and technically we would have no rebuttal to that and so we would have to agree.

Mr. Goldbeck chimed in: The flip side is that before they thought that the language was trying to force the Corps to do something that we can’t force them to do and that it was abrogating law. So that is why they were going to go to the Office for Coastal Management and complain that we were overstepping.

Chair Nelson noted: So this reads more like a policy statement as opposed to a permit requirement.

Mr. Goldbeck agreed: Right and so it is not directed at the Corps as Megan said. Most of all of our policies direct the Commission as to what should happen therefore it removes what they thought was an improper direction in trying to enforce on the Corps through the Bay Plan. And we think that either language would have the same amount of enforcement power which is limited. What we have is what we have.

Ms. Hall added: And it doesn’t have to be an either/or as we’ll talk through in the charts in a moment.

Commissioner McGrath asked: Does the Corps accept this language?

Ms. Hall answered: Yes.

Mr. Goldbeck stated: They didn’t see their name up there.

Ms. Hall noted: The only difference between the version that they were okay with and this version; we haven't shown them this version exactly yet but we just added their agencies' names saying that it is their project.

Commissioner Ziegler chimed in: So Steve neither language if this language is included and the other language is changed as discussed; my understanding is that it doesn't change the enforcement authority that you have in relationship to this. And vice versa if they are removed you still have the same enforcement authority. So all we are talking about is the optics.

Ms. Goeden chimed in: Well there is a little more.

Chair Nelson opined: To me it's more than just the optics. The Corps is going to come back to us for whatever that next project is. And memorializing the lack of progress on this is going to affect how we think on that next project. It doesn't mean we are going to take enforcement action with Middle Harbor. Until the Corps addresses these issues and the litigation they will have a steeper hill to climb with the Commission.

Commissioner Ziegler continued: So for that reason it's helpful to have something in there in particular.

Chair Nelson replied: I don't know if the staff came up with this or the Corps came up with this but flipping it around so that it doesn't read like a permit requirement – it reads more like a policy statement I think is an elegant solution.

Mr. Goldbeck stated: For the record it was staff. (Laughter) The other thing that it does is that the concern was that by removing the other one that the Commission could be perceived as putting it in neutral on Middle Harbor – sort of, we are just taking it away and moving on. And so what this does, even beyond the next project, this says – hey, no, the Commission is committed to getting this project done and we're going to force the Corps through all available methods to try to get it done.

Commissioner Ziegler continued: So that is very helpful. And then a thought like do we need both of them? And does the Map Policy or is there any gain in not including the Map Policy? Because the Map Policy if you don't get the Corps' approval sounds like it is kicking a hornet's nest and just continuing that part. And that is taking that I agree with all of what you are saying. And having an MO--you know MOUs can be worth nothing and take a lot of time to do. And if there was an MOU that would get to success that is great. So I am just wondering how to get to that success. What is the best way to do that?

Chair Nelson stated: All I can say about that is that I know that when I read the Bay Plan I usually don't flip through the maps and say; well what are the policies in the maps? From my perspective I didn't like the box in the upper right-- the Dredging Policy 11b and the Map Policy. I read the Bay Plan all the time and I don't read the Map Policy that often.

Ms. Hall added: The Plan Map Policy also is a specific directive to get the project done whereas the Dredging Policy is saying the same thing but in a more indirect way. The question is, does BCDC think it is to our advantage to also have a statement saying let's just do this project.

Chair Nelson observed: There are two statements in there. One of the statements says, get that project done and the other one says and until that project is done here is what it means for similar projects. That is a really good point.

Ms. Latta stated: We support putting it in the Map Policy and certainly support things like a completed project. I have concerns about the marsh and some of the elements where it is just creation in an area where it is not sustainable. I think I speak for our group that this sounds good the way you have amended 11b.

Commissioner Showalter noted: So you are saying the top right box.

Ms. Latta agreed: The top right box, yes. I think ultimately our official is that we support removing 11b. But they haven't heard this modified language yet. It is not exactly the same as what you proposed originally. I think it sounds very good and I will let you know. This seems like a good compromise.

Chair Nelson chimed in: Could we go back to 11b because I have one observation. I apologize I am going to wordsmith. (Laughter) On the fourth line where it says, enhancement project in scale, bathymetric modification and type – you guys might think about words along the line of; in characteristics such as just to give yourself a little more room. When you say, scale, bathymetric modification and type – that sounds like those three criteria and that's it.

