

San Francisco Bay Conservation and Development Commission

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TO: Commissioners and Alternates

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SUBJECT: **Staff Report and Recommendation to Commence Rulemaking to Revise Permit Application Fees and Other Amendments to Title 14, Division 5, Appendix M**
(For Commission consideration on February 1, 2018)

Summary

Both the McAteer-Petris Act and the Suisun Marsh Preservation Act authorize the Commission to require the payment of a reasonable permit application fee prior to a filing a permit application as “complete.” In 2008, the Commission adopted by regulation a set of permit application fees, and a methodology to calculate potential fee adjustments every five years. 14 Cal. Code of Regulations, Division 5, Appendix M. (For your convenience, a copy of Appendix M is attached to this memorandum.) The fees are categorized by the type of permit application (*e.g.*, major permit, minor permit, regionwide permit, material amendment, and nonmaterial amendment). For larger projects, a permit fee may be based on a percentage of the applicant’s total project costs. The fees were established with the goal of recovering from permit applicants, on an average annual basis, 20% of the total costs of the Commission’s regulatory program. Fees are to be recalculated every five years to continue to recover 20% of total regulatory program costs.

Permit application fees collected by the Commission are deposited into the State’s General Fund from which the Legislature appropriates funds to support the Commission’s regulatory program. BCDC staff was scheduled to recalculate BCDC permit fees in 2013 as part of the regulation adopted by the Commission. However, absent both a Chief Counsel and a Chief Budget Officer, staff was unable to do so.

In 2015, the Department of Finance (DoF) approved, as part of the Governor's Budget, BCDC's request for an annual budget augmentation of \$1 million from General Fund revenues. This augmentation included an agreement, made by BCDC's Executive Director, that staff would propose to the Commission that it amend its permit fee regulation (Appendix M) to double the Commission's current permit application fees. Any increased revenues would continue to be deposited by the Commission into the General Fund to reimburse the General Fund for a significant, albeit variable, portion of the annual \$1 million budget augmentation. During the budget discussions with DoF, the Administration's representatives recognized that any changes to BCDC's permit fee schedule require Commission approval.

Therefore, as promised by the Executive Director to DoF, the Executive Director recommends that the Commission authorize staff to initiate the rulemaking process to revise the current permit application fees to double the existing fees and make other conforming amendments to Appendix M.

Staff Report

Background. In 1991, the Commission raised its permit application fees in response to a recommendation from the Legislative Analyst's Office that the Commission increase its permit application fees to recover at least 20% of permit processing costs. By 2003, after 12 years without adjustments, the Commission's permit application fees were estimated to generate revenue equal to about seven percent of the full costs (direct and indirect) of BCDC's permit program.

In October 2003, staff recommended that the Commission consider increasing its permit fees so that permit applicants would pay a greater portion of BCDC's permit process costs. At that time, the staff presented a range of alternative fee schedules that would have been intended to recover: (1) 20% of direct permit costs; (2) 50% of direct permit costs; (3) 100% of direct permit costs; (4) 20% of total (direct and indirect) permit costs; (5) 50% of total permit costs; and (6) 100% of total permit costs. The staff also presented information regarding the permit fees of a number of other government agencies. That information showed that the Commission's fees were lower, and in some cases substantially lower, than all of the surveyed state and local Bay Area government agencies.

In April 2004, the Commission initiated a rulemaking process to increase its permit application fees to generate revenue that would equal approximately 20% of the Commission's total (direct and indirect) regulatory program costs. This resulted in a more than tripling of then current fee levels. At or about that time, the Department of Finance (DoF) included a

provision in its 2004-05 Final Budget Summary report stating that it was the intent of the Legislature that the Commission revise its permit fee schedule to increase fee revenues to pay for at least 20 percent of the amount appropriated to support the operation of the Commission's regulatory program.

In November 2004, the Commission increased its permit fees. In addition to increasing the fees, the Commission amended the permit fee regulation to require an annual fee adjustment process. Its purpose was to recalculate fees based on annual permit fee revenues and annual total regulatory program costs to recover 20% of BCDC's total regulatory program costs.

In 2008, the Commission again amended the permit application fee regulation by adopting the current version of Appendix M to the Commission's regulations. The 2008 amendments changed the fee regulation in two ways. First, the fee schedule was revised to create more categories of permit applications, each of which is subject to a different fee based on the applicant's total project costs. As a project's total costs increase, so does its application fee. At the same time, the fee schedule was revised to reduce the fees for low-cost projects.

