

San Francisco Bay Conservation and Development Commission

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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: May 8, 2020, Commission Bay Fill Policies Working Group Draft Meeting Summary

1. **Roll Call, Introductions and Approval of Agenda.** Chair Barry Nelson called the meeting to order and approved the Agenda through a virtual Zoom meeting. Chair Nelson ran through the logistics of the virtual meeting.

Bay Fill Policy working Group members in attendance were Commissioners Tessa Beach, Jim McGrath, Pat Showalter, Sean Randolph, and Sam Ziegler. BCDC staff in attendance included Chief Deputy Director Steve Goldbeck, Bay Resources Program Manager Erik Buehmann, Planning Director Jessica Fain, Planning Manager Shannon Fiala, Sediment Program Manager Brenda Goeden, Coastal Scientist Megan Hall, BRRIT analyst Anniken Lydon, CivicSpark Fellow Amber Leavitt, Permit Analyst Morgan Chow, Coastal Scientist Rachel Wigginton, and Permit Analyst Walt Deppe. Members of the public in attendance were John Coleman of the Bay Planning Coalition, Arthur Feinstein of the Citizens' Committee to Complete the Refuge, Steven Chew of Curtin Maritime, James Hausener of the California Marine Affairs and Navigation Conference, Robert Powelson of the Alliance for Equitable Community Restructuring, and Jeff McCreary of Ducks Unlimited.

2. **Approval of September 19, 2019 BFPWG Meeting Minutes.** The Working Group members approved the meeting minutes for September 19, 2019 as presented.

3. **Update on State and Federal Approval of the Fill for Habitat Bay Plan Amendment.** Dr. Hall explained that the Fill for Habitat Amendment had been approved by the state Office of Administrative Law on December 27, 2019, and had been approved with qualifications on May 8, 2020. The qualification stated that the Plan Map Policy on the Middle Harbor Enhancement Area (MHEA) would not apply for federal consistency, because under the federal CZMA, states can't directly call out federal agency and direct it to do something. Mr. Goldbeck explained that the policy was intended to put on record that the Commission wants to see this project done quickly and completely, and that BCDC staff don't believe this qualification in the Office for Coastal Management's approval would disadvantage BCDC in its ongoing work with the Corps on the MHEA project. Ms. Goeden provided a quick update on the Middle Harbor Enhancement Project—BCDC plans to meet with USACE and the Port of Oakland the following week to review design options for the project, and there has been good progress over the past 6 months.

4. **Consideration of Commencing Mitigation Bay Plan Amendment Process.** Dr. Hall presented slides on a potential Mitigation Bay Plan Amendment. The slides outlined the objectives of the presentation, background on the potential amendment, process to date, and seven issue areas identified by staff. For each issue area, staff discussed the issue and offered some potential solutions. The seven issues identified were: Long-term maintenance of mitigation sites; Preference for on-site mitigation; BCDC's role in mitigation planning; Required mitigation kind (nexus); Required mitigation amount (proportionality); Environmental Justice and Social Equity; and Lack of clarity in current mitigation policies. Dr. Hall paused the presentation, and Chair Nelson asked for feedback on the issues presented, specifically whether any of the issues identified are not issues, or whether any key issues were not identified.

Commissioner Showalter was concerned about the use of the term “mitigation” to address compensatory mitigation rather than “mitigation” to reduce GHG emissions. There was some discussion about potential use of another term, but Chair Nelson noted that it was first used in this context, and Commissioner McGrath pointed out that it's important to distinguish between required mitigation to offset an impact and voluntary restoration.

Commissioner McGrath added two things that he thought were missing from the discussion. The first is the idea of “island biogeography” – the value of some smaller wetlands for the benefits of re-populating ecosystems in the event of spill. Sometimes you get more value by adding a relatively small area to a small site than by adding another few acres to an already large site. The second is that many areas are experiencing increased salinity and other climate-induced environmental changes, and the regulatory review process does not anticipate/account for those changes. We need to better anticipate what will happen to mitigation sites over time in the wetland restoration planning process.

Mr. Feinstein commented that one thing that would need to go under long-term maintenance is the need to consider managed retreat. Mitigation should play a role in the need for habitats to migrate—we need to move our wetlands and mudflats inboard of where they are now. Mr. Feinstein also added some points on mitigation banks and in-lieu fees: First, he noted that in-lieu fees often don't get spent. Regarding mitigation banks – 1) do we need them—there's already a lot of restoration occurring around the Bay. Could contribute funds to restoration projects; 2) mitigation banks bring in a new cost, as you're paying for the company that's doing the mitigation. Chair Nelson raised an example of a small wetland at Galilee Harbor, and how that would hypothetically be handled in the future—he asked Mr. Feinstein to clarify whether he thinks this type of situation presents important questions to think about. Mr. Feinstein agreed, and recommended that in light of sea level rise, we need a different/bigger perspective on mitigation than what we've typically had. Impacts are greater and mitigation needs to be more substantive if they're going to survive. Chair Nelson also followed up on the importance of considering transition habitat in mitigation programs.