Ms. Goeden asked: So add "such as"?

Chair Nelson replied: You might add "such as". You have to go off and think about that. That doesn't mean that if a project came up and you had to look at it carefully to figure out if it was distinguishable from this project – it would give you a little more flexibility.

Ms. Hall reiterated: So yes, characteristics or qualities such as, okay.

Chair Nelson responded: Yes, so wordsmithing over, sorry.

Commissioner Showalter was recognized: I think that the top right box is acceptable too. I too was on the – let's just get rid of Dredging Policy 11b—mindset, but because of the barrier issue, the barrier to further work. I understand what is being said and I think it is okay.

Ms. Hall continued: We did want to discuss the relationship between Dredging Policy 11b and this other proposed policy specifically the last part of it. This is currently added in, Fish, Other Aquatic Organisms and Wildlife as Policy 7. This was staff's proposal for how to still be cautious with deep-water sediment placement if Dredging Policy 11b were removed but if we are thinking about retaining it now we may have to reassess whether this is actually necessary. So the first part of this policy we are all still supportive of--that sediment placement for habitat adaptation should be prioritized in the margins of the Bay.

But then we tacked on to the end here just to further the statement that we really want it in these areas and we don't want it in the deep, sub-tidal areas. A minor amount of sediment placement for habitat projects in deep, sub-tidal areas may be authorized if sediment placement will maximize the habitat restoration or enhancement benefits provided by the project.

This is a slightly broader statement of what our current proposed 11b is. The question is would we still need that if we retain 11b?

Ms. Latta commented: I know in a past meeting it was clarified that sediment means everything. I want to make sure that dredged sediment and we are talking about placement of muds here and things like oyster shell or others may be, who knows – this is still all experimental – but it may be different in the deep, sub-tidal areas.

Ms. Goeden observed: So this does not say dredged sediment and it is not in the dredging policies.

Ms. Latta replied: But it still includes every grain size.

Commissioner Showalter stated: Yes we did that on purpose. So sediment in a geological sense includes all of those.

Ms. Goeden added: I looked it up and it says material able to be moved by water which includes boulders.

Commissioner McGrath chimed in: If you have a flood-control district that has suitable sediment that it is hauling out and we can reuse it without adverse impacts we should.

Ms. Hall agreed: Absolutely.

Chair Nelson weighed in: And this also means that if somebody is working on a larger project and over in the corner of the project is some deep-water habitat and the placement of some fill would hold that project together this would reduce the risk that there would be unintended consequences of the changes of 11b.

Ms. Latta commented: I guess we always get wrapped up on this term “minor” and there is no definition of that.

Commissioner Showalter stated: I personally would like it better if the last sentence was not there because when I worked on the Salt Bay Salt Ponds it seems to me that Pond A8 in some places is as deep as 16 feet. It is quite subsided.

Ms. Goeden chimed in: It is very deep but again just remember that you are talking about a salt pond. So they have different criteria. That is how we have allowed 900,000 cubic yards of fill.

Commissioner Showalter weighed in: I think that is good. What I am saying is that – what does this last sentence add that we don’t have currently from the modified version of 11b or is this the right place for this? And does it really make it better?

Chair Nelson noted: When you read that in the context of one and two I think it makes sense because we do want to make sure that we are not saying, under no circumstances, never, we are never allowing a single grain to be placed in the sub-tidal environment. And when you look at one and two here, Diked Baylands, Tidal Marsh and Tidal Flats and the second is, Inter-Tidal and Shallow Sub-Tidal – without that final sentence you could read the remainder of that paragraph as saying, don’t even come talk to us about deep sub-tidal habitat.

Ms. Goeden chimed in: And also on the flip side of it, we know that we have a shortage of sediment for the habitat restoration that is inter-tidal, both marshes and mudflats. We know that and scientifically, hands down – it is not a question. We do not have enough sediment.

So do we want to spend our valuable sediment in sub-tidal habitat in the face of sea level rise? That is part of the impetus behind this. We really want the sediment to go where we know it is desperately needed without a question.

Commissioner McGrath agreed: And I fundamentally agree with that. This is to me is the answer to the Bay Farm Island question.