Second, the amended regulation requires BCDC to recalculate permit fees every five years, rather than every year. This change was made because recalculating fees on an annual basis under the 2004 regulation never generated revenues close to 20% of total regulatory program costs. This failure appeared to be caused by the fact that there is no consistency in the types of projects that are proposed annually. For example, larger (i.e., higher cost) projects are not proposed every year, but only every few years. Thus, while regulatory costs grow annually due to salary increases and other variables, fee revenues can decline in a year when few, or only small, projects are proposed. BCDC staff suggested that the permit fees should be recalculated every five years to collect a larger sample of fee data so that average annual fee revenues reflect the fees paid by the occasional very large project and would be balanced against years that experience a low volume of permit applications or even a high number of smaller projects.

This current regulation provides that the existing permit application fees shall remain in effect until December 31, 2013, or until the Executive Director recalculates the permit fees in accordance with the regulation. The regulation further requires that potential fee adjustments shall be calculated for each five-year period following the effective date of the amended regulation (2008), commencing in 2013. However, without both a Chief Counsel and a Chief Budget Officer, staff was unable to calculate potential fee adjustments in 2013.

In 2015, DoF approved, as part of the Governor's Budget, BCDC's request for an annual budget augmentation of \$1 million from General Fund revenues. This augmentation included an agreement, made by BCDC's Executive Director, that staff would propose to the Commission that it amend its permit fee regulation to double the Commission's current permit application fees. Any increased revenues would continue to be deposited by the Commission into the General Fund to reimburse the General Fund for a significant, albeit variable, portion of the annual \$1 million budget augmentation. During the budget discussions with DoF, the Administration's representatives recognized that any changes to BCDC's permit fee schedule require Commission approval.

Prior to proposing that the Commission initiate the rulemaking process to double the existing permit fees, staff collected and analyzed the information specified in the current regulation for the most recent five fiscal years (regarding annual permit fee revenue and annual total regulatory program costs) to determine whether the existing fees need to be adjusted under the current regulation for the next five-year period. If those fees required adjustment, and if the recalculated fees would be double the existing fees, that exercise would meet the objectives of the Executive Director’s agreement with DoF. However, those calculations show that the existing fees would not change under the current regulation but, rather, would remain unchanged.

The following table shows revenue from permit fees and total regulatory program costs for each of the past five fiscal years (2012/2013 through 2016/2017). As specified in the regulation, total regulatory program costs were calculated by: (1) identifying the direct costs for employee compensation, contracts, and equipment and facilities that are allocated to Commission’s permit and enforcement activities; (2) adding indirect costs such as administrative, legal, and other support allocated to the regulatory program; and (3) subtracting any reimbursements, grants, abatements, or other income received to support regulatory program activities.

Table 1 – Permit Fee Revenue and Total Regulatory Program Costs

Fiscal Year	Revenue from Permit Fees	Total Regulatory Program Costs
2012/2013	\$300,244	\$2,476,176
2013/2014	\$335,326	\$2,795,152
2014/2015	\$1,033,328	\$3,258,019
2015/2016	\$1,226,485	\$3,128,714
2016/2017	\$531,879	\$3,539,666
Average	\$685,452	\$2,476,176

The regulation requires that calculating permit fees for subsequent five-year periods must be based on: (1) the average fiscal year revenue generated from fees collected over the prior five years; and (2) the “target revenue,” which is twenty percent of the highest total regulatory program costs incurred during any of the prior five years. The regulation further provides that the Executive Director will not recalculate new fees for the following five years if the average revenue generated from fees is within five percent of the target revenue. On the other hand, if the average revenue generated from fees is more than five percent higher or lower than the target revenue, then the Executive Director must calculate new fees in accordance with the methodology specified in the regulation.

In this case: (1) the average fiscal year revenue generated from fees collected over the prior five years is \$685,452; (2) the “target revenue” is \$707,933, which is twenty percent of \$3,539,666, the highest fiscal year total regulatory program costs over the prior five years; (3) five percent of the target revenue is \$35,397; and (4) the difference between the target revenue and the average fiscal year revenue generated from fees is \$22,481. Thus, because the average revenue generated from fees is within five percent of the target revenue, the Executive Director would not recalculate new fees for the following five years (i.e., permit fees would remain unchanged).

Recommendation

In accordance with his agreement with DoF, the Executive Director recommends that Commission authorize staff to initiate the rulemaking process to double the existing permit application fees, and make other conforming amendments to Appendix M. The primary conforming amendment would be to modify the “target revenue” to be used in determining whether fees are to be recalculated for subsequent five-year periods. As shown by the figures presented above for the most recent five fiscal years, during this period, the average revenue generated from fees (\$685,452) was approximately 19.36% of the highest annual total regulatory program costs (\$3,539,666), or only about 0.64% less than the target revenue of 20% of the highest annual total regulatory program costs (\$707,933). Therefore, since fee revenues over the past five years approximately met the target revenue established by the current regulation, if the Commission were to decide to double the permit fees, it would be appropriate to also amend the regulation to double the target revenue, to 40% of the highest annual total regulatory program costs.