Commissioner Randolph echoed Commissioner Showalter's ambiguity about the use of the term mitigation in this context. He felt that we need more clarity about what mitigation should or should not necessarily apply to in the context of climate adaptation. Chair Nelson suggested

having a framing discussion as we move forward about the evolving way we're thinking about mitigation, as well as the complexity we're facing given GHG mitigation.

Mr. Coleman noted that he thinks it's wrong to talk about managed retreat at this time, stating that it's too early to discuss what we'll give up and not, and that it's an environmental justice issue. We shouldn't be limiting what mitigation is—any option of mitigation should be open to facilitate getting projects done. We're limiting what our options are from an economic perspective by limiting mitigation options.

Commissioner Ziegler liked Mr. Feinstein's thought about a new perspective on mitigation. Under Clean Water Act Section 404, there's a long history of failed mitigation, culminating in a National Academy of Science report in the early 2000s. This resulted in a new mitigation rule in 2008 that was science-based. For restoration, mitigation is a very different framework—he would like us to think about the necessity for mitigation being required for restoration projects. We should try to simplify, particularly for the restoration community. Commissioner Ziegler also noted the importance of ensuring consistency among agencies. He added that the 2008 mitigation rule is being rolled back, but the science behind it stands. Finally, he suggested that future framing of a potential mitigation Bay Plan Amendment clearly breaks down the different definitions of the term mitigation and what we mean by it. Chair Nelson raised the hypothetical example of how mitigation would work for green infrastructure projects, such as a horizontal levee constructed on a mudflat. Commissioner Ziegler raised that he is hoping for data to address how much mitigation has happened, what type, and whether it has been successful.

Commissioner McGrath weighed in again—we need to have some appreciation of what's ahead of us in the windshield. He agreed that we shouldn't talk about managed retreat yet at this point. Caltrans projects are the more immediate issue for which we need mitigation. In the short-term, those will have impacts. Can we re-think these projects—if we have a footprint of fill, and a whole corridor in the North Bay that could accommodate that mitigation, we need to make sure we don't have policies that prevent us from even thinking about that more off-site, out-of-kind mitigation.

Ms. Goeden pointed out that BCDC does not regularly require mitigation in wetland restoration projects. We generally see those as habitat benefits and don't require mitigation. We may have minimization measures, but don't in most cases do compensatory mitigation. Ms. Goeden also noted that when thinking about EJ and mitigation banks, in areas where there are EJ issues, in developing mitigation banks, we may actually be moving benefits away from EJ communities by consolidating mitigation banks in other areas.

Mr. Deppe of BCDC Bay Resources permits team added a couple of nuances: first, we use the mitigation policies for small amounts of Bay fill, even for administrative permits. Second, in the discussion between how we fit in and collaborate with other agencies, BCDC is primarily looking at tidal wetlands, whereas other agencies are often looking at seasonal wetlands and other habitats out of our jurisdiction.

Dr. Hall ran through the remainder of the presentation, including staff's recommendation to move forward with background research on a potential Bay Plan Amendment, and the

proposed process moving forward. Chair Nelson concluded that there was plenty to think about and chew on moving forward, and agreed that the proposed process appeared to be right. Commissioner McGrath noted the viewpoint of David Lewis would be helpful as well. He noted that Mr. Lewis was supportive and said there is plenty of time to work on this. Commissioner Showalter reiterated her confusion about the mitigation terminology. She believed that the next amendment would be Bay Fill for Flood Protection, since we want to encourage projects that protect our region and the Bay from sea level rise impacts. Dr. Hall explained that this would be a component of the Mitigation BPA, but that another BPA on Fill for Flood Protection was slated as a separate amendment to occur in the future.

5. Consideration of Renaming the Working Group. Dr. Hall offered the question of what the Working Group should be named moving forward, especially considering its likely focus on mitigation. Alternatives suggested “Wetlands Policy Working Group” and “Mitigation Working Group.” Mr. Coleman suggested “Shoreline Protection Working Group”. Mr. Feinstein responded that he didn’t agree with “Wetland Working Group”, since the process is aimed at mitigation, which is very different than talking about wetlands in general. He agreed that “Mitigation working group” would be fine. Commissioner McGrath suggested that we postpone the conversation. Commissioner Randolph believed the “Wetlands Working Group” seemed a bit confining, but liked John’s suggestion of “Shoreline Protection”. He echoed that we don’t have to decide it today. Chair Nelson raised the question of whether “wetlands” restricted the consideration of mitigation for impacts to mudflats and open water.

Dr. Hall also talked through where we go from here, including presenting to the Commission on May 21, and then re-convening the working group, possibly on July 10. Chair Nelson noted that there was also a possible conflict with a Bay Adapt Leadership Advisory Group on July 10 at 2 pm. No one indicated that the morning of July 10 would present a conflict.

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