Ms. Goeden stated: Exactly.

Commissioner McGrath continued: If we knew that there was a sub-tidal area like the Bay Farm Island that was degraded for some reason and wasn't providing habitat – I don't want to prohibit fill. But this sets priorities. And that is the correct answer. It is not that under no circumstances might a project at Bay Farm Island make sense – it's aren't there more important ways to do it? I am mindful of having put together projects and review projects for decades and where you are still at is you need circulation. I think that last sentence does not take that away. You are going to try to make circulation work.

Commissioner Showalter noted: When I read it again I see that sub-tidal much more clearly. It is listed much more frequently and comes through much more strongly than the first time I read it. And that really is the key to this – is it sub-tidal or not?

Ms. Latta commented: I know you recognize and included many text changes that recognize these sub-tidal habitats beyond oyster and eel grass; here again we are kind of just referring for Number 2 to tidal marsh and tidal flat and eel grass beds – do we need to limit it in that way?

Commissioner McGrath added: We could use a term “such as” there or “including”.

Ms. Fiala chimed in: But what we are proposing if we keep 11b is that until Middle Harbor is completed it will limit the amount of dredged sediment to a “minor amount” in similar types of areas. So if Middle Harbor is completed it unlocks the ability to put more than a minor amount in similar types of projects to Middle Harbor and yet we will still have this policy here which will restrict us to a minor amount of sediment in deep, sub-tidal areas. I want to lay that out that it seems like that is what we are doing right now.

Ms. Goeden replied: Yes that is what we are doing.

Commissioner Showalter stated: I really would like it better if it said, “an appropriate”. I don't like the minor for reasons you are saying. I think we should use “appropriate” or “reasonable” – I don't know.

Mr. Buehmann chimed in: It still is important to remember that any fill in the Bay will still have to satisfy 666 and other McAteer Act provisions including the minimum amount of fill necessary.

So “minor” here is in a sense an existing or on top of minor or minimum amount of fill and it is supposed to be an additional constraint. So even minimum amount of fill for the project is still sort of reaching what you are talking about which is the appropriateness of a measure.

Commissioner Showalter asked: Well do we want to just reuse that language from the McAteer-Petris Act instead of using different language?

Ms. Goeden stated: If you do that you will take the priority away.

Chair Nelson acknowledged Ms. Goeden’s statement: You are saying something really important. If the Corps goes back and finishes Middle Harbor and – wow, we love that project. And then they go off and they do something spectacular in the borrow pit and then somebody comes up to us with some other project and it looks like we’ve cleared Policy 11b with flying colors, full speed ahead; this gets in the way of other potential projects. So another way of thinking about this might be something like – until Dredge Fill Policy 11b has been satisfied or something like that. The Commission’s priorities will be placing fill in, other than minor amounts, in other areas. What we do is link this to Dredge Fill Policy 11b.

Mr. Buehmann chimed in: Then you might as well remove it and just have 11b to be in place.

Chair Nelson offered a hypothetical: But if we leave 11b in place what happens if somebody comes in to us with a project that would have a small amount of fill? If we pull this and leave 11b what happens if somebody comes in with a restoration project with a small amount of fill?

Ms. Hall replied: That would be fine. It says a minor amount is allowed.

Commissioner McGrath had reservations: Your comment has made me nervous. The poster child for why we needed this is the mouth of Sonoma Creek. And the phenomenon that as we try to develop resiliency projects and how they are going to work and how they are going to hook up enough tidal prism so that you don’t exacerbate fluvial flooding is important.

You’ve got substantial channel systems all going north and south not hooked up to the Creek. And making that system work in a superior way may take a lot of fill. It may not necessarily be net fill but reorienting the fill so you’ve got tributary areas to more robust channels that have a channel geometry that will get you circulation through the main channel is needed.

Remember that whole system has been accretional. It may not remain accretional for all time as sea level rises but that accretion has not created a system that circulates well. And it has created a system that makes flooding in the lower valley worse which has exacerbated our political problem and our habitat problem of having a more robust Steelhead stream.

So I am worried that it may not be possible to rejigger it. We can just say that because we may not get the funding and the science may be indeterminate but let’s assume that those two things do happen; this remaining might be a barrier.

Ms. Goeden asked: In that scenario Jim is that deep sub-tidal area or is it shallow sub-tidal area or inter-tidal mudflats?