Staff is in the process of developing the information that will be necessary to support the rulemaking process to amend the permit fee regulation. Such information includes analyzing the number of permit applications received in recent years, and the types of applicants for those permits, in each category of permit application under Appendix M. This information will allow the Commission to assess the potential impact of increasing the permit fees on state agencies, local governments, and private parties, as well as on restoration and “green infrastructure” projects. Staff will also collect information regarding the permit fees imposed by a number of other state and local Bay Area government agencies for comparison with the Commission’s existing permit fees and the proposed increased fees. As required by law, staff will also develop for the Commission’s consideration potential alternatives to the proposal to double the existing permit fees.

After the staff issues the proposed amendments to the permit fee regulation, there will be a minimum 45-day public comment period. During this period, the Commission would hold a public hearing on the proposed amendments.

Appendix M

Commission Permit Application Fees

(a) All applicants for a Commission permit, permit amendment or amendment to an application shall submit as part of the application an application fee as identified in the following sections.

(b) The following permit application fees shall be effective until December 31, 2013 or until the Executive Director re-calculates the fees under subsection (c), whichever is later.

<i>Type of Permit Application</i>	<i>Application Fee 2008-2013</i>
Abbreviated Regionwide Permit	\$100
Regionwide Permit	\$100
Time Extension for any permit	\$150
Nonmaterial Amendment To a Minor Permit Other Than a Time Extension With a Total Project Cost (TPC) of:	
—Less than \$5,000	\$100
—\$5,000 to \$50,000	\$150
—\$50,001 to \$100,000	\$200
—\$100,001 to \$600,000	\$300
—\$600,001 to \$100 million	0.05% of TPC
—more than \$100 million	\$100,000
Nonmaterial Amendment To a Major Permit Other Than a Time Extension With a TPC of:	
—Less than \$5,000	\$100
—\$5,000 to \$50,000	\$150
—\$50,001 to \$100,000	\$200
—\$100,000 to \$600,000	\$600
—\$600,001 to \$100 million	0.10% of TPC
—more than \$100 million	\$100,000
Material Amendment to permit	Same as for first time application
Material Amendment to application	75% of original application fee
Emergency Permit	Same as for project as if not an emergency
Minor Permit with a total project cost (TPC) of:	
—Less than \$5,000	\$150
—\$5,000 to \$50,000	\$175
—\$50,001 to \$100,000	\$350
—\$100,001 to \$600,000	\$1,050
—\$600,001 to \$10 million	0.12% of TPC
—\$10,000,001 to \$50 million	\$12,000 or 0.10% of TPC, whichever is greater
—\$50,000,001 to \$100 million	\$50,000 or 0.08% of TPC, whichever is greater
—\$100,000,001 to \$300 million	\$80,000 or 0.06% of TPC, whichever is greater
—\$300,000,001 to \$600 million	\$180,000 or 0.04% of TPC, whichever is greater
—more than \$600 million	\$240,000
Major Permit with a total project cost (TPC) of:	
—Less than \$50,000	\$350
—\$50,000 to \$100,000	\$700
—\$100,001 to \$200,000	\$900
—\$200,001 to \$300,000	\$1,100
—\$300,001 to \$600,000	\$1,200
—\$600,001 to \$10 million	0.20% of TPC
—\$10,000,001 to \$50 million	\$20,000 or 0.17% of TPC, whichever is greater
—\$50,000,001 to \$100 million	\$85,000 or 0.14% of TPC, whichever is greater
—\$100,000,001 to \$300 million	\$140,000 or 0.11% of TPC, whichever is greater
—\$300,000,001 to \$600 million	\$330,000 or 0.08% of TPC, whichever is greater
—more than \$600 million	\$600,000

(c) Calculation of Permit Fees for Subsequent Years.

(1) For each five year period following the effective date of this regulation, commencing in 2013, the Commission will calculate:

(A) the average fiscal year revenue generated from fees collected over the prior five years;

(B) the highest fiscal year total regulatory program costs (TRP) over the prior five years;

(C) twenty percent of the highest TRP ("target revenue").

(2) If the average revenue generated from fees is within five percent of the target revenue, then the Executive Director will not recalculate new fees from the following five years.

(3) If the average revenue generated from fees is more than five percent higher or lower than the target revenue, then the Executive Director will calculate new fees according to the method specified in subparagraph (4).

(4) Calculation Method. If new fees will be calculated pursuant to subparagraph (c)(3), the Executive Director shall use the following method.

(A) No earlier than July 1 and no later than October 1 of 2013 and in five year increments thereafter, the Executive Director shall calculate the fees that will apply to applications received in the following five calendar years.

(B) The fees shall be calculated in the following way:

(i) Divide the target revenue derived from subparagraph (c)(1)(C) by the average revenue generated from fees derived from subparagraph (c)(1)(A). This is the adjustment factor.

(ii) Adjust the permit application fees by multiplying each fee by the adjustment factor.

(5) The "total regulatory program costs" (TRP) shall be based on the amount of revenue appropriated to support the Commission's regulatory program in the Budget Act for that fiscal year. The total regulatory program costs shall be calculated by: (A) identifying the direct costs for employee compensation, contracts, and equipment and facilities that are allocated to the Commission's permit and enforcement activities; (2) adding to the direct costs the indirect costs such as administrative, legal, and other support allocated to the regulatory program; and (3) subtracting any reimbursements, grants, abatements or other income received to support regulatory program activities.

(6) The adjusted fees shall be effective on January 1 of the following calendar year and shall remain effective for five years or until the Executive Director calculates the new fees, whichever is later. All calculated figures shall be rounded up to the nearest dollar.

(d) Total Project Cost.

(1) "Total project cost," means all expenditures, including the cost for planning, engineering, architectural, and other services, made or to be made for designing the project plus the estimated cost of construction of all aspects of the project both inside and outside the Commission's jurisdiction.

(2) The total project cost for an amendment to a permit shall consist of only the total project cost of the subject matter of the amendment application.

(3) The Commission shall use the cost stated by the applicant in the application to BCDC to determine the total project cost unless the Executive Director determines that the amount stated does not appear to include the total project or to reflect accurately all project costs.

(4) Whenever the Executive Director determines that the stated project cost does not appear to include the total project cost or to reflect accurately all project costs, he or she shall return the application unfiled and state his or her reasons for concluding that the total project is not included or why the stated cost does not accurately reflect all project costs or the Executive Director shall hold the application unfiled until the applicant verifies the total cost figures by having an estimator selected by the Executive Director and prepaid by the applicant review and certify as complete and accurate all project costs.

(e) Fees for Projects Involving More than One Category. Projects involving two (2) or more categories, (i.e., shoreline construction and filling as part of one (1) project), will not be charged the total of the fees that would be due if each part of the project were considered as a separate application. Rather, the fee is the single amount due under highest fee category into which the project falls.

(f) When Fees are to be Paid. All fees shall be paid before the Commission files a permit application. No fees shall be charged for preliminary inquiries and requests for information prior to the filing of an application.

(g) Refunds.

(1) A \$100 refund of an administrative permit application fee shall be made if the application is withdrawn prior to the mailing of the adminis-

trative listing for the application. No refund shall be made for an administrative permit application after listing.

(2) For all other fees, the first \$200 hundred dollars is not refundable and the remainder shall be refunded if the application is withdrawn prior to mailing notice of a public hearing either on whether the application is complete or on whether the project is consistent with the applicable Commission policies but shall not be refunded after the notice of the public hearing has been mailed.

(h) Fees in Special Circumstances.

(1) The fee for resubmitting an application that had earlier been denied by the Commission or withdrawn by the applicant before a Commission vote shall be seventy-five percent (75%) of the fee that would be charged for a new application covering the same work. Such fee shall be in addition to the fee charged for the original application.

(i) Fees for Applications Arising from an Enforcement Investigation.

(1) The Commission shall double all relevant application fees if the Executive Director determines that the applicant submitted the application in response to an investigation by the staff or the Commission of a possible violation of the McAteer-Petris Act, the Suisun Marsh Preservation Act, or the terms or conditions of a permit.

(2) Applications shall be presumed to have arisen out of an enforce-

ment investigation if the staff prepared a written enforcement report prior to the applicant presenting the application for filing.

(j) Appeal of Fee Determination.

(1) Any person who believes a fee charged is not correct under these regulations may appeal to the Commission any objection that the applicant, the Executive Director, and the Chair cannot resolve.

(2) Pending resolution of the amount of the fee, the applicant shall pay the fee that the Executive Director assesses and shall file a letter explaining why the fee is incorrect.

(3) When an applicant appeals a fee, the Commission shall determine the correct fee at the time it votes on the application or at the time for commenting on the administrative listing, whichever applies.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Section 66632(b) and (c), Government Code; and Section 29520(b), Public Resources Code.

HISTORY

1. New Appendix M (combination and amendment of former sections 10330-10338) filed 11-20-91; operative 12-20-91 (Register 92, No. 8).
2. Amendment of Appendix M and amendment of NOTE filed 10-14-2004; operative 10-14-2004 pursuant to Government Code section 11343.4 (Register 2004, No. 42).
3. Amendment of Appendix M and NOTE filed 12-11-2008; operative 1-10-2009 (Register 2008, No. 50).

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