Chair Nelson replied: It is not deep.

Commissioner McGrath weighed in: But again without definition of deep, sub-tidal channels develop their own geometry and so there are some that are probably six to eight feet below mean/low or low water.

Ms. Goeden noted: But channels into and within tidal marshes are part of tidal marshes. You can't have a tidal marsh that is healthy without those things. So we don't say – well the marsh is all in the vegetated area. It is the channels that feed them.

Commissioner McGrath continued: So you think the distinction between deep, sub-tidal in channel is sufficient to not create problems?

Ms. Goeden answered: I think so.

Ms. Latta chimed in: I don't know if everyone would agree with you. I think there is so much confusion and if we were to poll regulatory staff it is just hard.

Ms. Goeden continued making her point: I would just look at Suisun Marsh and our policies at Suisun Marsh because it very clearly says that Suisun Channel which is a very deep channel is part of Suisun Marsh.

Commissioner McGrath asked: Well what's wrong with just taking out "a minor amount" because you still have your check. I want the priorities set.

Commissioner Showalter stated: Yes I like that a lot better.

Commissioner McGrath continued: If you just strike "a minor amount" and sediment placement for habitat projects may be authorized "if" – I mean that is another –

Chair Nelson interjected: That would not change the McAteer-Petris Act applicable elsewhere.

Ms. Hall agreed: No it wouldn't.

Commissioner McGrath added: It just says, notwithstanding our priorities there might be some way that this would make the priority list.

Mr. Goldbeck chimed in: My only concern and I am just thinking aloud here is maximizing the habitat restoration or enhancement that is provided by the project. So it seems that this might be putting into the project proponent's hands the definition of what it is. Well they could say we need to do the Bay Farm Island Borrow Pit because we are going to make it shallow to make habitat and so -

Commissioner McGrath interjected: It is far enough off shore – I don't think that is going to happen.

Chair Nelson noted: But this would not eliminate the amount of fill requirement – it just –

Mr. Goldbeck stated: It would still be the minimum amount of fill to do the project. So if they are proposing a project with a lot of fill and say the Bay Farm Island Borrow Project then it could be much more than a minor amount.

Ms. Fiala commented: The point is that this is sediment that wouldn't be going to the tidal marshes and sub-tidal areas.

Commissioner McGrath added: Right which is our priority; so we would still have that priority.

Mr. Goldbeck stated: I like where you are going but I am just worried about that unintended consequence.

Chair Nelson chimed in: But if we were to do this and we were to pull the "minor amount" then 11b would have to stay in. But then we would really be sending the wrong signal.

Ms. Hall stated: I agree that removing both of them would not be good.

Ms. Fain noted: What we are hearing is let's keep 11b and the Maps. Do we need the "minor amount" here?

Commissioner Nelson referenced a project: I was just thinking of the DWR project where they got, for whatever reason, to really substantially enhance fisheries for Steelhead. The projects that are landscape level are going to be really big projects and maybe they will be legislatively authorized and they will come out of and Endangered Species Act or some damage done somewhere else that we couldn't stop. And I don't want this to be even a speed bump if it makes sense. The subset of stream where you can get a lot of salmonid benefit in the Bay Area is Alameda, Sonoma and San Francisco. And I don't think you need the "minor amount" in this place.

Mr. Goldbeck stated: So you think the priority would help us to weed out those projects that we do think might not be so good because it is a lot of fill needed.

Commissioner McGrath added: And that is going to preclude these other six projects that would have a lot more habitat benefits.

Ms. Goeden chimed in: So Jim I am just trying to understand the point about the Steelhead. So the fill would be placed for Steelhead habitat? I'm having trouble tracking that a little bit and maybe you could explain a little more.

Commissioner McGrath explained: Sonoma Creek still has Steelhead habitat but the mouth is pretty funky. And the channels aren't very good. The channels aren't deep enough and they fill in with sediment so you have to do a lot of flood control work down there. The farmers hate the government because it floods and in my mind a healthy estuarine system, if it has a large enough tidal prism and there aren't that many options, will provide flood control benefits and habitat benefits including rearing in the nursery in the shallow areas.

Ms. Goeden stated: And I understand that part. But what that leads me to is creating bigger tidal channels not placing fill. And so that is where I am having the disconnect.

Commissioner McGrath explained: But to get the sediment you might have to or to get the tidal prism to be focused into that channel –

Chair Nelson added: You might have to fill here and not there –

Ms. Latta stated: You might have to create a marsh.

Commissioner McGrath noted: Well you’ve got more marsh out there but that marsh, tidal prism is going north and south instead of into Sonoma Creek to keep Sonoma Creek deeper and having the micro-tone of tidal channels that go from maybe 12 feet deep to inches which are all better habitat than what you have out there now.

Ms. Goeden continued: I guess I’m still –

Chair Nelson interjected: I think we are circling agreement here. (Laughter) We are not quite there but we are circling. Can we go back to the matrix please? I heard a couple of folks talk about that about the box in the upper right. Add the Plan Map Policy which says, we want to finish that project. And then amend 11b which says, until we finish that project this is what it means for other similar projects. I am thinking maybe we can see if we are in agreement here and then that will help us resolve that third question. How are we doing on the box in the upper right? Do we have agreement around that?

Ms. Fiala stated: That is what I wrote down.

Chair Nelson stated: I think we do.

Ms. Hall chimed in: Marilyn you think you guys would probably be okay with the amended 11b language?

Ms. Latta replied: Yes I think it sounds good.

Chair Nelson continued: So if that is where we are and this is still a package, nothing is final until it is final and we go to the next language – I absolutely hear what you are saying and I hate the idea of including in the Bay Plan a sort of a logical conundrum which means we kind of boxed ourselves in and that doesn’t make any sense. Given where we are in the matrix does anyone see a problem if we leave that sentence in but delete “minor amount”?

Ms. Goeden had a question: I have a question that should be discussed as part of that answer. Is “prioritized” strong enough? Because if a project proponent comes forward and says I want to do this deep sub-tidal habitat fill-placement project but we say – oh but it is our priority to do that and they say; well it is not our priority and we don’t have the ability to do that project over there then how are we to tell them that the sediment really needs to go somewhere else?

Chair Nelson chimed in: So if we delete “minor amount” then we are leaving the possibility that deep, sub-tidal fill might be allowed. If that is our goal then prioritized – we don’t want to say “required” there because you might as well delete that last sentence. So “strongly prioritize” or something else that just sends a very clear signal that we really mean it folks.

Mr. Goldbeck commented: I am just thinking aloud here so I am not proposing it necessarily. But what if we deleted “a minor amount” but said, sediment placement for habitat projects in deep, sub-tidal areas may be authorized if the sediment placement will provide such substantial habitat restoration benefits that it basically overwhelms or trumps the priority or something like that. I am just trying to think aloud of something that says – you can do that but only if you can show that, yes this is really such a great project we should do it. That kind of gives a little more umph to the prioritization aspect.

Commissioner Showalter suggested: What about something along the lines of the, total regional sediment supply will be considered in evaluating these priorities?

Chair Nelson added: This would be a preface to this that would say like, in order to maximize critical adaptation and habitat benefits blah, blah, blah – it just sort of raises the stakes at the start of this.

Commissioner Showalter continued: What we are talking about is that we know that we have a finite amount of sediment at any one time to use. And we want to have it used at the best place for the amount of habitat and our climate resilience point of view.

Ms. Hall noted: We do already have a finding that states issues of sediment limitation.

Ms. Goeden added: And one of our policies has sediment in it dealing with transport and supply.

Ms. Fiala chimed in: We also have a policy that says, in reviewing and approving habitat projects the Commission should consider regional goals. So that would address that issue as well.

Chair Nelson observed: That is all true but I absolutely recognize that what we are trying to do is to send a strong signal and it is critical that we prioritize one and two as we allocate our scarce resources. And I’m not sure if we read the different parts of these amendments together that they tell that story so this is really a critical issue.

Commissioner Showalter commented: I think to change it to make it say that would be, sediment placement for habitat adaptation “must” be prioritized. So change “should” to “must” and then get rid of “a minor amount”.

Mr. Goldbeck pointed out: That “should” is “shall” in the Bay Plan. So it is basically very strong language – sediment placement “shall” be prioritized.

Chair Nelson opined: “Shall” is good.

Commissioner Showalter added: “Shall” is better than “should”. It is a formal thing. I don’t think they do mean the same thing because we all use “should” all the time in standard English and we almost never use “shall”.

Mr. Buehmann stated: But it says it in the Bay Plan “should” means “shall”. It is literally a sentence in the Bay Plan.

Commissioner Showalter continued: When Joe Engineer like me who works in a water district is reading through this –

Commissioner McGrath added more levity: You are Jill Engineer. (Laughter)

Commissioner Showalter continued: - or JoAnne Engineer. I don't necessarily carry all those definitions to every paragraph that I read.

Mr. Buehmann stated: I would love to amend the Bay Plan to change "should" to "shall" in every instance – that would be wonderful.

Chair Nelson cautioned: Let's try not to slip into wordsmithing. A rule which I have violated. Let's try to provide some direction to staff to find the right way to strengthen that language about prioritization. We've heard a bunch of ideas and I am not sure what the right solution is.

Ms. Hall added: Combined with removal of "a minor amount".

Chair Nelson echoed the statement: And remove that - yes.

Mr. Buehmann asked for clarity: So say that again. "Minor amount" is being removed.

Mr. Goldbeck added: And we are going to wordsmith to make it all work. We may make that a three instead of a separate sentence. We think that might be a stronger regulatory approach.

Chair Nelson summarized: So the changes here are get rid of "a minor amount", find a creative way to emphasize the prioritization and with that package let's go back to the matrix.

Ms. Goeden had questions: I am unclear on some of this. I want to be clear today whether the habitat projects in deep, sub-tidal are they any habitat projects? I mean i.e. going from sub-tidal to tidal marsh? Or are they habitat projects that remain sub-tidal? Have we made that distinction?

Ms. Hall replied: We didn't explicitly make that distinction.

Chair Nelson stated: So with that package, the upright box in the matrix and those amendments to Fish and Wildlife Policies how are we doing? We have consensus. This is important – great.

Commissioner McGrath chimed in: I do want to make an editorial comment. It was about 1995 at the State of the Estuary Phil Williams said, we don't have enough sediment in the Bay. It is about time. (Laughter) And maybe we should be able to do this a little faster.

Ms. Hall continued: The other items are not very essential but I can quickly talk you through what we were thinking for the vote on October 3rd and more importantly here if any of you have important words of wisdom or tidbits that you would like to share about how we frame the presentation on that day or maybe how we discuss public comments – any of those aspects that you think would benefit us in getting this successfully to a vote. Commissioner Showalter chimed in: I am a little concerned with the quorum on that day because it does conflict with the CHARG. And I am going to be at the CHARG and so is Dave Pine. Dave and I are speaking on a panel about this. (Laughter) And we are the last item of the day.

4. **Discuss Presentation for BPA Vote on October 3, 2019.** Ms. Hall continued: I will cover briefly what the presentation would entail. It would cover a brief background and overview of the fill for habitat process again and why we are doing this. There will be an overview of public comments received. And we will cover process since the June 20th public hearing because a lot of people want to understand what we did once we received public comment to get to our Final Recommendation. And finally we will give an overview of changes made in the Revised Staff Recommendation in a little more detail than we did today.

Commissioner Showalter stated: I think it is a great plan but one thing I would like you to emphasize is the quality of the public comments we get. A lot of times the public comments just say, I support the change or I don't. And we have people who really dug in and gave us a lot of thoughtful comments. And that is how the public process is supposed to work but it doesn't usually.

Chair Nelson added: And I can reinforce that as soon as Zach gives me a chance to make some comments at the start.

Commissioner McGrath stated: You know I'd like the Conservancy in that November 21st meeting. I'd like to start thinking about what makes sense. I've already received questions from the mayor of Albany about making resilient frameworks. It is not as easy as some people think. How you set priorities, how you try to establish basic research and have the public agencies, particularly the Conservancy, help us set priorities and an agenda and a go-forward plan rather than some developer or some port or some airport. And we should structure it around how does this dovetail with resiliency planning?

5. **Next Steps.** Ms. Latta commented: When this Bay Plan Amendment was first proposed there was an anticipation of modifying and amending the McAteer-Petris Act after and the legislative code after that. I wonder if that is still in discussion and in the Plan.

Chair Nelson answered: Yes.

6. **Adjournment.** There being no further business Chair Nelson adjourned the meeting at 12:34 p.m.